NOTE: HIGH COURT SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF [2021] NZHC 136 PURSUANT TO S 205 OF THE CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [61].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 75/2022
[2024] NZSC 37

BETWEEN	JUSTIN RICHARD BURKE Appellant
AND	THE KING Respondent

Hearing:	20–21 March 2023
Further Submissions:	24 March 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ
Counsel:	J R Rapley KC, S M Grieve KC and S J Bird for Appellant M F Laracy, F R J Sinclair and L C Hay for Respondent C B Wilkinson-Smith and A M Simperingham for Criminal Bar Association New Zealand as Intervener R J Stevens and E E McClay for Te Matakahi | Defence Lawyers Association New Zealand as Intervener
Judgment:	22 April 2024

JUDGMENT OF THE COURT

A The appeal is allowed.

B We seek submissions from counsel on the consequential orders that should follow, as set out at [175] of the reasons of the Court.

REASONS

SUMMARY OF REASONS
(Given by the Court)

[1] This is a summary of the reasons of the Court on the issues likely to have importance for other cases, but it must be read in conjunction with the full reasons. While the reasons of the minority judges (Winkelmann CJ and Glazebrook J) are summarised, the reasons of the majority (O'Regan, Williams and Kós JJ) are of course those to be applied in future cases.

Background

[2] This appeal concerns the scope of joint enterprise liability under s 66(2) of the Crimes Act 1961 in relation to culpable homicide. In particular, at issue is what exactly a secondary party to manslaughter must foresee as a probable consequence of the prosecution of the common unlawful purpose they formed with the principal offender.

[3] In this case the appellant, Mr Burke, and Mr Webber, both associated with the Nomads gang, were tasked with punishing the victim, Mr Heappey, who had been disrespectful to the President of the gang. The punishment was to consist of a "mean hiding" but, in fact, Mr Webber repeatedly stabbed Mr Heappey and he died as a result.

[4] Mr Burke was found guilty of manslaughter. The directions given by the trial Judge meant a conviction under s 66(2) was possible if Mr Burke did not know that Mr Webber had a knife and if all Mr Burke foresaw was an assault likely to cause non-trivial harm. The trial Judge sentenced Mr Burke on the basis that he had been found guilty as a s 66(2) party and that he did not know that Mr Webber had a knife.

[5] The appeal was advanced on the basis that the probable consequence of the prosecution of the common purpose that Mr Burke needed to have foreseen was either:

(a) a stabbing or similarly grave assault; or

(b) an unlawful killing.

[6] The Court is unanimous that the appeal should be allowed, but for different reasons. The majority allow the appeal under the first ground. The minority would have allowed the appeal under the second ground.

First ground

[7] The majority found that, in the circumstances of this case, the jury should have been directed that they had to be satisfied that Mr Burke foresaw as a probable consequence of the prosecution of the common purpose that Mr Webber would assault Mr Heappey in the manner that actually occurred. To do that, they should also have been directed that they needed to be satisfied Mr Burke knew Mr Webber had a weapon.

[8] The majority also found that the trial Judge's directions were flawed in other respects. First, because the trial Judge had described the common purpose as involving a lesser degree of harm: a "hiding" rather than a "mean hiding", meaning an assault likely to cause serious harm. Second, because the way the Judge's question trail was framed meant that the jury may have wrongly understood the requirement for the act causing Mr Heappey's death to be "in the prosecution of" the common purpose as meaning "at the same time as" and not "in the course of implementing" the common purpose of giving Mr Heappey a mean hiding.

Second ground

[9] The majority rejected the contention that, to be guilty as a party to manslaughter under s 66(2), an accused has to foresee an unlawful killing as a probable consequence of the prosecution of the common purpose. They considered that foresight of death is not required of a principal offender and should not be required of

the secondary party either. They did not consider this approach would lead to over-criminalisation given their conclusion on the first ground.

[10] Winkelmann CJ and Glazebrook J each concluded that the probable consequence Mr Burke needed to foresee was that an unlawful killing would occur. They considered this was consistent with the authorities and with policy, and reflected the actual wording of s 66(2), which requires foresight of the offence (culpable homicide) committed. An unlawful killing is an essential ingredient of a culpable homicide.

Probable consequence

[11] The Court was also asked to revisit the meaning of "probable consequence" in s 66(2). The majority and Glazebrook J refused to do so and endorsed the wording adopted in the present case and in earlier authorities, which defines "probable consequence" as "a substantial or real risk" and something that "could well happen". Winkelmann CJ disagreed, finding that those other expressions were not synonyms for "probable consequence", instead preferring "likely" as a synonym for "probable". All of the Judges agreed that there was merit in the guidance given to juries in Victoria, Australia, which emphasises that the word "probable" is in contrast to merely "possible".

O'REGAN, WILLIAMS AND KÓS JJ
(Given by O'Regan J)

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Introduction

[12] This appeal raises for consideration some difficult issues about the scope of s 66(2) of the Crimes Act 1961 in relation to culpable homicide. Section 66(2) provides for joint enterprise liability—that is, liability in defined circumstances for the criminal acts of another with whom the defendant has joined to pursue an unlawful purpose. Given the nature of the issues, the Court invited the Criminal Bar Association New Zealand and Te Matakahi | Defence Lawyers Association New Zealand to intervene. Both accepted the invitation, and we record our gratitude for their counsel's contribution to the hearing.

Facts[1]

[13] Shayne Heappey was an associate of the Nomads gang in Christchurch. He was in a dispute with Leonie Cook regarding his use of a stolen car claimed by Ms Cook and a sum of money that he owed to Ms Cook (about $300). Ms Cook was the stepdaughter of the president of the Christchurch Nomads, Randall Waho. Mr Heappey ignored repeated attempts to meet to discuss the dispute, in circumstances which were seen as a sign of disrespect for Mr Waho. It was decided that Mr Heappey needed to be punished. Mr Heappey appeared to accept this, and told Mr Waho that he would come over to collect his punishment.

[14] After some false starts when Mr Heappey failed to appear, he was eventually brought to the address of Richard Sim, another member of the gang, on the night of 8 December 2018. The plan was that the Nomads' disciplinarian, Matthew Webber, and the appellant, Justin Burke, would give Mr Heappey a "hiding".[2]

[15] Although Mr Burke was an associate of the Nomads elsewhere, he had recently arrived in Christchurch when the events leading to Mr Heappey's death unfolded. He aspired to becoming a patched member of the Christchurch Nomads.

[16] Mr Webber had a reputation as a violent and unpredictable man, a characteristic exacerbated by methamphetamine use. There was some dispute about how much Mr Burke knew of Mr Webber's reputation, but the jury was not asked to resolve this in the Judge's directions and we do not think we need to form a view on it to resolve the legal issues arising on the appeal.[3]

[17] There was evidence that, earlier in the evening, Mr Sim gave knives to Mr Waho and Mr Webber in Mr Burke's presence and Mr Webber showed Mr Burke how duct tape could be added to the blade to prevent it bending when used. The Crown case was that Mr Burke was aware that Mr Webber was armed with a knife at the time of the planned hiding. The defence disputed this: its case was that Mr Burke did not

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1 A more detailed account of the facts is contained in the judgment under appeal: *Burke v R* [2022] NZCA 279, (2022) 30 CRNZ 387 (Brown, Mallon and Moore JJ) [CA judgment] at [5]–[25].

2 In his police statement, Mr Burke admitted the purpose was to give Mr Heappey a "mean hiding".

3 The Judge found Mr Burke knew Mr Webber was "prone to violence" and "often crazy and out of control": *R v Burke* [2021] NZHC 136 (Osborne J) [HC sentencing notes] at [13].

know Mr Webber had a knife at the relevant time. In sentencing Mr Burke, the Judge accepted that the Crown had not established Mr Burke knew for sure that Mr Webber had a knife on him at the time, but that he knew his possession of a knife was a "distinct possibility".[4]

[18] After Mr Heappey was brought to Mr Sim's house late on 8 December 2018, there was some evidence that Mr Burke accompanied Mr Webber out of the house to administer the hiding.[5] Given that Mr Heappey was associated with the same gang as the other protagonists, the appellant asked us to assume that there was no intention that the hiding Mr Heappey was to receive would involve more than a punishment commensurate with the minor infractions involved. We were asked to contrast this with other gang violence cases where the two sides are from different gangs hostile to each other, where an escalation of violence may well happen.

[19] What in fact happened then was that Mr Webber stabbed Mr Heappey repeatedly. Mr Burke punched and put Mr Heappey in a chokehold. There was evidence that Mr Burke stopped attacking when he realised that Mr Heappey had been stabbed. In sentencing Mr Burke, the Judge accepted the Crown had not established Mr Burke had been able to see Mr Webber had stabbed Mr Heappey.[6]

[20] Ms Cook took Mr Heappey to hospital, but he died soon after arrival.

Charges

[21] Mr Webber was charged with murder under s 167 of the Crimes Act. He pleaded guilty and was sentenced to life imprisonment with a minimum period of imprisonment of 15 years.[7] Mr Burke was charged as a party to murder under ss 66(1), 66(2) and 167 of the Crimes Act. After a jury trial, Mr Burke was found not guilty of murder but guilty of manslaughter. He was sentenced to a term of imprisonment of

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4 At [14].

5 There was some disagreement about whether Mr Burke went outside with Mr Webber to administer the hiding or whether he remained inside and came outside at a later point. At sentencing, Osborne J proceeded on the basis that Mr Burke accompanied Mr Webber when Mr Heappey was escorted outside for punishment: at [14] and [28]. Nothing in this judgment turns on this factual point.

6 At [15].

7 *R v Webber* [2020] NZHC 2328.

five years and two months.[8] Mr Waho, Ms Cook and Mr Sim were charged as parties to causing Mr Heappey grievous bodily harm with intent to injure. They all pleaded guilty and were sentenced to terms of imprisonment of between approximately two and three years.[9]

Section 66

[22] Section 66 of the Crimes Act provides:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> (a) actually commits the offence; or
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
>
> (c) abets any person in the commission of the offence; or
>
> (d) incites, counsels, or procures any person to commit the offence.
>
> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

[23] Although s 66 does not characterise the offender who actually committed the offence and the other parties differently, we will differentiate them in this judgment for ease of comprehension. We will refer to the person who actually commits the offence as the "principal offender" and anyone who becomes liable under s 66(1)(b)–(d) or s 66(2) as a "secondary party".

[24] Under s 66(2), a secondary party who has subscribed to a common purpose to commit an offence is liable where the principal offender commits that offence. But the secondary party is also liable in relation to every other offence committed by anyone else who has joined the common unlawful purpose, provided (a) that offence

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8 HC sentencing notes, above n 3, at [59].

9 *R v Waho* [2020] NZHC 112 and, on appeal, *Waho v R* [2020] NZCA 526; *R v Cook* [2019] NZHC 2890; and *R v Sim* [2019] NZHC 2361.

was also committed in the prosecution of the common purpose and (b) the secondary party knew such offence was a probable consequence of prosecuting the common purpose. It is not a requirement that the secondary party intended the principal (or other) offender to commit the other offence; liability is based on knowing that such an offence was a probable consequence of the prosecution of the common purpose.

[25] Mr Burke was charged as a party under both s 66(1) and s 66(2) of the Crimes Act. It was unclear whether Mr Burke was convicted under the former or the latter. However, the Judge sentenced Mr Burke on the basis that he had been convicted under s 66(2).[10] As we come to, it is for this reason that this appeal focuses upon issues arising under s 66(2).

Trial Judge's question trail for the jury

[26] The specific wording and order of the questions that the trial Judge put to the jury are particularly relevant. This is because, in our view, they led the jury to reach certain conclusions about the relevance of Mr Burke knowing that Mr Webber had a knife, which were then relevant to determining if the stabbing was in the prosecution of, and a probable consequence of, the common purpose.

[27] The Crown case against Mr Burke at the trial was that he was guilty of murder either under s 66(1) or under s 66(2). The prosecutor did not address the possibility of a manslaughter verdict in closing, but defence counsel did, though he argued the correct verdict was that Mr Burke was not guilty of either murder or manslaughter. The question trail provided by the Judge to the jury dealt with both s 66(1) and s 66(2), in relation to both murder and manslaughter. Given the jury's verdict, we are concerned only with the directions in relation to manslaughter. In the case of s 66(2), the jury was directed on alternative bases—that Mr Burke knew Mr Webber was in possession of a knife, and that he did not know this. The question trail asked the

[10] HC sentencing notes, above n 3, at [13].

following questions in relation to the possibility of liability under s 66(2) for manslaughter:[11]

> 16. Are you sure that there was a shared understanding or agreement (common goal) between Mr Burke and Mr Webber to inflict a physical beating or "hiding" on Mr Heappey for his disrespect to the gang?
>
> …
>
> 17. Are you sure that Mr Burke and Mr Webber had agreed to help each other and participate to achieve their common goal?
>
> …
>
> 18. Are you sure that Mr Webber's *stabbing* of Mr Heappey was committed in the course of carrying out his and Mr Burke's common goal?
>
> …
>
> 19. Are you sure that Mr Burke knew it was a probable consequence of carrying out that common goal that Mr Webber would *assault* Mr Heappey?
>
> …
>
> 20. Are you sure that Mr Burke knew that Mr Webber was in possession of a knife at the time of the assault on Mr Heappey?
>
> If **yes**, go to question 21.
>
> If **no**, go to question 22.
>
> 21. Are you sure that Mr Burke knew that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial?
>
> …
>
> 22. Are you sure that Mr Burke, despite not knowing that Mr Webber possessed a knife, knew that Mr Webber knew the *assault* would be dangerous, being *likely to cause harm that was more than trivial*?[12]
>
> …

[28] The jury was required to answer questions 16–19 and 22 affirmatively to reach a guilty verdict under s 66(2). If they answered question 20 in the negative, they were

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11 Italicised emphasis added.

12 The words "that Mr Webber knew" in this question seem superfluous because the question is whether Mr Burke knew the assault was, in fact, likely to cause non-trivial harm, not whether Mr Burke knew that Mr Webber knew that. However, nothing turns on this.

told not to address question 21 and to proceed straight to question 22. We assume they did, consistent with the Judge's observation in his sentencing notes that he was not satisfied the Crown had proved that Mr Burke knew Mr Webber had a knife.

[29] We have emphasised aspects of questions 18, 19 and 22 in the quotation above. This is because of the relevance of the fact that question 18 referred to a "stabbing", while question 19 referred to an "assault" and question 22 referred to an "assault … likely to cause harm that was more than trivial". If the Judge's factual finding that the Crown had not proved Mr Burke knew Mr Webber had a knife reflected the view of the jury, the affirmative answer to question 18 would indicate the jury found the *stabbing* was carried out in the course of the common purpose, even though Mr Burke did not know Mr Webber had a knife. And question 22 assumes the assault that was known by Mr Burke to be a probable consequence of the prosecution of the common purpose was something other than the stabbing, because it is predicated on the jury having found that Mr Burke did not know Mr Webber had a knife.

[30] It is helpful to contrast this to questions 12–14, which dealt with the possibility that Mr Burke could be liable for manslaughter under s 66(1) on the basis that he assisted or encouraged Mr Webber. The Judge asked whether the jury was sure Mr Burke had assisted or encouraged Mr Webber to *stab* Mr Heappey, whether Mr Burke intended to do so, and whether Mr Burke knew that Mr Webber was going to stab, or was stabbing, Mr Heappey. These questions could have been answered affirmatively only if the jury found that the Crown had proved that Mr Burke knew Mr Webber had a knife. Unlike the directions in relation to s 66(2), the directions in relation to s 66(1) did not deal with the possibility that Mr Burke could be liable under s 66(1) even though he did not know Mr Webber had a knife. Counsel for the respondent argued that, consistent with question 22, the reference in these questions should have been to an assault causing non-trivial harm, not to a stabbing. We do not agree.

The case under s 66(2)

[31] In this Court's decision in *Ahsin v R*, the majority summarised the elements of s 66(2) as follows:[13]

> [102] To summarise, in order to establish party liability under s 66(2), the Crown must prove beyond reasonable doubt that:
>
> (a) the offence to which the defendant is alleged to be a party was committed by a principal offender;
>
> (b) there was a shared understanding or agreement to carry out something that was unlawful;
>
> (c) the person(s) accused of being parties to that agreement had all agreed to help each other and participate to achieve their common unlawful goal;
>
> (d) the offence was committed by the principal in the course of pursuing the common purpose; and
>
> (e) the defendant intended that the offence that eventuated be committed, or knew that the offence was a probable consequence of carrying out the common purpose. This requires foresight of both the physical and mental elements of the essential facts of the offence.

[32] Based on the question trail provided to the jury by the Judge and the factual findings set out above, and applying the *Ahsin* criteria, the case against Mr Burke regarding manslaughter as a s 66(2) party that was put to the jury by the Judge can be summarised as follows:

(a) *Offence was committed by Mr Webber:* Mr Webber committed the offence of culpable homicide. Under s 171 of the Crimes Act, manslaughter is culpable homicide that is not murder.[14] In this case, the killing was a culpable homicide under s 160(2)(a) of the Crimes Act: a killing by an unlawful act. The unlawful act was an assault that was likely to cause harm that was more than trivial.[15]

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13 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 per McGrath, Glazebrook and Tipping JJ. We do not propose to depart from this analysis in the present case; rather, we explain the application of the elements as articulated in *Ahsin* to the facts of the present case.

14 In *R v Tomkins* [1985] 2 NZLR 253 (CA), the Court of Appeal said in s 66(2) cases involving murder or manslaughter the offence is to be seen broadly as culpable homicide: at 256.

15 In fact, Mr Webber committed murder but, given Mr Burke was found not guilty of murder, the focus of the present appeal is on manslaughter. We explain why below at [34].

(b) *Common intention to prosecute an unlawful purpose:* Mr Webber and Mr Burke formed a common intention to prosecute the unlawful purpose of giving Mr Heappey a physical beating or hiding. The Crimes Act categorises assaults into different levels of seriousness by reference to the defendant's intention and to the harm inflicted. In his summing up, the Judge set the level of assault at the less serious end of that scale—as an assault that would cause non-trivial harm, but not an assault that would cause serious harm. The way the Judge defined the common purpose was problematic, as we explain below.[16]

(c) *Assist each other:* Mr Webber and Mr Burke also agreed to assist each other in the prosecution of the common purpose.

(d) *Offence committed in the prosecution of the common purpose:* The culpable homicide was committed by Mr Webber in the prosecution of the common (unlawful) purpose of giving Mr Heappey a physical beating or hiding. As noted earlier, the Judge directed the jury that they had to be sure that the *stabbing* of Mr Heappey by Mr Webber was committed in the prosecution of the common purpose.[17] If the jury convicted on the basis of s 66(2), they must have found it was. However, it is not clear what the jury's basis for this finding was. As we discuss further below, this direction, too, was problematic.[18]

(e) *Known to be a probable consequence:* The commission of culpable homicide was known by Mr Burke to be a probable consequence of the prosecution of the common purpose of giving Mr Heappey a physical beating or hiding; that is, Mr Burke knew Mr Webber could well assault Mr Heappey in a manner likely to cause non-trivial harm.[19] Mr Heappey died as a result of the violence Mr Webber inflicted upon him.

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16 Below at [50]–[57].
17 Above at [26]–[30].
18 Below at [58]–[78].
19 The offence of manslaughter involves the undertaking of an unlawful act that is dangerous in the sense that it is likely to cause more than trivial harm: *R v Lee* [2006] 3 NZLR 42 (CA) at [137]–[138].

[33] As we will come to, there is a close connection between the last two requirements. If the offence was not committed in the prosecution of the common purpose, it would not be a known probable consequence of the prosecution of the common purpose either. The converse is also likely to be true in almost every case: if the offence was not a known probable consequence, it would not have been committed in the prosecution of the common purpose. This highlights the need for trial judges to give clear directions on these elements of s 66(2) and on what the Crown says is the common purpose in the particular case.

The relevant offence

[34] As noted above, the Crown case against Mr Burke was that Mr Burke knew that a *murder* under s 167(b) was a probable consequence of the prosecution of the common purpose of giving Mr Heappey a hiding; that is, that it was probable that Mr Webber would kill Mr Heappey with intent to cause bodily injury known to be likely to cause death, being reckless as to whether death ensued or not. But the jury's verdict, finding Mr Burke not guilty of murder, indicates this aspect of the Crown case was rejected. In considering the alternative of Mr Burke being guilty of manslaughter (a culpable homicide that was not murder), the issue becomes whether Mr Burke knew that a probable consequence of the prosecution of the common purpose was the commission of a culpable homicide different in nature from that actually committed by Mr Webber.

[35] On the respondent's approach in this Court, and that of the majority of the Court of Appeal, Mr Burke would be guilty of manslaughter as a secondary party under s 66(2) even though the common purpose to which he subscribed was merely to assault Mr Heappey in a way that was likely to cause non-trivial harm, as opposed to serious harm, and he did not know Mr Webber had a knife.[20]

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[20] As we will come to, the prosecution said there was a common purpose to give a mean hiding (which would equate with an assault intended to cause serious harm). But the Judge used the term "hiding" in his summing up. See below at [50].

Appeal to the Court of Appeal

[36] Mr Burke appealed to the Court of Appeal against conviction and sentence. The Court of Appeal dismissed the appeals.[21] Although a number of discrete grounds of appeal were pursued in the Court of Appeal, the only one which remains of relevance is the issue of what the Crown needed to prove to establish Mr Burke's guilt for manslaughter under s 66(2). The Court of Appeal proceeded on the basis that Mr Burke's conviction must have been under s 66(2), not s 66(1). The majority also evaluated the issue on the basis that Mr Burke did not know Mr Webber had a knife when the attack on Mr Heappey occurred.[22] The Court of Appeal was unanimous in dismissing the appeal, but the reasons of Brown and Moore JJ differed from those of Mallon J. We will revert to this later.[23]

Appeal to this Court

[37] Mr Burke now appeals to this Court against conviction. This Court granted leave to appeal on 21 October 2022, the approved question being "whether the Court of Appeal correctly interpreted and applied s 66(2) of the Crimes Act 1961".[24] We will proceed on the same assumptions as those adopted by the majority in the Court of Appeal: that Mr Burke was convicted under s 66(2) and that the Crown had not proved that Mr Burke knew Mr Webber was in possession of a knife when the plan to give Mr Heappey a hiding was implemented. The approved question in this Court's leave judgment anticipated this approach.

Recent common law developments

[38] There have been significant common law developments in relation to party liability in other jurisdictions since the issue was last before this Court. Those developments were the focus of some of the submissions made to us and are important background to the appeal. We therefore address those developments now, before turning to the grounds on which the present appeal was advanced.

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21 CA judgment, above n 1.
22 At [12], n 2 and [70].
23 See below at [151]–[153].
24 *Burke v R* [2022] NZSC 124 (Glazebrook, Williams and Kós JJ).

[39] Two earlier decisions of this Court have addressed the scope of s 66(2): *Edmonds v R* and *Ahsin*.[25] In *Edmonds*, this Court discussed the historical origins of s 66 and the operation of its common law equivalent in England and Wales.[26] We have set out above the summary of the elements of s 66(2) in *Ahsin*.[27] Since the *Edmonds* and *Ahsin* judgments were delivered, however, there has been a significant change in the common law relating to joint criminal enterprises in England and Wales and some other jurisdictions.

[40] In the judgment of *Regina v Jogee* and *Ruddock v The Queen*, a consolidated decision of the United Kingdom Supreme Court and the Privy Council on appeal from Jamaica (sitting in a joint hearing) (*Jogee*), the combined Court effectively abolished the common law equivalent of s 66(2), extended joint criminal enterprise.[28] The *Jogee* Court said that the common law had taken a wrong turn in the earlier decision of *Chan Wing-Siu v The Queen*, a decision of the Privy Council on appeal from Hong Kong.[29] *Jogee* also effectively overruled the decision of the House of Lords in *Regina v Powell*.[30]

[41] Despite this significant development in the common law of the jurisdictions affected by *Jogee* (England and Wales, and Jamaica), both the High Court of Australia (in relation to the common law of New South Wales)[31] and the Hong Kong Court of Final Appeal declined to follow *Jogee*.[32]

[42] These developments in the common law emphasise the point made by this Court in *Edmonds* that the common law is "more susceptible to judicial development and adaptation than s 66(2)".[33] The approach of the courts in this country to common purpose liability must be based firmly on the wording of s 66(2).[34] Therefore, there is

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25 *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445; and *Ahsin*, above n 13.
26 *Edmonds*, above n 25, at [22]–[40].
27 Above at [31].
28 *Regina v Jogee* [2016] UKSC 8, [2017] AC 387.
29 At [62] and [87], discussing *Chan Wing-Siu v The Queen* [1985] AC 168 (PC).
30 For example see *Jogee*, above n 28, at [74]–[75] and [100], discussing *Regina v Powell* [1999] 1 AC 1 (HL).
31 *Miller v The Queen* [2016] HCA 30, (2016) 259 CLR 380 at [2] per French CJ, Kiefel, Bell, Nettle and Gordon JJ and [131] per Keane J. The common law also continues to apply in South Australia: see *Halsbury's Laws of Australia* (2022, online ed) vol 130 Criminal Law at [130-7200].
32 *HKSAR v Chan Kam Shing* [2016] HKCFA 87, (2016) 19 HKCFAR 640 at [58].
33 *Edmonds*, above n 25, at [23].
34 At [47].

a need for care in applying decisions in common law jurisdictions and jurisdictions with legislative equivalents of s 66(2) that have differing wording.

[43] In its submissions, the Criminal Bar Association traced the legislative history of s 66(2) and argued that the provision represents a restatement of the common law. Its counsel, Mr Wilkinson-Smith, argued that the concerns expressed in *Jogee* apply also to the way s 66(2) is applied in this country. He argued that correcting this would not be overriding a statute but correcting an erroneous interpretation of it. This Court previously declined to give leave in a case where a party proposed to make a similar argument on appeal, on the basis that the point was not arguable.[35] As the leave panel noted in that case, "[t]he Court is not free to depart from the clear language of s 66(2)".[36] We add that, as *Jogee* abolished the common law equivalent of s 66(2) in the jurisdictions affected by the decision, achieving the same result in New Zealand would require the repeal of s 66(2).

Grounds of appeal

[44] The appeal was advanced on two grounds:

(a) *Known probable consequence had to be a stabbing or similarly grave assault:* The first ground of appeal was that the Judge should have directed the jury that a conviction under s 66(2) was open only if the jury was satisfied that Mr Burke knew that a stabbing (or an act of its type) was a probable consequence of the prosecution of the common purpose.

(b) *Known probable consequence had to be a killing:* The alternative ground of appeal (in the event that the first ground was not accepted) was that the Judge should have directed the jury that a conviction under s 66(2) was open only if the jury was satisfied that Mr Burke knew that an unlawful killing was a probable consequence of the prosecution of the common purpose.

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35 *Uhrle v R* [2016] NZSC 64, (2016) 28 CRNZ 270 at [5].
36 At [5].

[45] As is apparent, there is a degree of overlap between these grounds. We ultimately allow the appeal under the first ground, for two reasons:

(a) First, the jury directions left open the possibility that the requirement for the offence to be committed "in the prosecution of" the common purpose was decided on an incorrect basis. The wording and order of the trial Judge's question trail may have erroneously suggested to the jury that "in the course of" carrying out the common purpose meant "at the same time as", rather than "as part of the process of implementing". The Judge should have directed the jury that they had to be satisfied Mr Burke knew about the knife *before* they could address whether the stabbing was in the prosecution of the common purpose of inflicting a physical beating or hiding on Mr Heappey. Instead, the question trail first asked the jury whether the stabbing occurred in the prosecution of the common purpose, before asking about knowledge of the knife.[37]

(b) Second, the trial Judge's directions did not conform with what we see as the correct approach to the issue of what the secondary party in a culpable homicide case needs to know is a probable consequence of the prosecution of the common purpose under s 66(2). It is unwise to stray too far from the actual words of s 66(2) and the specific facts of the case. It was necessary for the jury to be directed that they had to be satisfied Mr Burke knew the assault that actually occurred was a probable consequence of the prosecution of the common purpose of giving Mr Heappey a hiding. To reach that conclusion, the jury needed to be satisfied that Mr Burke knew Mr Webber had a weapon. The Judge's directions erroneously allowed for the jury to find Mr Burke guilty of manslaughter even if he did not know about the weapon. The jury was told that Mr Burke could be found guilty if the jury was satisfied he knew that an assault merely causing more than trivial (but not necessarily serious) harm was a probable consequence of carrying out the common purpose of giving Mr Heappey a hiding.[38]

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37 Below at [74]–[77].
38 Below at [141]–[142].

[46] Although our conclusion on the first ground makes it unnecessary to consider the second ground, we discuss it nonetheless, given the point was argued in detail before this Court and was the subject of Mallon J's separate reasons in the Court of Appeal.[39] We conclude that it is not necessary to expand the interpretation of the term "offence" in the "probable consequence" context of s 66(2) beyond the acts or omissions of the principal offender, to the extent that they are known by the secondary party to be a probable consequence of the prosecution of the common purpose.[40]

First ground of appeal

Issues

[47] To address the first ground of appeal, we will deal with the following issues:

(a) How should the common purpose have been defined in this case?

(b) What direction should have been given on whether the offence was committed in the prosecution of the common purpose?

(c) What is the meaning of "probable consequence"?

(d) What direction should have been given on whether Mr Burke knew the offence was a probable consequence of the prosecution of the common purpose?

[48] As we have said, the factors identified above at [32](b), [32](d) and [32](e) are the key elements in this case, as in most s 66(2) cases. Those factors (defining the common purpose, determining whether the actions fall within the prosecution of it and analysing whether the outcome was a known probable consequence) are closely

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39 Winkelmann CJ and Glazebrook J in this Court would have allowed the appeal under the second ground. See below at [177] and [248].

40 Below at [171]–[172].

interlinked. The relationship between them was analysed in these terms by this Court in *Edmonds*:[41]

> [49] The common purpose which is left to the jury is largely for the prosecutor to define. In a group violence case, there will often be a decision to be made as to where to pitch the alleged common purpose in terms of criminality. In this case, the common purpose was pitched at a high level of criminality – an intention to inflict serious violence. But the prosecutor could also have pitched it much lower, for instance to assault the deceased and the other members of his group. The lower the criminality of the alleged common purpose, the easier it will be to establish, but perhaps the harder it will be to show that the ultimate offence was recognised to be a probable consequence of its implementation. The higher the criminality of the alleged common purpose (and thus the closer it is to the offence eventually committed), the more difficult it may be to establish that particular defendants formed the intention to prosecute that common purpose, but the easier it will be to infer that such defendants (that is, those who did form that intention) knew that the ultimate offence was a probable consequence of its implementation.

[49] The requirement that the offence be committed in the prosecution of the common purpose is an especially important component in some s 66(2) cases, given the connection between determining whether an offence was committed in the prosecution of the common purpose and whether it was known to be a probable consequence of the prosecution of the common purpose.

How should the common purpose have been defined in this case?

[50] In this Court, the respondent argued that the common purpose was to give Mr Heappey a "mean hiding"; that is, to assault Mr Heappey in a manner likely to cause serious harm. This reflected the Crown case at the trial. At the trial, the prosecutor used the phrases "mean hiding" and "serious violence" in describing the common purpose. By contrast, the question trail described a different, less serious common purpose—to inflict violence causing non-trivial harm.[42] In light of that, we cannot assume the jury found the common purpose was to cause serious violence. The trial Judge consulted counsel about the question trail, so the reason for the definition of the common purpose in the question trail differing from that put forward by the prosecutor in her closing address is unclear.

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41 *Edmonds*, above n 25.

42 See questions 16, 19 and 21 in the question trail quoted above at [27].

[51] As we noted earlier, the prosecutor did not address the possibility of a manslaughter verdict in her closing address. This was unfortunate because it left the Judge to direct the jury on the possibility of a manslaughter verdict under s 66(2) without there being a clear indication of the competing cases of the Crown and the defence on the issue. In fact, the case presented to the jury by the prosecutor to support its position that murder was the right verdict was that Mr Burke knew Mr Webber had a knife; this was an important element of the Crown's case for a murder conviction.

[52] On the basis of what the prosecutor said to the jury about the common purpose, it would seem that the Crown's case in relation to manslaughter would have been that the common purpose was to give Mr Heappey a mean hiding (and in the question trail, the Judge gave alternative directions based on whether the jury found that Mr Burke did know, or did not know, Mr Webber was armed). This relatively generic framing carried risks for the Crown. Be that as it may, it is for the prosecutor to pitch the common purpose.[43] The Judge should have directed the jury to that effect and then considered whether a weapons direction (that is, a direction that the jury needed to determine whether Mr Burke knew Mr Webber was armed) was required. This highlights the need for counsel and the judge to focus on the way the common purpose will be described to the jury, given its importance in the application of s 66(2).

[53] That said, the reality is that in the present case the common purpose as put to the jury by the Judge was simply the purpose of inflicting a physical beating or hiding; that is, inflicting more than trivial harm but not necessarily serious harm. Whatever the prosecution's position at the trial was, the position of the respondent in this Court was that, on the directions given by the trial Judge, the requirements for a conviction for manslaughter under s 66(2) were met. The appeal was argued on that basis, and we must evaluate the arguments made by counsel before us against that background.

[54] On the basis of the description of the common purpose in the question trail, the jury may well have thought the Judge was telling them that it was open to them to find Mr Burke guilty of manslaughter if the common purpose of giving Mr Heappey a hiding was to involve the infliction of only non-trivial harm, well short of grievous

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[43] *Edmonds*, above n 25, at [49], quoted above at [48]. An exception would be if the judge was not satisfied the evidence established that there was such a common purpose.

bodily harm, and if Mr Burke did not know Mr Webber had a knife. Of course, we do not know whether the jury did reach their verdict of guilty of manslaughter on this basis, but the question trail left open that possibility. We must therefore consider the points made on appeal on the assumption that the verdict may have been reached on that basis.

[55] In addition, we note that the intra-gang context and the fact that there were only two protagonists involved in the assault on Mr Heappey distinguishes this case from cases dealing with confrontations between large rival groups, where an escalation of violence may be predictable. In this case, the violence was in an orchestrated environment where the victim had (albeit reluctantly) submitted to being "disciplined" (that is, assaulted) and the common purpose was, as represented by the Judge in the question trail, to give him a hiding involving non-trivial harm, not to cause the victim serious harm.[44]

[56] These factors are important because the evaluation of cases involving allegations of liability under s 66(2) must be firmly grounded in the facts of the case.[45] To reiterate, it is important that there is clarity about the nature of the common purpose alleged by the Crown and the offence said by the Crown to be a known probable consequence of the implementation of that common purpose. Observations made in decisions about s 66(2) and its overseas analogues need to be carefully assessed against the facts of the case in which they are made.

[57] To conclude on this point, the Crown's case was that the common purpose was to give Mr Heappey a mean hiding—ie, to assault him in a manner likely to cause serious harm. Because there was a proper evidential basis for that case, the Judge should have directed the jury accordingly. But because he did not, we assess this appeal on the basis that the jury convicted Mr Burke in accordance with the Judge's directions (that is, that the common purpose was to assault Mr Heappey in a manner

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[44] As noted earlier, the Crown case at the trial was that the planned violence was of a greater seriousness than reflected in the question trail. Before us, the respondent argued that seriously violent retribution was reflective of gang culture. But, as noted earlier, we are proceeding on the basis that the jury's verdict reflected the instructions to it in the question trail.

[45] As noted by this Court in *Edmonds*, above n 25, at [46].

involving the infliction of non-trivial harm), and on the basis that Mr Burke did not know that Mr Webber was armed with a knife.

What direction should have been given on whether the offence was committed in the prosecution of the common purpose?

[58] One of the elements of s 66(2) that the Crown was required to prove was that the culpable homicide in this case was committed by Mr Webber in the prosecution of the common (unlawful) purpose of giving Mr Heappey a physical beating or hiding.

[59] To recap, the question trail addressed this by asking:[46]

> Are you sure that Mr Webber's *stabbing* of Mr Heappey was committed in the course of carrying out his and Mr Burke's common goal?

[60] The Judge did not elaborate on the question he posed in the question trail as set out above, either in the question trail itself or in his summing up.

[61] We have already referred to the Judge's finding that the Crown did not prove Mr Burke knew Mr Webber had a knife when they began administering the hiding. The Judge qualified this by adding that Mr Burke knew possession of the knife was a distinct possibility, but, as already noted, the argument before us proceeded on the basis that Mr Burke did not know about the knife. There was evidence to the contrary, but we must proceed on the basis that this evidence to the contrary was rejected.

[62] Mr Rapley KC, who argued this aspect of the appeal for Mr Burke, submitted that under the common law of England and Wales prior to *Jogee*, a secondary party would not be guilty of manslaughter on the present facts. He referred to a number of cases that applied in England prior to the decision in *Jogee*, which were seen as establishing the concept of "fundamental difference".[47] Mr Rapley asked us to apply these cases by analogy in determining the scope of s 66(2) to facts like those of the

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46 Emphasis added.

47 *Davies v Director of Public Prosecutions* [1954] AC 378 (HL); *Regina v Anderson* [1966] 2 QB 110 (Crim App); *Regina v Lovesey* [1970] 1 QB 352 (CA); *Chan Wing-Siu*, above n 29; *Powell*, above n 30; and *Regina v Rahman* [2008] UKHL 45, [2009] 1 AC 129. Some of these cases were referred to in the Court of Appeal's judgment in *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299, which we discuss below at [103]–[113].

present case (though he did not expressly advance a defence based on fundamental difference in this case).

[63] The leading case was *Regina v Anderson*, which was decided in 1966.[48] The key passage in the judgment of the English Court of Criminal Appeal in that case, delivered by Lord Parker CJ, is this:[49]

> It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.

[64] Lord Parker then responded to the submission that if the offenders had a common design to commit an unlawful act, from which death resulted, they would both be guilty of manslaughter, but the secondary party would not be guilty if the principal offender decided to kill the victim in a moment of passion. Lord Parker rejected the submission that this approach would be illogical. His Honour said:[50]

> Considered as a matter of causation there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked upon as causative factors.

[65] The words "overwhelming supervening event" were treated as significant in *Jogee*, as we will come to. It is not entirely clear whether the fact the ultimate offence resulted from an overwhelming supervening event relates to the requirement (in s 66(2) terms) that the Crown must prove the offence was committed in the prosecution of the common purpose, or the requirement that the offence was a probable consequence of the prosecution of the common purpose. In truth it relates to both. As noted earlier, the jury must have considered the stabbing in the present case was committed in the prosecution of the common purpose.[51]

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48 *Anderson*, above n 47.
49 At 120.
50 At 120.
51 See above at [32](d).

[66] There are two impediments to adopting, in the present case, the "fundamental difference" approach arising from the decision in *Anderson*, namely:

(a) it was rejected in *Jogee*; and

(b) in *Edmonds*, this Court said there was no room for its application in s 66(2) cases.

[67] Some elaboration on these impediments is required.

[68] The *Jogee* Court rejected the "fundamental difference" concept (albeit in the context of abolishing common law joint criminal enterprise liability and confining accessory liability to the common law equivalent of s 66(1), which arguably reduced the need for the fundamental difference concept).[52] In its place the *Jogee* Court adopted a variation of the expression "overwhelming supervening event" used by Lord Parker in *Anderson*. *Jogee* put it this way:[53]

> ... it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.

[69] It is clear from case law in England and Wales since *Jogee* that the scope of the overwhelming supervening event concept is limited in practice and, if it had applied in this case, would not have assisted Mr Burke. This is because of authority that the unforeseen use of a knife alone is not an overwhelming supervening event.[54] In any event, we consider that introducing this concept into the law in New Zealand would add complexity without any real benefit. So, as we see it, neither "fundamental difference" nor "overwhelming supervening event" has any place in the application of s 66(2). Section 66(2) requires a finding by the jury that the offence committed by the principal offender was committed in the prosecution of the common purpose and that

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52 *Jogee*, above n 28, at [98]. See Beatrice Krebs "Overwhelming Supervening Acts, Fundamental Differences, and Back Again?" (2022) 86 JCL 420 at 430–431.

53 *Jogee*, above n 28, at [97]. See also at [12].

54 *Regina v Tas* [2018] EWCA Crim 2603, [2019] 4 WLR 14; *Regina v Harper* [2019] EWCA Crim 343, [2019] 4 WLR 39; *Lanning v R* [2021] EWCA Crim 450; and *R v Smith* [2022] EWCA Crim 1808.

the secondary party knew that the offence was a probable consequence of the prosecution of the common purpose. As already noted, these two requirements are connected. The wording of s 66(2) does not leave any room for the "fundamental difference" or "overwhelming supervening event" concepts, and under s 66(2) there is no necessity for them.

[70] Our position is supported by the earlier decision of this Court in *Edmonds*. William Young J, giving the reasons of the Court, traced through the development of fundamental difference in the United Kingdom[55] and said:

> [47] The approach of New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2). That section recognises only one relevant level of risk, which is the probability of the offence in issue being committed. If the level of risk recognised by the secondary party is at that standard, it cannot matter that the actual level of risk was greater than was recognised. It follows that there can be no stand-alone legal requirement that common purpose liability depends on the party's knowledge that one or more members of his or her group were armed or, if so, with what weapons. As well, given the wording of s 66(2), there is no scope for a liability test which rests on concepts of fundamental difference associated with the level of danger recognised by the party. All that is necessary is that the level of appreciated risk meets the s 66(2) standard.

[71] However, shortly after rejecting the "fundamental difference" concept the Court said:[56]

> … there may be cases where the use by one member of a group of a weapon which other members of the group had not known about may conceivably justify the conclusion that the offence committed involved such a departure from the common purpose as not properly to be regarded as occurring in the course of its implementation.

[72] The Court went on to add that this did not extend to cover the situation where the secondary party knew of a weapon but not what *type* of weapon. That is not the situation here.

[73] This observation from *Edmonds* suggests that an acquittal of the secondary party may be appropriate where the principal offender uses a weapon that the secondary party does not know about (for example, stabs the victim with a knife when

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55 *Edmonds*, above n 25, at [31]–[42].
56 At [51].

the secondary party did not know any kind of weapon was being carried by a member of the group). *Edmonds* suggests this would involve a finding by the jury that the stabbing offence was not committed in the prosecution of the common purpose. Although that has some resemblance to the fundamental difference concept as explained in *Anderson* and adopts similar logic to it, it is not a judicial gloss on the statutory wording, but rather an application of the words of s 66(2); that is, it is "firmly based on the wording" of s 66(2), to use the words of this Court in *Edmonds*.

Guidance on "in the prosecution of the common purpose" was required in this case

[74] As noted earlier, the jury in the present case appears to have answered affirmatively the question in the question trail to the effect that the stabbing was committed by Mr Webber in the course of pursuing the common purpose.[57] The Judge did not provide guidance on what that required. "In the course of" carrying out the common purpose could mean "at the same time as" or it could mean "as part of the process of implementing" the common purpose. It is clear from the quotation from *Edmonds* set out above at [71] that the correct interpretation is the latter, and in most cases this will be obvious to a jury without further explanation. But, in this case, given the inconsistency between the jury's apparent findings that (a) a stabbing was in the pursuit of the common purpose and (b) Mr Burke did not know Mr Webber had a knife, it may be the jury thought it was sufficient that Mr Heappey was stabbed *during* the assault.

[75] If the jury had been told the correct interpretation was "part of the process of implementing", and they considered Mr Burke did not know about the knife, they may have found the stabbing was, in the words of *Edmonds*, "such a departure from the common purpose as not properly to be regarded as occurring in the course of its implementation". That, in turn, means the jury needed to be told that they had to decide whether they were satisfied that Mr Burke knew about the knife before addressing whether the *stabbing* was in the prosecution of Mr Webber's and Mr Burke's common purpose of *inflicting a physical beating or "hiding"* (that is, an assault causing more than trivial harm) on Mr Heappey.

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[57] Above at [32](d).

[76] As noted earlier, the question trail did pose the question to the jury as to whether Mr Burke knew about the knife. But that question came *after* the question about whether the stabbing occurred in the prosecution of the common purpose. This would have suggested to the jury that whether Mr Burke knew Mr Webber had a knife was not important in answering the question of whether the stabbing was in the prosecution of the common purpose, when in fact it was very important. So, the question as to whether Mr Burke knew about the knife needed to come before the question about whether the stabbing occurred in the prosecution of the common purpose.

[77] As the direction given to the jury left open the possibility that the jury found that the offence was committed in the prosecution of the common purpose on an incorrect basis, we consider the appeal needs to be allowed on this ground.

[78] But, as much of the argument before us focused on the known probable consequence requirement, we go on to consider that on the assumption that the jury needed to address that issue (that is, that they were satisfied that the "prosecution of the common purpose" requirement was met). As will become obvious, there is a close correlation between the ambit of the group's common purpose and the issue of whether other offending is a probable consequence of pursuing it. Problems tend to arise under s 66(2) when there is not a close fit between the way the common purpose is defined and the facts of the ultimate offending that is the focus of the trial.

What is the meaning of "probable consequence"?

[79] As mentioned earlier, a significant issue in this case was whether the stabbing of Mr Heappey by Mr Webber was known by Mr Burke to be a probable consequence of the prosecution of their common plan to give Mr Heappey a hiding. In his question trail for the jury, the Judge told the jury that "probable consequence" means "there was a 'substantial or real risk', or that it could well happen". He repeated this in his summing up. In doing so, the Judge was following a longstanding authority.[58]

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[58] See *Ahsin*, above n 13, at [100]–[101].

[80] Neither party took issue with this aspect of the Judge's directions to the jury, given that this Court has previously confirmed that meaning as being correct. However, the interveners sought to argue that we should depart from earlier authority. The argument on this issue was presented by Mr Stevens for Te Matakahi, but explicitly supported by Mr Wilkinson-Smith for the Criminal Bar Association.

[81] In *R v Gush*, the Court of Appeal acknowledged that "probable consequence" could have different meanings, depending on the context.[59] One possibility was "more probable than not".[60] Another was a consequence that "could well happen".[61] The Court ruled that the "more probable than not" standard was inappropriate for the purposes of s 66(2).[62] It found the correct meaning was "could well happen".[63]

[82] In *Darkan v The Queen*, the High Court of Australia also concluded that "could well happen" was an appropriate interpretation of "probable" in the context of the equivalent provision in Queensland.[64] We note that some of the Australian statutes that are equivalent to s 66(2) now adopt a recklessness standard.[65]

[83] This Court has declined to revisit the law as stated in *Gush* in the past.[66] In *Ahsin*, the trial Judge used the phrase "could well happen" and "real or substantial risk" in his summing up.[67] Counsel before the Supreme Court argued the trial Judge should have used the statutory words "probable consequence" and elaborated only if

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59 *R v Gush* [1980] 2 NZLR 92 (CA).

60 At 94.

61 At 94.

62 At 95.

63 At 94. Note this formulation is not merely that the consequence could happen, but that it could *well* happen.

64 *Darkan v The Queen* [2006] HCA 34, (2006) 227 CLR 373 at [79] per Gleeson CJ, Gummow, Heydon and Crennan JJ, citing *Gush*, above n 59, at 94, and [132]–[133] per Kirby J. The majority said it was not necessary in every case to explain the meaning of "probable consequence" to the jury, but where it was necessary or desirable a correct direction would be "probable in the sense that it could well have happened": at [81]. They also said probable "means more than a real or substantial possibility or chance": at [78].

65 Section 11.2A(3) of the Criminal Code Act 1995 (Cth) provides that a secondary party is liable for an offence committed by the principal offender if they are reckless about the commission of the offence by the principal offender. Section 5.4(1) provides that a person is reckless if they are aware of a substantial risk and, having regard to the circumstances known to them, it is unjustifiable to take the risk. See also the Criminal Code 2002 (ACT), s 45A(3).

66 *Ahsin*, above n 13.

67 At [98].

asked to do so by the jury.[68] The majority in *Ahsin* rejected that submission in these terms:[69]

> [100] Counsel's criticism [of the direction] is directed at established law on the requirements of s 66(2). In *R v Gush*, the Court of Appeal, construing the words "probable consequence" in the provision purposively and in their context, held that they meant an event that could well happen rather than one which is more probable than not. In *R v Piri*, Cooke P reiterated that "the words do not require proof that the accused thought that the result which in fact eventuated was more likely than not". He added that while no single formula is "preferable or adequate", the degree of foresight required to be proved may be referred to as "a real risk, a substantial risk, … [or] something that might well happen".
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> [101] These decisions have been consistently followed since in New Zealand. The Judge's direction in this case is entirely in accordance with them and the present case does not require reconsideration of this aspect of the law.

[84] The standard question trail for s 66(2) asks the jury whether they are sure the secondary party knew the principal offender's offence was a probable consequence (thus using the statutory wording), then refers to a "probable consequence" as "a substantial or real risk" or that it "could well happen".[70] Counsel for Te Matakahi, Mr Stevens, submitted the standard question should explain "probable consequence" as follows:

> Knowing something to be a probable consequence means that the secondary party knew the offence was a likely outcome on the facts known to him or her at the time.

[85] Support for that position (and the position advanced by counsel in *Ahsin*) can be derived from the bench book guidance to trial judges used by the courts in Victoria, Australia in relation to the equivalent provision in the Crimes Act 1958 (Vic), s 323(1)(d). That provision refers to the secondary party being "aware that it was

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68 At [99].

69 Per McGrath, Glazebrook and Tipping JJ (footnotes omitted). See also at [17] per Elias CJ. This was reiterated by a leave panel in *Stretch v R* [2020] NZSC 128 at [9] and referred to in *Uhrle*, above n 35, at [5], n 7. In *R v Piri* [1987] 1 NZLR 66 (CA) at 78–79, the Court of Appeal dealt with the meaning of "likely" in s 167(d) of the Crimes Act 1961, but cited *Gush*, above n 59, as authority.

70 Ngā Kōti o Aotearoa | Courts of New Zealand "Hybrid section 66(1) and (2) Crimes Act 1961 - No unanimity required" <www.courtsofnz.govt.nz>; and Ngā Kōti o Aotearoa | Courts of New Zealand "Party to wounding with intent to cause grievous bodily harm (Sections 66(2), 188 Crimes Act 1961)" <www.courtsofnz.govt.nz>.

probable" that the principal offence would be committed. The guidance is in these terms:[71]

> It is likely, as a matter of statutory interpretation, that the word "probable" is an ordinary English word and it is a matter for the jury to give the word meaning. If necessary, a judge may suggest that "likely" is an acceptable synonym (see, e.g. *Crabbe v R* (1985) 156 CLR 464). If the jury requires further guidance, it may be permissible to explain that the word "probable" is used in contrast to what is merely "possible". When directing the jury, the judge should not equate the word "probable" with a "balance of probabilities" test.

[86] In *R v Piri*, the Court of Appeal rejected an argument that judges should refrain from expanding on the meaning of probable or likely.[72] It found that a jury may be "entitled to more guidance" in cases where the degree of likelihood or probability is a critical issue.[73]

[87] Mr Stevens referred to the definition of "probable" in the Oxford Dictionary ("[l]ikely to happen or be the case")[74] and submitted that "likely outcome" was a middle ground between "possible consequence" and "more probable than not". We do not consider that substituting "likely" for "probable" provides much assistance to a jury. It simply substitutes one open-textured word for another. It is also not clear that "likely" adds any additional clarification to "probable". Indeed, in *Gush*, the Court of Appeal expressed the view that "likely to cause death", as it appears in s 167(b) of the Crimes Act, could be interpreted as "such as could well cause death", thus giving the same meaning to "likely" in s 167(b) as to "probable" in s 66(2).[75] Mr Stevens acknowledged that the use of "likely" instead of "probable" retains an element of vagueness, but said "likely" was preferable to "could well happen", which he submitted was a standard that was below the normal understanding of "probable".

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71 Judicial College of Victoria *Bench Book/Criminal Charge Book* (2023) at ch 5.2, [95].

72 *Piri*, above n 69.

73 At 79.

74 As cited in Julia Tolmie "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441 at 463. Currently, the Oxford English Dictionary uses the phrase "reasonably expected to happen or be the case; likely": Oxford English Dictionary "probable" (April 2024) <www.oed.com>.

75 *Gush*, above n 59, at 96. *Piri* also equated likely with "might well happen": *Piri*, above n 69, at 78.

[88] We do not consider directing a jury that "probable" means "likely" will provide them with much assistance. The law in this area has been clear and constant since *Gush*, and we do not consider there is any more of a case for revisiting it now than there was when *Ahsin* was decided in 2014. We decline to do so. However, we see merit in the Victorian bench book suggestion that it may be helpful to a jury for the direction to state that the word used in s 66(2), "probable", is used in contrast to merely "possible".

[89] Finally, it is worth reiterating that "probable" simply describes the required nexus between the alleged ultimate offending and the common purpose that triggered it. Its open texture is reduced when the fit between purpose and consequence is carefully articulated. Problems arise when "probable" is being asked to close a gap between purpose and consequence that is too wide. In such cases, "probable" risks being asked to do the work of the merely "possible".

What direction should have been given on whether Mr Burke knew the offence was a probable consequence of the prosecution of the common purpose?

Appellant's submissions

[90] Mr Rapley said the unlawful act that caused the death of Mr Heappey was the stabbing of Mr Heappey by Mr Webber. That being the case, he argued Mr Burke could not be guilty of manslaughter unless the Crown proved that Mr Burke knew a stabbing or an assault of similar gravity was a probable consequence of prosecuting the common purpose as defined by the Judge.

[91] Mr Rapley said the directions given by the Judge incorrectly allowed for the jury to find Mr Burke guilty of manslaughter on the basis that Mr Burke knew a different offence (the assault that would constitute a hiding), which did not cause Mr Heappey's death, was a probable consequence of the prosecution of the common purpose. The Court of Appeal failed to differentiate the stabbing (which did cause death) and the hiding (which did not). The result was that Mr Burke was found liable for homicide when the offence he knew to be a probable consequence of the prosecution of the common purpose was only the assault involved in giving

Mr Heappey a hiding. Foresight of acts that did not cause death are legally irrelevant to liability for manslaughter.

[92] Mr Rapley accepted it was not necessary that Mr Burke knew the "exact concatenation of events" leading to Mr Heappey's death (the stabbing) was a probable consequence of the prosecution of the common purpose,[76] but he did need to foresee the type of offence that Mr Webber committed. As the majority of this Court said in *Ahsin*, s 66(2) requires "foresight of both the physical and mental elements of the essential facts of the offence".[77] In the present case, it was a requirement that the Crown proved that Mr Burke knew an assault causing grievous bodily harm or really serious harm was a probable consequence of the prosecution of the common purpose.[78]

[93] Mr Rapley said this argument led to two things. First, it meant the jury directions were wrong because the jury was not asked to determine whether Mr Burke knew a stabbing or other assault causing grievous bodily harm was a probable consequence of the prosecution of the common purpose. Secondly, it meant a verdict of manslaughter was not open on these facts unless the jury found that Mr Burke knew Mr Webber had a knife, which it did not. So, if the jury had been directed correctly, a verdict of not guilty of manslaughter would have resulted.

Respondent's submissions

[94] Mr Sinclair, who addressed this aspect of the case for the respondent, said accepting the argument advanced for Mr Burke would blur the distinction between murder and manslaughter. If Mr Burke had foreseen a stabbing, this implies that he would be acting with something close to murderous intent and suggests he may have been guilty of murder. On the appellant's case, if he did not foresee the stabbing, he would be guilty of neither murder nor manslaughter. Mr Sinclair said the appellant's position was at odds with authorities in both New Zealand and Canada.[79]

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76 *Edmonds*, above n 25, at [54].

77 *Ahsin,* above n 13, at [102(e)] per McGrath, Glazebrook and Tipping JJ.

78 However, Mr Rapley accepted that, if Mr Heappey had died as a result of a punch, Mr Burke would have been guilty of manslaughter because he knew a punch was a probable consequence of the prosecution of the common purpose to give Mr Heappey a hiding. This concession was made in the context of the first issue and subject to the argument presented on the appellant's behalf in relation to the second issue.

79 Mr Sinclair cited to *R v Jackson* [1993] 4 SCR 573; and *R v Rapira* [2003] 3 NZLR 794 (CA).

[95] Mr Sinclair rejected the proposition that the Court of Appeal's approach would lead to over-criminalisation. He noted there was a wide discretion in sentencing for manslaughter, so any case where the level of criminality of the s 66(2) party is low can be met with a commensurately low sentence. However, he acknowledged that concern has also been expressed about the stigma attaching to a conviction for manslaughter. He said this needs to be kept in perspective. He noted the Supreme Court of Canada addressed this in *R v Creighton*.[80] In that case, McLachlin J, writing for the majority, addressed the issue of stigma in some detail and concluded that the mens rea requirement for manslaughter (foreseeability of harm) was "entirely appropriate to the stigma associated with the offence of manslaughter".[81]

[96] Mr Sinclair said attempts to address the risk of over-criminalisation, such as by limiting the scope of manslaughter or the approach addressed in the first ground, are inappropriate and add complexity. A simple approach, allowing for simple jury directions, is called for. He said the "overwhelming supervening event" approach adopted in *Jogee* could provide a safety valve to avoid unfair attribution of homicide liability, but it would not have availed Mr Burke on the facts of this case.

New Zealand cases

[97] Counsel traversed several New Zealand authorities in the course of argument. We concentrate on four cases that we see as important in the analysis of the way in which s 66(2) should be applied.

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80 *R v Creighton* [1993] 3 SCR 3.

81 At 48 per L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ: the converse of the stigma of a conviction for manslaughter is the risk that the victim's death is not sufficiently recognised by the criminal law unless those involved are convicted for culpable homicide, as opposed to a lesser charge such as causing grievous bodily harm with intent to injure. See also at 56 per L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. The High Court of Australia adopted a different approach in *Wilson v The Queen* (1992) 174 CLR 313. The majority in that case found the act done by the principal offender must have exposed the victim to an appreciable risk of "serious injury" as judged by a reasonable person: at 333–334 per Mason CJ, Toohey, Gaudron and McHugh JJ.

(a) *Rapira*

[98] The first case in chronological order is *R v Rapira*.[82] The respondent argued this case supported its position as to the correctness of the approach of the majority in the Court of Appeal in this case.

[99] *Rapira* involved a group robbery of a pizza deliverer. One of the group hit the victim on the head with a baseball bat and he died as a result. The principal offender and others were charged with murder under s 168 of the Crimes Act (where death results from the infliction of grievous bodily injury for the purpose of facilitating the commission of another specified offence).[83] A person is guilty of murder under s 168 whether or not they meant death to ensue, or knew death was likely to ensue, from the infliction of harm.[84]

[100] In *Rapira*, the trial Judge directed the jury that secondary parties would be guilty of manslaughter in a case where the principal offender committed murder under s 168 if the secondary party knew that it was a probable consequence of the prosecution of the common purpose that the principal offender would intentionally strike someone (and death in fact resulted from that unlawful act).[85]

[101] The Court of Appeal found the direction was correct;[86] if the secondary party knew the infliction of physical harm that was more than trivial or transitory was a probable consequence of prosecuting the common purpose, that party was guilty of manslaughter.[87] This aspect of *Rapira* was expressly approved by this Court in *Edmonds* in relation to situations where the principal offender is guilty of murder under s 168.[88] It is also consistent with the approach to liability under s 66(1).[89]

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82 *Rapira*, above n 79.
83 Section 168(1)(a).
84 Section 168(1).
85 *Rapira*, above n 79, at [20].
86 At [35].
87 At [31].
88 *Edmonds*, above n 25, at [27], n 25. At [10], the Court said it would leave for another day whether foresight of a killing was a requirement in other culpable homicide cases. See below at [149].
89 As discussed in *R v Renata* [1992] 2 NZLR 346 (CA) at 349; and noted by this Court in *Edmonds*, above n 25, at [27], n 22. See below at [105].

[102] On its face, *Rapira* appears to add support to the respondent's case and the approach of the majority in the Court of Appeal in this case. But the Court of Appeal has previously distinguished *Rapira* in *R v Hartley* (which we discuss next), on the basis that the common purpose in *Rapira* (robbery) included the use of a baseball bat to silence or incapacitate the robbery victim.[90] That also clearly distinguishes *Rapira* from the present case.

(b) *Hartley*

[103] The second case is the decision of the Court of Appeal in *Hartley*.[91] *Hartley* was in fact a s 66(1) case, but Mr Rapley argued it was also relevant in the context of s 66(2).

[104] In *Hartley*, Mr Hartley and his associates assaulted several victims on three separate occasions over a period of some hours. In the course of the second assault, Mr Hartley and the principal offender approached a victim's car. Mr Hartley punched the victim through the window. The principal offender then pushed Mr Hartley away, pulled out a knife, and stabbed the victim. Mr Hartley did not know that the principal offender had a knife. The Court of Appeal found that Mr Hartley could not be guilty of manslaughter under s 66(1) unless it was proved that he aided or abetted offending of the type that actually occurred.[92] As that offending was a stabbing, and Mr Hartley did not know the principal offender had a knife, a conviction for manslaughter was not open.[93] The Court saw knowledge of the knife as a "convenient proxy", on the facts of the case before that Court, for the need to prove under s 66(1) that the secondary party aided or abetted offending of the type that actually happened.[94]

[105] The Court in *Hartley* referred to an earlier s 66(1) case, *R v Renata*.[95] In *Renata*, the Court of Appeal set out the requirements for a conviction of manslaughter

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90 *Hartley*, above n 47, at [31].
91 *Hartley*, above n 47.
92 At [19], [22], [32] and [40].
93 At [53] and [70].
94 At [19].
95 At [22]–[24], discussing *Renata*, above n 89.

in relation to a principal offender and a secondary party charged under s 66(1)(b), (c) or (d). The *Renata* Court said:[96]

> … where one person unlawfully assaults another by a dangerous application of force, the assailant is guilty of manslaughter if death is caused even in a most unexpected way. Unlikelihood of the result is relevant only to penalty, although it may be of great significance in that regard. No different principle applies to a person who is guilty of the assault as a secondary party under s 66(1)(b), (c), or (d).

[106] That statement of the law was approved by this Court in *Edmonds*.[97] However, the *Hartley* Court saw *Renata* as distinguishable. It described the outcome in *Renata* in these terms:[98]

> [24] Although the fact death resulted in *Renata* was unexpected, the death was the result of an act (kicking or punching) within the contemplation of the parties. That is in contrast with the present case [*Hartley*] where the act contemplated was punching or hitting with the fists in some way but not stabbing.

[107] That distinction is significant given the facts of the present case, where giving Mr Heappey a hiding involved an assault, but the death was caused by a stabbing. The Court in *Hartley* found there was no foundation for a manslaughter verdict in that case because "the assault which occurred was completely different from that which the appellant was assisting".[99] Later, the Court observed that, because the definition of assault is so all-embracing, it was necessary when applying s 66(1) "to capture the reality of what the [secondary] party was said to be involved in".[100]

[108] Mr Rapley argued the reasoning in *Hartley* applied equally to liability under s 66(2), noting that, in its reasoning, the *Hartley* Court had discussed cases under s 66(2)[101] and its common law equivalent in the United Kingdom.[102] However, as noted earlier, the position in common law jurisdictions has changed somewhat since *Hartley* was decided. It should be noted that one of the judges who decided *Hartley*

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96 *Renata*, above n 89, at 349.
97 *Edmonds*, above n 25, at [27], n 22.
98 *Hartley*, above n 47.
99 At [53].
100 At [54].
101 At [27]–[36].
102 At [41].

pointed out in a later case that the "knowledge of the weapon" approach in *Hartley* is not necessarily applicable in s 66(2) cases.[103]

[109] The significance of *Hartley* in the present case is that it reflects a careful delineation of what the secondary party was said to have aided or abetted, acknowledging that aiding a minor assault does not necessarily mean the aiding also applied to the much more serious assault that ensued. There is a question as to whether the same approach is applicable in a case involving s 66(2).

[110] The respondent argued *Hartley* was wrongly decided. We do not agree. It reflects a correct concentration on the particular facts of the case that subsequent s 66 cases have adopted.

[111] In relation to the common law of England and Wales, and Jamaica, the approach in *Jogee* contrasts starkly with that in *Hartley*. In *Jogee*, the Court made this obiter observation:[104]

> [96] If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. …

[112] This appears to assume that the violence causing the death is automatically attributable to the aider or abettor, whether or not that person knew the escalation of violence was likely. Professor Simester was critical of this aspect of *Jogee*. He wrote:[105]

> It is hard to see why this conclusion follows under the law of aiding and abetting. Suppose that S joins an enterprise to commit an assault. In joining it, let us concede, S encourages P to commit the assault. (That would of course need to be proved.) P, however, goes on to commit murder by deliberately inflicting serious injuries that cause death. How is it the case that S has intentionally encouraged *that* act? It is true, as the court notices, that murder and manslaughter are constructive crimes. But that truth does not permit us to bypass the requirement that secondary parties must have

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103 *R v Vaihu* [2009] NZCA 111 at [86] per William Young P. See also [40]–[45] per Chisholm and Heath JJ.

104 *Jogee*, above n 28. The Court did, however, acknowledge that this may not be the case if death is caused by an overwhelming supervening act by the principal offender: at [97]. We discuss this above at [68].

105 AP Simester "Accessory Liability and Common Unlawful Purposes" (2017) 133 LQR 73 at 86 (emphasis in original). See also Krebs, above n 52, at 427.

> encouraged *the (type of) act that caused death*, and that they must have done so intentionally. Of course, one might argue that an unlawful and dangerous act, sufficient for manslaughter, was included in the greater act of inflicting GBH. *But that lesser act did not cause death*.

[113] This highlights the distinction made in *Hartley* between a case where the killing results from the type of violence embarked upon by the group and where the killing is effected by a violent act of a different and more serious kind. When it comes to applying this to s 66(2), the question becomes whether the switch from the lesser common purpose violence to the violence causing death was known to be a probable consequence of carrying out the lesser common purpose violence. The greater the gap between purpose and consequence, the less likely it is that the answer to that question is in the affirmative: "probable" should not be made to do the work of the merely possible. Of course, actual context will be very important. If, for example, either the principal or the victim is volatile, such that escalation is known by all in the group to be "probable", then that is relevant to both a proper and realistic understanding of purpose and consequence.

(c) *Vaihu*

[114] The third case is *R v Vaihu*.[106] Although it did not feature prominently in counsel's arguments, it provides an informative backdrop to the analysis of the fourth case, *Edmonds*.

[115] In *Vaihu*, three brothers were part of a group engaged in an attack to exact revenge on another group after an earlier fracas involving two armed groups. The Vaihu brothers' group numbered eight (or potentially 13) and carried two hammers. Two of the victims were carrying bats as they approached the Vaihu group. These victims were disarmed and brutally beaten. The Vaihu brothers faced charges of causing grievous bodily harm with intent to cause such harm. By the end of the trial, the Crown relied on s 66(2). One brother was found guilty of causing grievous bodily harm to both of the victims. The other two brothers were found guilty of grievous bodily harm only with respect to one of the victims.

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[106] *Vaihu*, above n 103.

[116] The Court of Appeal unanimously allowed the brothers' appeal against all convictions on the basis that the legal directions given to the jury at the trial were confusing and the verdicts were plainly inconsistent.[107] Relevantly, the Court also considered whether it was necessary to direct the jury on whether the Vaihu brothers knew others in the group were carrying weapons. The sentencing Judge had concluded that the jury was not satisfied that the Vaihu brothers knew that the hammers had been brought to the scene.[108]

[117] In their reasons, Chisholm and Heath JJ distinguished *Hartley* as a s 66(1) case.[109] They concluded on the facts in *Vaihu* that there did not need to be evidence of a weapon to find foresight of the infliction of really serious harm. This was in light of the number of attackers, evidence that victims were knocked down and kicked, and the Vaihu brothers' own intentions and conduct during the fight (based on their admissions to police).[110]

[118] In his reasons, William Young P noted that the serious nature of group violence meant the existence of weapons is often immaterial. He also distinguished *Hartley* on the basis it was a s 66(1) case.[111] However, he noted that there will be situations where a rational jury will need to be satisfied that a defendant knew of a weapon to establish liability on the facts.[112]

[119] Ultimately, William Young P saw the way the Crown pitched the common purpose to be key. When the Crown relies on s 66(2), it must decide the level at which to pitch the common purpose. For example, in a case involving an assault causing grievous bodily harm, if the Crown pitches the common purpose at a low level (assault), it will be easy to prove there was a common purpose, but harder to prove that the serious assault that occurred was a known probable consequence of the prosecution of that common purpose. Conversely, if the Crown pitches the common purpose at a high level (an assault intended to cause really serious harm), it will be harder to prove there was such a common purpose but, if such a purpose is found to

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107 At [60]–[61], [65]–[66] and [73] per Chisholm and Heath JJ, and [84] per William Young P.
108 At [20] per Chisholm and Heath JJ.
109 At [40]–[45].
110 At [45].
111 At [86].
112 At [88].

exist, easier to prove that the secondary party knew a serious assault was a probable consequence of carrying out that common purpose.[113]

[120] In *Vaihu*, the Crown pitched the common intention at the relatively low level of assault.[114] William Young P concluded:[115]

> … logic suggests that the Crown could only establish that the intentional infliction of grievous bodily harm was known to be a probable consequence against a defendant who knew of facts which were additional to those which were intrinsic to the asserted common purpose.

[121] Put another way, the closer the association between the common purpose and the ultimate offence, the less additional evidence is required to connect the common purpose to its probable consequence.

[122] William Young P saw *Vaihu* as a case on the margin.[116] He noted that knowledge of the earlier fracas, the number involved in the group violence or the mood of the group could arguably, on their own, provide the required evidence of foresight of intentional grievous bodily harm.[117] But, on the facts, he adopted a more conservative approach of requiring a weapons direction. One benefit of this was that it gave the jury a firm basis to approach their deliberations.[118]

[123] We do not overlook the fact that *Vaihu* was a case involving a charge of causing grievous bodily harm with intent to do so, not manslaughter. There is a significant difference between manslaughter, where intent to inflict grievous bodily harm is not required, and the grievous bodily harm offences faced by the Vaihu brothers. Intent to cause grievous bodily harm is an element of the latter offence, meaning an assault with such intent would need to be part of the common purpose or, if not, a secondary party under s 66(2) would need to know an assault with such intent was a probable consequence of prosecuting the common purpose of carrying out a lesser assault. But *Vaihu* is significant to the extent that it introduces the concepts of pitching the common

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113 At [89]–[90]. See our comment above at [52].
114 At [91] and [93].
115 At [93].
116 At [95].
117 At [87].
118 At [95].

purpose, and how the association between the common purpose and ultimate offence determines the evidence required.

(d) *Edmonds*

[124] The fourth case is *Edmonds*.[119] That was also a group violence case. A member of Mr Edmonds' group stabbed a member of the other group. Mr Edmonds was charged with murder, the Crown case being that he was liable under s 66(2).

[125] The common purpose alleged by the Crown was to cause serious violence to a member of the other group. Mr Edmonds had pleaded guilty to participation in an organised criminal group. This meant he was taken as accepting the group had a common purpose of violence involving at least a serious risk of serious harm.[120] He was found guilty of manslaughter under s 66(2). His appeal to the Court of Appeal failed.[121]

[126] On appeal to this Court, Mr Edmonds argued that the jury should have been directed that Mr Edmonds needed to know that the principal offender was in possession of a knife and that he could not be found guilty under s 66(2) without that knowledge.[122] At the time of the stabbing, Mr Edmonds himself was holding a gun and he knew another in the group was armed with a baseball bat.[123] The evidence was that Mr Edmonds stayed by the car, which his group had driven to the scene, while the fracas that included the stabbing occurred.[124]

[127] The trial Judge's direction was to the effect that Mr Edmonds needed to know a weapon was being carried, but not that it was a knife.[125] Mr Edmonds' appeal was dismissed.

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119 *Edmonds*, above n 25.
120 At [9].
121 *Pahau v R* [2011] NZCA 147.
122 *Edmonds*, above n 25, at [2] and [12].
123 At [12], n 4.
124 At [5].
125 At [11].

[128] This Court, in *Edmonds*, said:

> [54] The Crown case was that the appellant put in train a sequence of events with the purpose of inflicting serious violence and an associated substantial risk of death. For present purposes, there is no difference between death caused by the use of a blunt instrument and death effected by stabbing. What was material for the purposes of s 66(2) was that the appellant appreciated that the ultimate result was probable rather than that he foresaw the exact concatenation of events which, in the end, brought that result about. There was thus no need for the Crown to prove that the appellant knew that a stabbing (as opposed to some other form of death-inflicting violence) was a probable consequence of the implementation of the common purpose.

[129] That meant there was no need for a direction to the effect that Mr Edmonds knew about the knife. The Court held that the trial Judge's direction that Mr Edmonds needed to know a weapon was being carried was unduly favourable to the appellant and not strictly necessary on the facts of the case.[126]

[130] Mr Rapley argued the Court of Appeal decision in the present case was inconsistent with *Edmonds* in two respects.

[131] The first is that, as indicated earlier, this Court in *Edmonds* said the Crown must determine at what level of criminality to pitch the common purpose in a group violence case under s 66(2); the more serious the common purpose, the harder it is to establish the existence of the common purpose, but the easier it is to prove the ultimate offence was known to be a probable consequence of the prosecution of the common purpose (and vice versa).[127] Applied to the present facts, if the low level of the common purpose (a hiding) makes it harder to prove the ultimate offence (manslaughter) was foreseen, that must be because:

(a) the ultimate offence was more serious than the common purpose and, therefore, potentially outside its ambit; and

(b) the Crown must prove the defendant knew the more serious ultimate offence was a probable consequence of prosecuting the common purpose of carrying out a lesser assault.

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126 At [55].

127 At [49]. This assumes the ultimate offence is of a different level of seriousness from the common purpose.

[132] In contrast to this, the directions in the present case meant the Crown had to prove only that there was a common purpose to give Mr Heappey a hiding involving non-trivial harm and that Mr Heappey died as a result. As the common purpose to give a hiding was itself an assault involving non-trivial harm, it was undeniable that Mr Burke knew that such an assault was a probable consequence of prosecuting the common purpose because it *was* the common purpose. The directions meant the Crown did not have to prove that Mr Burke knew the ultimate offence (manslaughter by stabbing) was a probable consequence of the prosecution of the common purpose of giving a hiding.

[133] The second is that in *Edmonds*, this Court accepted that in some group violence cases, knowledge by the defendant that the principal offender had a weapon may provide the only evidence that the defendant knew the ultimate offence was a probable consequence of the prosecution of the common purpose.[128] Mr Rapley submitted the only reason that would be so is because the Crown must prove that the defendant knew the greater violence inflicted by the weapon was known to be a probable consequence of the prosecution of the common purpose; that is, the defendant's foresight of lesser violence not involving a weapon does not amount to foresight of the more serious violence that was inflicted by the use of a weapon.

[134] These two aspects of this Court's judgment in *Edmonds* (and the similar comments in the reasons of William Young P in *Vaihu*) are premised on distinctions between levels of violence and, in cases where the ultimate offence involves serious violence, on the need for the Crown to prove the secondary party knew the serious violence was a probable consequence of the prosecution of the common purpose.

[135] We accept that the argument for Mr Burke derives support from these aspects of the *Edmonds* decision.

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[128] At [50]. This reflects a similar observation by William Young P in *Vaihu*, above n 103, at [89]–[93]: see above at [119]–[121].

Overseas authorities

[136] Counsel also referred to overseas authorities. The respondent referred to both Australian[129] and Canadian[130] authorities in support of its position. We accept the Canadian cases provide support for the respondent's position. It is less clear that the cited Australian cases do. In any event, the differing wording of the provisions that are similar to s 66(2) in other jurisdictions and the different common law approaches make these authorities of limited utility in addressing the issue before us.

Our approach

[137] We now turn to the approach we consider should have been taken in the directions to the jury on the issue of what the secondary party in a homicide case needs to know is a probable consequence of the prosecution of the common purpose. We begin by setting out the three proposed approaches we reject.[131]

[138] The first is that advocated by the respondent in this case and adopted by the Canadian courts. On that basis, a secondary party who is party to a common purpose to inflict violence involving harm that is more than trivial (but not necessarily serious) will be liable for manslaughter if a victim dies as a result of any action by the principal offender. In essence, that was the approach taken by the trial Judge in this case.

[139] The second is an approach that requires the secondary party to know that a probable consequence of the prosecution of the common purpose is that the precise event which caused the death of the victim will be perpetrated by the principal

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129 *The Queen v Keenan* [2009] HCA 1, (2009) 236 CLR 397 at [124] per Hayne, Heydon, Crennan and Kiefel JJ. The respondent also pointed to comments in the decisions of the High Court in *Varley v The Queen* (1977) 51 ALJR 243 (HCA) and *Markby v The Queen* (1978) 140 CLR 108, both cases decided under the common law of New South Wales, but we do not see either as assisting us in resolving the issues before us.

130 *Jackson*, above n 79, at 583. See also *Miazga v R* 2014 CarswellBC 3833 (SCC) declining leave to appeal the British Columbia Court of Appeal decision of *R v Miazga* 2014 BCCA 312, 2014 CarswellBC 2303. The common purpose provision in the Canadian Criminal Code RSC 1985 c C-46 is s 21(2). It is similar to s 66(2) but with one significant difference. Whereas s 66(2) requires that the secondary party *knew* the commission of the offence in question was a probable consequence of the prosecution of the common purpose, s 21(2) requires that the secondary party *knew or ought to have known* this, though this objective standard does not apply to murder or attempted murder: *R v Logan* [1990] 2 SCR 731 at 744–745 and 747–748 per Dickson CJ, Lamer CJ, Wilson, Gonthier and Cory JJ.

131 This analysis excludes the potential approach of foresight of death, which is discussed below at [145] onwards.

offender. On the facts of this case that would require Mr Burke to have known that it was a probable consequence of the prosecution of the common purpose that Mr Webber would stab Mr Heappey. That is not the approach advocated on Mr Burke's behalf in this case. His counsel accepted that Mr Burke would be liable for manslaughter if he knew that an assault by Mr Webber of sufficient gravity to cause "really serious harm" was a probable consequence of the prosecution of the common purpose. We do not say any more about this approach.

[140] The third is an approach that requires the secondary party to know it was a probable consequence of carrying out the common purpose that the principal offender would assault the victim in a way that would cause really serious harm. That was the position advocated by Mr Rapley. The difficulty with that very generalised approach is that it does not allow for the situation where the common purpose includes merely punching the victim, and it is a punch that kills the victim. In that case, the secondary party may not have foreseen that a probable consequence of the punch would be really serious harm, even if that was always a possibility. But as the punch was the very point of the group enterprise, s 66(2) deems the secondary party to have accepted the risks associated with another member of the group doing exactly what all had agreed to. In other words, in that scenario, the probable consequence to which s 66(2) is directed is the punch itself, not the result. As we understood it, Mr Rapley accepted that was the case.

[141] As we have emphasised earlier, we think it is unwise to stray too far from the actual words of s 66(2) and the specific facts of the case, and we frame our approach as that required for the present case, rather than as a generic one. As noted earlier, the facts we are required to assume in this case are that Mr Burke did not know about the knife and the context was an internal gang disciplining to which the victim acquiesced, albeit reluctantly. And we must assess the correctness of the directions on the basis that the jury was told the common purpose was to give a hiding (not a mean hiding as the prosecutor had described it). The death of Mr Heappey was caused by Mr Webber stabbing him. The challenge in describing the common purpose in this case arises because, on those facts, Mr Heappey was assaulted in a radically different way to that which had been agreed. The common purpose did not involve the deployment of a lethal weapon.

[142] In that combination of events, it was necessary for the jury to be directed that they had to be satisfied that Mr Burke knew an assault of the type that actually occurred was a probable consequence of the prosecution of the common purpose of giving Mr Heappey a hiding. To reach that conclusion, the jury needed to be satisfied that Mr Burke knew Mr Webber had a weapon (not necessarily a knife, but on the facts that was the only weapon in issue). The Judge's directions needed to make that clear. As mentioned earlier, while the directions did address knowledge of a weapon, they also allowed for the jury to find Mr Burke guilty of manslaughter if he did not know about the weapon but knew that an assault merely causing harm that was more than trivial (but not necessarily serious) was a probable consequence of carrying out the common purpose of giving Mr Heappey a hiding. We consider that was an error. Accordingly, we consider that the appeal must be allowed on this ground as well.

How we would have directed the jury

[143] It may be helpful if we set out how we would have directed the jury in this case, on the basis of the closing addresses of counsel and our analysis of the law. We again use the *Ahsin* criteria for this purpose, with one enlargement reflecting the weapons direction we consider necessary here. Applying those criteria, we consider that to come to a manslaughter verdict, the jury would have had to be satisfied beyond reasonable doubt that:

(a) Mr Webber committed culpable homicide.

(b) Mr Webber and Mr Burke formed a common intention (as pitched by the Crown) to prosecute the unlawful purpose of giving Mr Heappey a mean hiding involving the infliction of serious harm to Mr Heappey.[132]

(c) Mr Burke knew Mr Webber was armed.

(d) Mr Burke agreed with Mr Webber that they would assist each other in the prosecution of the common purpose.

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[132] This differs from [132] in that the required direction reflects the common purpose that should have been put to the jury: a mean hiding involving the infliction of serious harm to Mr Heappey (as advanced by the Crown), not a mere hiding.

(e) Mr Webber's assault on Mr Heappey occurred in the prosecution of the common purpose as defined above; that is, as part of the implementation by Mr Webber and Mr Burke of the common purpose.

(f) Mr Burke knew it was a probable consequence of the prosecution of the common purpose of giving Mr Heappey a mean hiding involving the infliction of serious harm that Mr Webber would, in the course of implementing such common purpose, assault Mr Heappey with the weapon.

[144] As mentioned earlier, there is a close correlation between requirements (e) and (f). In most cases, the answer to (f) also answers (e). And, on the facts of the present case, the jury needed to be satisfied that Mr Burke knew Mr Webber had a weapon to be satisfied that requirements (e) and (f) were met.

Second ground of appeal

[145] We will address the second ground of appeal (though on our view of the case it is not strictly necessary to do so) before setting out our conclusion as to how the appeal should be resolved.

[146] The second ground of appeal (advanced as an alternative to the first ground if the first ground was not accepted) was that the Judge ought to have directed the jury that Mr Burke could not be found guilty under s 66(2) unless he knew that it was a probable consequence of the prosecution of the common purpose that an unlawful killing would occur. It was argued that s 66(2) requires foresight of every element necessary to establish the offence, not just the elements in respect of which a principal offender or a s 66(1) party must have mens rea.[133]

[147] Ms Grieve KC presented this ground of appeal for the appellant. Our decision in relation to the first ground means the second ground is not of any practical importance in the present case, but we set out our views given that we heard full argument on the point and there was a division of views in the Court of Appeal.

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[133] As noted earlier, the Judge in fact directed the jury that, to find Mr Burke guilty under s 66(1), he had to assist or encourage a stabbing: see above at [30].

However, the submissions made by the parties must now be gauged in light of the conclusion we reached on the first ground.

[148] In essence, Ms Grieve argued that the majority in the Court of Appeal was wrong to uphold the conviction in circumstances where the Crown had not been required to prove that a killing was a known probable consequence of the prosecution of the common purpose. She said the trial Judge should have directed the jury that Mr Burke could not be found guilty under s 66(2) unless he knew that it was a probable consequence of the prosecution of the common purpose that an unlawful killing would occur. This position was supported by both Te Matakahi and the Criminal Bar Association.

Edmonds

[149] In *Edmonds*, this Court identified this issue, but it was unnecessary for the Court to address it in that case. The Court said:[134]

> [10] The Judge was of the view that the appellant could be found guilty of manslaughter only if the jury were satisfied that he appreciated that the killing of somebody was a probable consequence of the prosecution of the common purpose. It is arguable that this was unnecessary, as we will explain later. For present purposes, it is sufficient to note that we are leaving for another day resolution of the issue whether the Judge was correct and we will address this appeal on the assumption that he was.
>
> …
>
> [27] Both under the Crimes Act and at common law very limited mens rea (not extending to an appreciation that death is likely) is required to be established against a principal to justify a conviction for manslaughter. The same is true of a party who is prosecuted as an aider and abettor (under both s 66(1)(b), (c) or (d) and under the Accessories and Abettors Act [1861 (UK)]) and at common law under common purpose liability principles. Whether this is also always the case in New Zealand under common purpose principles is unclear. It certainly is where the principal has been found guilty of murder under s 168 but the practice in other culpable homicide cases has been to require the Crown to show that the secondary party subjectively appreciated that death was a probable consequence of the implementation of the common purpose. As we have said, it is arguable whether this is correct, but it is unnecessary for us to address this further in these reasons.

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134 *Edmonds*, above n 25 (footnotes omitted).

[150] It was argued on behalf of Mr Burke in the Court of Appeal that *Edmonds* was authority for the proposition that foresight by the secondary party of a killing was a requirement for a manslaughter conviction under s 66(2) (where the principal offender is guilty of murder under s 167). Unsurprisingly, given the passages from *Edmonds* quoted above, the majority rejected this, and the argument was not pursued before us.[135] However, Ms Grieve did argue before us that a requirement for foresight of a killing was consistent with the "practice" in New Zealand, as noted in the quotation from *Edmonds* set out above.[136]

Division of views in the Court of Appeal

[151] The Court of Appeal was divided on this issue.

[152] Having reviewed the authorities, the majority concluded that a direction to the effect that a secondary party could be guilty of manslaughter if they knew there was a substantial or real risk the principal offender would engage in some degree of violence was correct.[137] They gave five reasons, namely:

(a) It was consistent with the words of s 66(2), which require knowledge that the offence committed by the principal offender is a probable consequence.[138] In a manslaughter case, the principal offender commits the offence by doing an unlawful act that is likely to do more than trivial harm to the victim (provided that the unlawful act causes death). Thus the foresight required of the secondary party is only foresight of an unlawful act likely to do more than trivial harm.

(b) It was consistent with logic.[139] If the secondary party was required to foresee a killing as a probable consequence, this would render nugatory the distinction between manslaughter and reckless murder under s 167(b) and (c).

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135 CA judgment, above n 1, at [48]–[50] per Brown and Moore JJ.
136 *Edmonds*, above n 25, at [27], quoted above at [149].
137 CA judgment, above n 1, at [57]–[58] per Brown and Moore JJ.
138 At [59] per Brown and Moore JJ.
139 At [60] per Brown and Moore JJ.

(c) It was congruent with the basis of liability for a secondary party for aiding and abetting manslaughter under s 66(1)(b), (c) or (d).[140]

(d) It was consistent with the commentary in *Adams on Criminal Law*.[141]

(e) It was consistent with the general principle in *Rapira* that a s 66(2) party does not require a greater mens rea than that of the principal offender.[142] As a principal offender can be liable for manslaughter even if they do not appreciate that death might result from their actions, it cannot be correct that a secondary party must have a greater appreciation of the risk of the principal offender's actions than the principal offender has.

[153] The minority Judge, Mallon J, considered that the jury had to be satisfied that Mr Burke knew that it was a probable consequence of the prosecution of the common purpose that Mr Heappey would be killed.[143] She considered the majority's approach omitted a central requirement from the actus reus component of the offence of manslaughter that must be foreseen by the secondary party: that the act carried out by the principal offender causes the victim to be killed.[144] However, she considered that the manslaughter verdict was inevitable on the facts of the case, so joined the majority in dismissing the appeal.[145]

New Zealand cases

[154] In *R v Tomkins*, the Court of Appeal set out the circumstances in which a secondary party could be guilty of murder under s 66(2) in a case where the principal

140 At [61]–[62] per Brown and Moore JJ.
141 At [63] per Brown and Moore JJ, citing *Adams on Criminal Law* as at the time of the CA judgment: Simon France (ed) *Adams on Criminal Law — Offences and Defences* (online looseleaf ed, Thomson Reuters) at [CA66.28(3)(b)].
142 CA judgment, above n 1, at [64] per Brown and Moore JJ, citing *Rapira*, above n 79.
143 CA judgment, above n 1, at [151] and [180].
144 At [156].
145 At [185].

offender has killed the victim with murderous intent.[146] The Court then went on to consider manslaughter and commented:[147]

> The common feature of the rather less grave cases is that the subjective foresight necessary to make the accused guilty of the murder as a party is lacking. Nevertheless he will be guilty of manslaughter if the jury are satisfied that he knew that, as knives were being carried, *a killing could well eventuate* – even by their use in some way or circumstances totally unexpected. …
>
> Accordingly in joint enterprise cases where an accused is charged with murder as a party it may be appropriate to direct as follows. … [I]f he knew only that at some stage in the course of the carrying out of the criminal plan there was a real risk of a killing short of murder, he will be guilty of manslaughter.

[155] However, it should be noted that the Court was dealing with a case where there was no doubt that Mr Tomkins knew that knives were being carried by him and his fellow offenders.[148] The Court of Appeal made it clear that its pronouncement about the law did not cover every case that may arise.[149] So, while we accept that *Tomkins* assists the appellant's argument, we do not see it as decisive.[150]

[156] The argument against the approach set out in *Tomkins*, advanced on behalf of the respondent by Ms Laracy, was that the *Tomkins* approach, and that advanced in this Court by Ms Grieve, introduces incoherence into the law. She said if Mr Webber had assaulted Mr Heappey in a manner likely to cause non-trivial harm and death resulted (without the required mens rea for murder), Mr Webber would have been guilty of manslaughter. If a secondary party had aided or abetted Mr Webber to do such an assault (and death resulted), the secondary party would also be guilty of manslaughter under s 66(1).[151] She argued there is no logical reason why a s 66(2) party should be treated differently from the principal offender or a s 66(1) party in that regard.

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146 *Tomkins*, above n 14.
147 At 256 (emphasis added).
148 At 254.
149 At 256.
150 *Tomkins* was applied in *R v O'Dell* CA46/86, 28 October 1986; *R v Hirawani* CA134/90, 30 November 1990; and *Doctor v R* CA366/92, 20 July 1992.
151 *Renata*, above n 89. In the present case, the respondent argued that a jury directed on the law as stated in *Renata* would have found Mr Burke guilty of manslaughter under s 66(1).

[157] Ms Laracy referred us to the decision of the Court of Appeal in *Renata*, which we discussed earlier.[152] In *Renata*, the Court of Appeal made it clear that both a principal offender and a s 66(1) party can be liable for manslaughter even if the victim's death occurred in an unexpected way.[153] That statement of the law in *Renata* was approved by this Court in *Edmonds*.[154] Ms Laracy argued that as s 66(2) was intended to broaden the scope of liability from that available under s 66(1), it would be illogical if the requirements for a conviction under the former were more stringent than under the latter. The majority in the Court of Appeal also observed that there was nothing in the language of s 66(1) and (2) that indicated a heightened mens rea is required for s 66(2).[155]

[158] Ms Grieve said the superficial attraction of the symmetry described by Ms Laracy concealed several problems. In particular:

(a) On a plain reading of the text of s 66(2), foresight of "the offence" should, when manslaughter is in issue, include the essential ingredient of that offence, namely that a death has occurred.

(b) Liability for a principal offender under s 160 and for an aider or abettor under s 66(1) is founded on different mens rea requirements from those required of a party charged under s 66(2). Ms Grieve accepted that liability for manslaughter under s 66(1) did not require mens rea as to the victim's death (accepting the approach in *Renata*, noted earlier). But she said this was of no moment because s 66(1) does not contain a mens rea requirement, which is instead left for judicial decision. In contrast, s 66(2) does describe the mens rea standard: knowledge that the offence actually committed is a probable consequence of the prosecution of the common purpose. Furthermore, unlike s 66(1), where the party helps or encourages the principal to commit the offence, a party can be held liable under s 66(2) even if they actively remonstrate with the principal not to commit the offence. Thus,

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152 Above at [105].
153 *Renata*, above n 89, at 349, quoted above at [105].
154 *Edmonds*, above n 25, at [27], n 22.
155 CA judgment, above n 1, at [62] per Brown and Moore JJ.

> Ms Grieve argued that there was no policy requirement that there be "congruence" between s 66(1) and s 66(2) in this regard. It was, in fact, desirable for s 66(2) to require foresight of death, as that provision otherwise requires a lower mens rea than s 66(1). She argued also that there is another policy reason for this approach, namely that liability under s 66(2) can be based entirely on evidence relating to inferences about the mental state of the secondary party, given that there is no requirement for an intentional act that aids, abets, incites and so on as required under s 66(1). Thus, she argued, requiring proof of knowledge that a killing was a probable consequence of the offending is an additional burden on the Crown that should be welcomed, rather than avoided.

[159] Ms Laracy said several New Zealand cases supported the proposition that consistency is required in relation to liability for principal offenders, s 66(1) parties and s 66(2) parties in relation to homicide offences. She referred to the Court of Appeal decision in *Rapira*, which we have discussed earlier.[156] In *Rapira*, the Court of Appeal reviewed earlier authorities, including *The Queen v Morrison*, *R v Hardiman*, *R v Tuhoro* and *R v Te Moni*.[157] *Rapira* addressed murder under s 168 of the Crimes Act. The Court said:[158]

> [22] A secondary party under s 66(2) of the Crimes Act is liable for "every offence" committed by another party to a common intention to prosecute any unlawful purpose if the commission of "that offence" was known to be a probable consequence of the prosecution of the common purpose. If the offence committed by the principal is murder on the basis of s 168, a secondary party will be guilty of murder if he knows that the principal intends to cause grievous bodily injury for the facilitation of a specified offence. Just as intention to kill or knowledge that death is likely to ensue is not necessary for the liability of the principal under s 168, it is not necessary for a secondary party. …

[160] Ms Laracy pointed out that, given that manslaughter (like s 168 murder) does not require foresight of death by the perpetrator of the unlawful act, the same logic suggested that in a case involving an allegation of manslaughter against a s 66(2) party,

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156 *Rapira*, above n 79, discussed above at [98]–[102].

157 *The Queen v Morrison* [1968] NZLR 156 (CA); *R v Hardiman* (1995) 13 CRNZ 68 (CA); *R v Tuhoro* [1998] 3 NZLR 568 (CA); and *R v Te Moni* [1998] 1 NZLR 641 (CA).

158 *Rapira*, above n 79.

there was no requirement that the s 66(2) party knew that the killing was a probable consequence of carrying out the common purpose. She said this applied not only in relation to a case where the principal offender was liable for murder under s 168, but in all cases where a principal offender is liable for murder, whether under s 167 or s 168.[159]

[161] Ms Laracy pointed out that it would be incongruous if a secondary party to a s 168 murder did not need to foresee death but a secondary party to manslaughter did.

Canadian cases

[162] The respondent's position is supported by the approach taken by the Canadian courts to the equivalent of s 66(2): s 21(2) of the Criminal Code 1985 (Canada).[160] In the leading judgment in the decision of the Supreme Court of Canada in *R v Jackson*, McLachlin J concluded that a conviction for manslaughter under s 21(2) did not require foreseeability of death, but only foreseeability of harm, which in fact resulted in death.[161] The Supreme Court rejected the approach taken by the Court of Appeal for Ontario in the decision under appeal in that case, which was to the effect that the secondary party needed to know that it was a probable consequence of the prosecution of the common purpose that the principal offender would assault *and cause the death of* the victim; that is, that a killing short of murder was the probable consequence. The Supreme Court saw its approach as logically following the approach to liability for manslaughter of the actual perpetrator, where foreseeability of death was not required; only foreseeability of harm.[162]

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159 Ms Laracy said the law as stated in *Rapira* would also apply when none of the parties is liable for murder and when the participant in the common purpose who actually caused the death cannot be identified, relying on [31]–[32] of that judgment.

160 Criminal Code RSC 1985 c C-46.

161 *Jackson*, above n 79, at 586–587 per La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ, citing earlier decisions of the Supreme Court of Canada (*Creighton*, above n 80; and *The Queen v Trinneer* [1970] SCR 638).

162 The fact that s 21(2) has an objective element (in contrast to s 66(2)) does not undermine that analysis.

Australian cases

[163] Ms Grieve drew support for her argument from the observation by Dixon and Evatt JJ in *Brennan v The King*.[163] This was a case involving the application of s 8 of the Criminal Code Act Compilation Act 1913 (WA), which is the equivalent in that legislation to s 66(2).

[164] Section 8(1) states:

> When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a
>
> probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

[165] There are two significant differences between this provision and s 66(2). Section 8(1) refers to "an *offence … of such a nature* that its commission *was* a probable consequence".[164] The wording in s 66(2) is: "if the commission of *that offence was known to be* a probable consequence".[165] The "known to be" wording in s 66(2) makes it clear the test is subjective, not objective as it is in the Western Australian provision. And the use of the phrase "an offence … of such a nature" in s 8(1) differs from "that offence" in s 66(2).

[166] In *Brennan*, the appellant had been acting as a lookout for those conducting a robbery, during which a caretaker of the property was killed. The trial Judge had directed the jury that if the appellant was a party to the robbery, he was guilty of the offence found to have been committed by the principal offenders, ie the murder or manslaughter. The High Court of Australia said this was wrong, and Dixon and Evatt JJ in their majority reasons observed:[166]

> Manslaughter is a form of homicide. It cannot be committed unless death is caused and by an unlawful act. Thus, to establish under sec. 8 that the applicant was guilty of manslaughter, it must appear that among the probable consequences of prosecuting the unlawful purpose upon which the prisoners had resolved was the death of the caretaker, or of a person chancing to be in their way.

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163 *Brennan v The King* (1936) 55 CLR 253.
164 Emphasis added.
165 Emphasis added.
166 At 264.

[167] In the same case, Starke J said in his separate reasons:[167]

> … if a person commits manslaughter who brings about the death of another by some unlawful act, then it must be taken, I think, that death is treated in law as a not improbable consequence of such an act, either because of the definition of the crime or because experience has established that such a result ought to be foreseen and expected. Under a proper charge, therefore, a verdict of manslaughter against the prisoner Brennan could upon the evidence be supported.

[168] Arguably, this suggests that death can automatically be treated as a probable consequence of prosecuting a common plan involving carrying out a relevant unlawful act. But this addresses the objective element of s 8. Starke J did not need to consider the situation where subjective foresight was required, as it would be under s 66(2).

[169] Ms Grieve argued that the observation by Dixon and Evatt JJ could be taken as general authority for the proposition that no conviction for manslaughter under s 66(2) or its equivalent was open unless the secondary party foresaw a killing. She said this was supported by the later decisions of the High Court of Australia in *Stuart v The Queen* and *The Queen v Barlow*,[168] a position disputed by Ms Laracy. We are hesitant to take too much from the comments made in the Australian cases. We have already noted the differences between the wording of the Australian statutory provisions and s 66(2).

[170] Ms Grieve also cited an article by Professor Orchard, who considered that "the offence" should, in cases involving culpable homicide (which includes both murder and manslaughter), refer not only to the acts and omissions of the principal offender, but also the resulting death.[169] He said it would not be anomalous if greater knowledge of the principal offender's offence were required of s 66(2) parties than of principal offenders and s 66(1) parties.[170] This view was, however, rejected by the Court of Appeal in *Tuhoro*.[171]

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167 At 261.

168 *Stuart v The Queen* (1974) 134 CLR 426; and *The Queen v Barlow* (1997) 188 CLR 1.

169 Gerald Orchard "Strict Liability and Parties to Murder and Manslaughter" [1997] NZLJ 93 at 93.

170 At 94.

171 *Tuhoro*, above n 157, at 572–573. We do note that *Tuhoro* only rejected this view in the context of s 168, not s 167.

Our approach

[171] Given our conclusion on the first ground, the concerns expressed by counsel for Mr Burke and the interveners are at least partially answered. That makes the arguments for Mr Burke in relation to the second ground less compelling than they would have been if we had found against Mr Burke on the first ground. As we see it, the policy concerns raised on Mr Burke's behalf in relation to the second ground are adequately addressed by our approach to the first ground.

[172] We do not consider it is necessary to expand the interpretation of the term "offence" in the "probable consequence" context of s 66(2) beyond the acts or omissions of the principal offender, to the extent that they are known by the secondary party to be a probable consequence of the prosecution of the common purpose. It is true that a killing is an element of the offence of manslaughter, but foresight of death is not required of the principal offender and should not be required of the secondary party either. In a case where the principal offender's conduct has caused death, death is a result of the conduct, but not an ingredient that has to be foreseen by the secondary party. This approach aligns with the Canadian approach in *Jackson* and is consistent with the approach in s 168 cases, such as *Rapira*.[172] It avoids the possible disjunct between the requirements for s 66(2) liability for manslaughter and s 168 murder. And it maintains consistency between the bases of liability for manslaughter for principal offenders, s 66(1) parties and s 66(2) parties. We do not consider this approach leads to over-criminalisation, given the approach we have taken to the first issue in this appeal. And it avoids the potential for under-criminalisation if liability for a secondary party under s 66(2) requires proof of foresight of a killing in circumstances where no such requirement applies to the principal offender.

Disposition of appeal

[173] We do not accept the respondent's submission that the appeal should be dismissed because a conviction under s 66(1) would have been inevitable if the Judge had directed correctly on the requirements of that provision. There are two problems with that submission. The first is that it assumes the trial Judge's direction, which

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[172] *Jackson*, above n 79; and *Rapira*, above n 79.

conformed with the approach of the Court of Appeal in *Hartley*, was wrong. We do not consider the direction was wrong. The second is that even if the direction was wrong, we would need to speculate to conclude that a jury would inevitably have found Mr Burke guilty. So, we do not consider it is open to this Court to accept the respondent's submission that a manslaughter verdict was inevitable.

[174] Nor do we agree with Mallon J's finding that a manslaughter verdict under s 66(2) was inevitable. The trial Judge found that the jury was not satisfied that Mr Burke knew about the knife, and the jury's not-guilty murder verdict suggests that they considered Mr Burke was not aware of Mr Webber's intentions. In these circumstances, to say that a s 66(2) finding was nonetheless inevitable would also require impermissible speculation.

[175] We therefore allow the appeal and indicate that we will, when making formal orders, set aside the conviction for manslaughter. We understand that Mr Burke may have completed his sentence, and in those circumstances there may be little point in ordering a retrial. Mr Rapley argued that, if we were minded to allow the appeal, the appropriate course would be to substitute a conviction for injuring with intent to injure under s 189(2) of the Crimes Act.[173] We consider it is appropriate to give the parties an opportunity to comment on that and also on the resulting sentencing outcome if that course were followed. Submissions should be filed as follows:

(a) Appellant: by 6 May 2024.

(b) Respondent: by 13 May 2024.

[176] If the parties agree on next steps, a joint memorandum may be filed.

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[173] We note that Mr Waho, Ms Cook and Mr Sim were convicted of *causing grievous bodily harm* with intent to injure under s 188(2): see above at [21].

WINKELMANN CJ

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Introduction

[177] I agree that the appeal must be allowed. Like Glazebrook J, I would have allowed the appeal on the second ground. That is, that the jury should have been directed that, to convict Mr Burke of manslaughter under s 66(2) of the Crimes Act 1961, they needed to be satisfied that he knew a killing was a probable consequence of the prosecution of the common purpose.

[178] I write separately to provide my reasons for my conclusion that the appeal should be allowed on that basis, and also to comment briefly upon an issue raised by the intervener, Te Matakahi | Defence Lawyers Association New Zealand, in relation to how juries are directed on the issue of foresight under s 66(2). Finally, I address the issue of whether a weapons direction was necessary in this case, and how that direction relates to the language of s 66(2).

Does guilt of manslaughter under s 66(2) require foresight of a killing?

The statutory language

[179] I start with the simple proposition that this issue is resolved by considering the provision of s 66(2) and its proper interpretation. Section 10 of the Legislation Act 2019 directs us to interpret statutory provisions by reference to their language, read in context, and in light of the statutory purpose.

[180] First, then, to the statutory language employed. I agree with Glazebrook J and the appellant that for a manslaughter conviction the wording of s 66(2) requires proof of foresight that prosecution of the common purpose will be likely to result in a killing.[174] This flows from the definition of culpable homicide in s 160, and also from the definition of manslaughter under s 171 — manslaughter is defined as culpable homicide that does not amount to murder. I also consider this to be the case even though a defendant was originally charged with murder under s 167 or under s 168 of the Crimes Act, and irrespective of whether a principal offender is charged with murder under those provisions. As I discuss below, although not an issue in this case, the logic of my position flows through to party liability for murder under ss 167 and 168.[175]

[181] In contrast, the interpretations favoured by the majority in the Court of Appeal and the majority in this Court involve adding a gloss to the statutory language. A requirement of foresight of a risk of harm that is more than trivial,[176] or of an assault with a weapon,[177] is not found in s 66(2) nor in the definition of the offence of manslaughter.

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174 See the reasons of Glazebrook J below at [314]. The killing foreseen would of course have to fit within the definition of acts which amount to culpable homicide, and in that sense be an unlawful killing. The unlawful element is unlikely to be at issue in a s 66(2) unlawful common purpose case.

175 Below at [219]–[220].

176 *Burke v R* [2022] NZCA 279, (2022) 30 CRNZ 387 (Brown, Mallon and Moore JJ) [CA judgment] at [66(a)] per Brown and Moore JJ.

177 Above at [143](f).

The authorities

[182] I agree with the view of the majority that the answer to the scope and nature of liability under s 66(2) is to be found in the words of the provision. There is no clear guidance as to that provision's purpose to be gained from excavating policy papers or Victorian England authorities. There is also limited value in contemporary authorities from other jurisdictions, addressing as they do different legislative provisions or common law principles.

[183] It is however necessary to discuss the New Zealand authorities addressing the nature of what must be foreseen for the purposes of a manslaughter conviction as a party under s 66(2). It is difficult to find a clear or coherent pathway through these authorities. There are authorities that are said by the Crown to support its argument that foresight of a killing is not necessary for a conviction of manslaughter — *The Queen v Morrison*, *R v Hardiman*, *R v Tuhoro* and *R v Rapira*.[178] As it happens, these are all cases in which murder was charged under s 168 of the Crimes Act. The principal authority the appellant can cite in support of his argument is *R v Tomkins*.[179] This case has been applied and followed by trial judges, and by the Court of Appeal, in cases where murder appears to have been charged under s 167 — for example *R v O'Dell* (1986), *R v Hirawani* (1990), *Doctor v R* (1993) and *R v Te Moni* (1997)[180] — and under s 168 in the first instance judgment of Tipping J in *R v Greening* (1990).[181]

[184] In *R v Edmonds* this Court attempted to sum up the state of authorities on this issue.[182] The Court said that in cases where the principal has been found guilty of murder under s 168, very limited mens rea was required to be established against the secondary party to secure a conviction of manslaughter (as the principal themselves need not have intended or even foreseen death). However, in other culpable homicide cases the practice has been to require that the secondary party subjectively appreciated

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178 *The Queen v Morrison* [1968] NZLR 156 (CA); *R v Hardiman* (1995) 13 CRNZ 68 (CA); *R v Tuhoro* [1998] 3 NZLR 568 (CA); and *R v Rapira* [2003] 3 NZLR 794 (CA).

179 *R v Tomkins* [1985] 2 NZLR 253 (CA).

180 *R v O'Dell* CA46/86, 28 October 1986; *R v Hirawani* CA134/90, 30 November 1990; *Doctor v R* CA366/92, 20 July 1993; and *R v Te Moni* [1998] 1 NZLR 641 (CA). I say "appears to have been charged" as it is not clear in all of these authorities which section murder had been charged under.

181 *R v Greening* (1990) 6 CRNZ 191 (HC).

182 *R v Edmonds* [2011] NZSC 159, [2012] 2 NZLR 445 at [21]–[43].

that death was a probable consequence of the implementation of the common purpose.[183] While doubting the existence of a requirement for a party to foresee a killing even in non-s 168 cases, the Court left the issue open for another day.

[185] Even though this argument was advanced as an alternative argument for the appellant on this appeal, it raises a logically prior issue to that which the majority finds dispositive. I consider that such is the state of the authorities on the issue that this Court should resolve the issue and, in doing so, provide clarity in the law. As I come to, I also consider that the distinction that has developed between s 167 and s 168 cases is insupportable, at least where the issue for the jury is manslaughter.

Authorities supporting the appellant's argument

[186] I begin with *Tomkins.* That case involved the killing of a taxi driver in the course of an aggravated robbery.[184] The facts proved against Mr Tomkins were that he, along with two others, forced the taxi driver to drive to a deserted spot. Mr Tomkins and the principal offender then forced the victim out of the taxi, pushing him into some bushes. Mr Tomkins, knife in hand, stood by while the principal offender stabbed the victim twice. While it is not made clear in the judgment, it seems that Mr Tomkins was charged as a party to a s 167, not a s 168, murder.

[187] At the first trial Mr Tomkins was convicted of murder and aggravated robbery, but the conviction for murder was quashed and a new trial ordered on the basis of a misdirection to the jury. On a retrial he was convicted of manslaughter. His defence at the second trial was that the knives were taken to frighten the victim, not to attack him.

[188] As is the case with many of the authorities in the area, to resolve this second appeal it was not necessary to determine whether the jury had been correctly directed in relation to s 66(2). Nevertheless the Court of Appeal accepted the invitation of amicus curiae to use the opportunity provided by the appeal to give guidance as to how juries should be directed where the defendant is charged as a party to either

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183 At [27], citing *Rapira*, above n 178, at [28]–[33].
184 *Tomkins*, above n 179, at 254.

murder or manslaughter under s 66(2).[185] While Cooke J reviewed earlier English, New Zealand and Australian authority, he said that in New Zealand "the whole question" has to be considered in light of s 66(2).[186] He continued:[187]

> Reading that section together with the definitions of "Crime" and "Offence" in s 2(1) of that Act and the provisions of s 160 as to culpable homicide, we think the act constituting the offence for the purposes of s 66 is rightly to be seen, simply and broadly, as culpable homicide.

[189] Cooke J said that proof of subjective foresight on the part of the defendant that the principal offender would kill with murderous intent was necessary for the defendant to be convicted of murder if charged under s 66(2). But where the charge was manslaughter under s 66(2) then, while proof of murderous intent was not necessary, the Crown still had to prove subjective foresight on the part of the defendant that a killing could well eventuate. While noting that a summing up must respond to the particular facts of each case, Cooke J said that in cases arising under s 66(1) and (2) where an accused is charged with murder as a party, it may therefore be appropriate to direct as follows:[188]

> He will be guilty of the murder if he intentionally helped or encouraged it. He will also be guilty of it if he foresaw murder by a confederate, and in the kind of situation which arose, as a real risk. But if he knew only that at some stage in the course of the carrying out of the criminal plan there was a real risk of a killing short of murder, he will be guilty of manslaughter.

[190] In the reasons of the majority, there is comment that *Tomkins* is not decisive on the issue because, notwithstanding the absence of such a direction, the Court of Appeal expressed itself as being in no doubt that a manslaughter verdict was open on the facts of that particular case (given that Mr Tomkins knew that knives were being carried).[189] It is, however, important to place the Court of Appeal's observation in the context of the appeal as argued.

[191] Mr Tomkins was not assisted by counsel, having made no application for legal aid. The ground of appeal, as he formulated it, was that there was no evidence upon which the jury could properly have convicted him of manslaughter. That was an

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185 At 255.
186 At 255.
187 At 256.
188 At 256.
189 Above at [155].

argument doomed to failure given the strength of the Crown case against him — not only did he know of the knives, he was himself armed and helped take the victim into the bushes where he was killed. The Court rejected his appeal, pointing to his knowledge of the knives. Given this context, I do not see the Court's dismissal of the appeal as detracting from the more general guidance provided by the Court in relation to the requirement of proof of foresight of a killing.

[192] Moreover, Cooke J's analysis is consistent with obiter remarks made by Woodhouse J, writing on behalf of the Court of Appeal in the earlier decision of *Hartley* (1977).[190] In that case, 11 offenders were charged with murder under s 66(2) in circumstances where it was clear who the principal offender was. The trial Judge had directed the jury that no accused could be convicted under s 66(2) of a greater *or a lesser* charge than the principal offender. Although it had not been pursued as a ground of appeal, the Court said that if:[191]

> … in such a case as this, murder were proved against the principal offender a jury might still find that although a probable known consequence of the common purpose had included culpable homicide there was no anticipation of a killing done with a murderous intent. In those circumstances it is likely that the accessory could properly be convicted of manslaughter.

[193] As this passage makes clear, Woodhouse J treats culpable homicide as the offence that must be foreseen as a probable consequence of prosecution of the common purpose for the purposes of s 66(2).

[194] There are several other Court of Appeal decisions in which the *Tomkins* approach is apparently approved — that is, in order to convict for manslaughter under s 66(2) the jury needs to be satisfied that a killing was a probable known consequence of the common purpose. These cases are *O'Dell* (1986), *Hirawani* (1990), *Doctor* (1993) and *Te Moni* (1997).[192]

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190 *R v Hartley* [1978] 2 NZLR 199 (CA).

191 At 203.

192 *O'Dell*, above n 180; *Hirawani*, above n 180; *Doctor*, above n 180; and *Te Moni*, above n 180. See the reasons of Glazebrook J below at [268]–[277].

[195] However, as to the last authority, it is fair to acknowledge that it is not without its difficulty. The Court in that case correctly stated and applied three discrete propositions it said emerged from *Tomkins*, the third of which was that:[193]

> If the accused knew there was a real risk of a killing, but did not contemplate any substantial risk that the killing would occur in circumstances amounting to murder, he will be guilty of manslaughter only.

But earlier in the judgment there is a suggestion, drawn from English authority, that a lesser mens rea is sufficient.[194] The Court overlooked that in *Tomkins*, although that same English authority had been cited, Cooke J immediately went on to state that in New Zealand this approach had to give way to the requirements of s 66(2).[195]

[196] There is a fuller (albeit obiter) discussion in *Greening* (1990) in the context of a ruling given during the trial by Tipping J, sitting as a judge at first instance.[196] At the end of the ruling the Judge records how he would have directed the jury on the relationship between ss 66(2) and 168. Although late guilty pleas removed the need to direct on this issue, the Judge said that the relationship between those provisions had been the subject of detailed discussion with counsel. The remarks are therefore obiter.

[197] The Judge said that he would have directed the jury that, because Mr Mason was charged as a party to a s 168 murder under s 66(2), the Crown had to prove, among other things:[197]

> That Mason knew — consciously appreciated — that in the course of prosecuting that common purpose there was a real and substantial risk that Greening would commit a murder within the scope of s 168, this by obvious implication involving knowledge on Mason's part of a real risk of Greening killing the deceased.

[198] The Judge continued that it would not have been necessary for the Crown to prove that Mr Mason knew that Mr Greening meant to cause death or that Mr Greening knew that death was likely to ensue (because Mr Greening himself did not have to

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193 *Te Moni*, above n 180, at 649.
194 At 648, citing *R v Reid* (1976) 62 Cr App R 109 (CA) at 112.
195 *Tomkins*, above n 179, at 255–256.
196 *Greening*, above n 181.
197 At 194.

have either mental state to be guilty of murder under s 168). However, it would have to have been shown that Mr Mason knew Mr Greening could well inflict grievous bodily injury for one of the purposes set out in s 168(1)(a), and that he knew there was a real risk of a killing. This was because "otherwise he could not have known that there was a real and substantial risk of Greening committing a murder which of necessity involves a killing".[198]

[199] As to how he would have directed on manslaughter, Tipping J said that he would have directed that the Crown had to prove foresight of the required risk of killing.

Authorities supporting the Crown's argument

[200] The cases that are said to support the Crown's argument mostly involve party liability where murder has been charged under s 168. To assist comprehension on this point, it is helpful at this point to say something (brief) about s 168.

[201] Unlike s 167, which is in question in this case, the offence of murder under s 168 does not require proof of intent to kill, or even foresight that death could result. Nevertheless, the cases dealing with s 168 are relevant because the logic of the appellant's position applies to murder or manslaughter convictions under s 66(2) even where murder has been charged under s 168.

[202] In taking this view, I differ from Glazebrook J, who has left for future consideration whether foresight of death must also be proved against a s 66(2) party where a principal is guilty under s 168, whether the s 66(2) party has been charged with murder or manslaughter.[199] I consider it is appropriate to deal with this issue because, as made clear in *Tomkins*, the requirement of foresight of death flows from the definition of culpable homicide, which is as much a part of the s 168 (or indeed the s 167) offence of murder as it is of the offence of manslaughter under s 171.

[203] Where party liability for manslaughter is at issue, the distinction between s 167 and s 168 murder becomes even more insupportable. The s 168 authorities seem to proceed on the basis that the extended nature of liability for murder created by s 168

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198 At 195.
199 See below at [289].

somehow flows into liability for manslaughter where the defendant has also been charged as a party to murder charged under s 168. But that is not the case. The offence of manslaughter is made out when the elements of culpable homicide are made out. By the time the jury is considering a verdict of manslaughter, the defendant will have been found not guilty of murder, however it has been charged. How a defendant is charged for murder — whether as a party to a s 167 or s 168 murder — can therefore have no effect on the elements of proof required for a conviction of manslaughter.

[204] As mentioned earlier, it is hard to chart a satisfactory path through the authorities which suggest that proof of foresight of a killing is not necessary. In some of the cases, discussion of the issue of s 66(2) is obiter, and in all of them there is little engagement with the language of s 66(2).

[205] There are two authorities that could be seen to support the Crown's argument in which the relevant discussion is not obiter — *Tuhoro* and *Rapira.*[200] I have found it easiest to approach them in reverse chronological order.

[206] In *Rapira* the Court of Appeal addressed the requirement for proof of foresight of a killing in the context of both murder and manslaughter convictions as a s 66(2) party where a principal is guilty of murder under s 168 — that is, a killing by the intentional infliction of grievous bodily injury for the purpose of facilitating a specified offence. In *Rapira* the offence being facilitated was robbery.[201]

[207] As to the knowledge required of a s 66(2) party to manslaughter where a principal is convicted of murder under s 168, the Court in *Rapira* began its analysis by noting that the word "offence" as used in s 66(2) is defined by s 2 to include "any act … for which any one can be punished under this Act".[202] The Court said the act for which the principal was liable to conviction for murder or manslaughter was intentionally causing grievous bodily injury by an unlawful assault. The principal was liable to conviction for murder or manslaughter only because death in fact ensued. Therefore, the Court said, it was enough for a conviction of manslaughter if the s 66(2) party knew that the infliction of physical harm that was more than trivial or transitory

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200 *Tuhoro*, above n 178; and *Rapira*, above n 178.

201 Crimes Act 1961, s 168(2)(k).

202 *Rapira*, above n 178, at [31]. I note that this definition of "offence" upon which the Court in *Rapira* relied was repealed on 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011.

was a probable consequence of prosecution of the common purpose (the common purpose to rob).

[208] It is immediately apparent that the Court in *Rapira* defined the nature of the offence which had to be foreseen for the purposes of s 66(2) differently to how it was defined in *Tomkins*. But *Tomkins* is of course correct that, whether charged as a party with manslaughter or murder under s 66(2), the offender must foresee the offence of culpable homicide.[203] An essential element of a culpable homicide is a killing.

[209] The Court in *Rapira* did not however rely solely upon the definition of "offence". It also cited previous Court of Appeal decisions as authority — *Renata*, *Hardiman* and *Tuhoro*.[204]

[210] *Renata* is not authority for the proposition for which it was relied upon in *Rapira*. In *Renata* the issue of party liability for manslaughter was put to the jury, and argued before the Court of Appeal, under s 66(1) — not s 66(2). It was in that context that the Court stated that a party could be found guilty of manslaughter whether or not they foresaw a killing. Cooke P, writing for the Court of Appeal, took care to distinguish a s 66(1) case from a case under s 66(2), noting that:[205]

> … the [*Tomkins*] judgment was not intended as a complete exposition of the law of manslaughter in New Zealand in cases of joint enterprise. In particular it was not directed at s 66(1).

[211] In *Hardiman*, s 66(2) was not properly at issue because the appellant had been convicted of murder on the basis that she was a party to a s 168 murder under s 66(1).[206] Although deciding the appeal under s 66(1) the Court of Appeal discussed whether foresight of a real risk of a killing was required under *either* s 66(1) or (2). The discussion provides some support for the *Rapira* proposition that such foresight need not be proved for the purposes of party liability under s 66(2). However, there are significant difficulties with the *Hardiman* analysis.

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203 If charged with murder under s 66(2) the offender will also have to foresee both the physical and mental elements of the essential facts of the offence of murder, as committed by the principal: *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [102(e)] per McGrath, Glazebrook and Tipping JJ.

204 *R v Renata* [1992] 2 NZLR 346 (CA); *Hardiman*, above n 178; and *Tuhoro*, above n 178.

205 *Renata*, above n 204, at 349.

206 *Hardiman*, above n 178. Further, manslaughter was a "very slender point" in that case: at 654–655.

[212] The Court in *Hardiman* relied upon two cases — *Renata* and *Morrison* — as authority for the proposition that proof of foresight of a killing is not required for party liability for murder or manslaughter.[207] I have already explained why *Renata* is not authority for that proposition.

[213] I therefore turn to the case of *Morrison*. In *Hardiman* it was said that the Court in *Morrison* had approved a summing up directing the jury that the accused could be convicted as a party to murder if he was proven to know that a probable consequence of carrying out a common intention to escape from custody was merely the infliction of grievous bodily injury on the victim.[208]

[214] However, there are problems with this analysis. First, it is difficult to find the approval referred to. The *Morrison* judgment sets out portions of the relevant summing up delivered by the trial Judge. From this it is apparent that when the Judge came to the basis of liability under s 66(2), he directed the jury that it was the type of injury inflicted that needed to have been foreseen as a probable consequence of the common purpose. The Judge relevantly directed:[209]

> … if we come to the second basis, did he know as a probable consequence of carrying out the common intention … that that type of injury would be inflicted on the constable, and there, of course, it may be inflicted either by him or by the other man, that is purely a matter of what develops during the altercation. … *Now, it must not under any circumstances be a type of injury which is quite beyond and outside what is fairly contemplated either in the type or in the method of inflicting the injury*. If what was done was not fairly within the common intention, if you find it as a reasonable consequence, you cannot convict him on this basis.

The highest it can be put, in support of the Crown's proposed interpretation of s 66(2), is that the direction to the jury as to the nature of injury that had to be foreseen was ambiguous.

[215] Second, even if the Court had approved such a direction, as Professor Orchard observes in his article "Strict Liability and Parties to Murder and Manslaughter",[210] the argument was not made in *Morrison* that proof of foresight of a killing was

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207 *Renata*, above n 204; and *Morrison*, above n 178.

208 *Hardiman*, above n 178, at 73, citing *Morrison*. For the relevant passage, see *Morrison*, above n 178, at 160.

209 *Morrison*, above n 178, at 160 (emphasis added).

210 Gerald Orchard "Strict Liability and Parties to Murder and Manslaughter" [1997] NZLJ 93.

required under s 66(2). The language of s 66(2) in this regard was not discussed and the point was simply not addressed. Relying on cases as authority for propositions that were not argued, and not squarely addressed by the court, is fraught with peril.

[216] In my view therefore, it is wrong to characterise *Morrison* as in any way supporting the *Rapira* formulation.

[217] In *Tuhoro*, the requirement for foresight of death was squarely at issue in the appeal.[211] The appellant was tried along with four others charged with offences arising out of the armed robbery of a hotel during which a person was killed by one of the accused, Mr Pou. The case for murder against the appellant was brought on the basis of ss 168(1)(a) and 66(2). On appeal it was argued that the Judge should have directed the jury that they needed to be satisfied that the appellant foresaw a killing as a probable consequence of the prosecution of the common purpose. Mr Hampton QC for the appellant invited the Court to revisit the decision in *Hardiman*, invoking the article by Professor Orchard in support of his argument.[212] Writing for the Court, Eichelbaum CJ declined to do so, citing *Morrison* as authority supporting *Hardiman.*[213] *Tuhoro* therefore provides no additional justifications to those offered in *Rapira* and *Hardiman* (justifications I have suggested are flawed) for this interpretation of the knowledge requirement imposed by s 66(2) in the case of culpable homicide.

A conclusion on the state of the authorities

[218] Where do we get to after reviewing the unsatisfactory state of the authorities? There is a long line of authorities that support the proposition that proof of foresight of a killing is required for a manslaughter conviction under s 66(2) where murder was charged under s 167. That is the category of case with which we are concerned.

[219] While there is also some authority that foresight of a killing is not such a requirement where murder is charged under s 168, those are unsatisfactory, both because they are based upon a misunderstanding of earlier authority, and because they are inconsistent with the requirements of s 66(2). The simple point is that the offence

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211 *Tuhoro*, above n 178.
212 At 572. See Orchard, above n 210.
213 *Tuhoro*, above n 178, at 573.

for the purposes of a manslaughter conviction is culpable homicide. It does not matter that some other person, or even the defendant, was also charged with murder under s 167 or s 168 in respect of the killing. When the jury comes to consider manslaughter, the relevant offence for s 66(2) is culpable homicide. Until the law as applied reflects this fact, it will lack coherence and involve the application of a judicial gloss to the words of the section.

[220] Although not an issue in this case, it is appropriate to acknowledge that the logic of this position flows through also to liability as a s 66(2) party to a murder, including a murder charged under s 168, because a culpable homicide is an element of the offence of murder. This point was made by Tipping J in *Greening.*[214]

A purposive interpretation?

[221] The Crown accepts that foresight of an unlawful killing is required on a literal reading of s 66(2) but contends that a purposive interpretation leads to a construction that dispenses with the requirement of foresight of a killing in manslaughter cases. The Crown argues that, since the essence of manslaughter is an intentional unlawful act causing death, requiring foresight of death distorts the integrity of manslaughter principles. On a purposive reading, "that offence" in this case should be read as just the violent assault. Moreover, the Crown argues that, since s 66(2) was intended to broaden the scope of liability from that available under s 66(1), it would be illogical if the requirements for a conviction of manslaughter under the former were more stringent than under the latter.

[222] In my view there are significant difficulties with the Crown's arguments. The most fundamental objection is that the purposive interpretation of s 66(2) the Crown contends for expands the scope of criminal liability created by that section. While criminal statutes may no longer be subject to a rule of narrow construction,[215] it is still the case that they are not to be given an expansive interpretation of the kind accorded to social legislation.[216] This conclusion flows inevitably from the provisions of the

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214 See above at [198].

215 RI Carter *Burrows and Carter: Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 301 and 307.

216 See, for example, *R v Clayton* [1973] 2 NZLR 211 (CA); and *Hickman v Turn and Wave Ltd* [2012] NZSC 72, [2013] 1 NZLR 741.

New Zealand Bill of Rights Act 1990. Section 22 of the Bill of Rights provides that everyone has the right not to be arbitrarily arrested or detained. As the authors of *The New Zealand Bill of Rights Act: A Commentary* explain, s 22 is a prophylactic provision — aiming to prevent an arrest or detention that is arbitrary if it can be avoided.[217] It is for that reason that "laws authorising arrest or detention must be written so as to provide meaningful standards by which a person can know whether his or her arrest or detention is lawful".[218] Courts should therefore exercise restraint in adopting expansive interpretations of criminal statutory provisions.

[223] It is relevant in this regard that s 66(2), and its predecessor doctrine at common law, already extend party liability beyond the traditional doctrinal foundations of criminal liability. The criminal law has long used intent as the indicator of moral culpability, and therefore required proof of intent (including recklessness) as a precondition for criminal liability.[219] But s 66(2) provides that a defendant can be liable as a secondary party for a crime they foresaw as a probable consequence of the common purpose but did not intend. Against that background the courts should be slow to adopt a purposive interpretation of s 66(2) to expand liability beyond that clearly imposed by the language Parliament chose to use.

[224] As noted, the Crown argues that, since s 66(2) was intended to broaden the scope of liability from that available under s 66(1), it would be illogical if the requirements for a conviction for manslaughter under the former were more stringent than under the latter. In a similar vein, the majority says that an interpretation of s 66(2) should be adopted to maintain consistency with the basis of liability for manslaughter for principal offenders and s 66(1) parties.[220]

[225] But rather than removing illogicality, the Crown's favoured interpretation introduces it — overlooking the different bases for liability under s 66(1) and s 66(2).

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217 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [19.5.1].

218 At [19.5.1].

219 *Miller v R* [2016] HCA 30, (2016) 259 CLR 380 at [116] per Gageler J dissenting; and *Director of Public Prosecutions v Smith* [1961] AC 290 (HL) at 312–313. I note that so strong is this principle in the law that a requirement for intent has been read into the words of s 66(1) of the Crimes Act: *Larkins v Police* [1987] 2 NZLR 282 (HC) at 288.

220 Above at [172].

As Cooke P explained in *Renata*, guilt in s 66(2) cases turns on foresight of consequences, whereas under s 66(1) it turns on actual agreement to commit, or knowing participation in, a particular criminal act.[221] If foresight is the basis of culpability for the offence, then it is coherent and logical to require proof of foresight of the offence before a finding of guilt. This does not distort the essence of manslaughter — it simply limits the criminalisation of conduct effected by s 66(2) in a manner appropriate given the basis of liability.

[226] Approached in this way, no illogicality or incoherence emerges from an interpretation of s 66(2) which gives the language employed by Parliament its natural and ordinary meaning. In *Rapira* the Court of Appeal commented that requiring proof of foresight of a killing for party liability under s 66(2) in the context of a murder charged under s 168 would have "the odd result of requiring foresight of more significant injury than the law requires of a principal to murder or manslaughter".[222] This proposition emerges from the fact that, as noted, a principal offender charged under the extended definition of murder under s 168 may be guilty of murder although the death of the victim was neither intended nor foreseen by them. However, that is not an odd result, once it is accepted that the basis of the extended liability under s 66(2) is foresight of probable consequence. The notion of an "odd result" also overlooks that liability as a principal or party under s 66(1) depends upon proof of a particular mens rea, which is not necessary under s 66(2) — proof of intention to commit or aid and abet the unlawful act that in fact causes death.[223]

[227] The majority in the Court of Appeal in this case identified what they saw as another illogicality.[224] They considered their interpretation to be demanded by logic, because if a secondary party's liability for manslaughter required them to foresee the risk of death, the distinction between reckless murder and manslaughter would be rendered illusory. [225]

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221 *Renata*, above n 204, at 349.
222 *Rapira*, above n 178, at [30].
223 Matthew Downs (ed) *Adams on Criminal Law – Offences and Defences* (online looseleaf ed, Thomson Reuters) at [CA66.20(2)].
224 CA judgment, above n 176.
225 At [60] per Brown and Moore JJ.

[228] As counsel for Te Matakahi submitted, this analysis ignores the mens rea required for reckless murder. To commit "reckless murder" the offender must know that their actions are likely to cause death and take the conscious decision to proceed with the action that causes death.[226] A party under s 66(2) must foresee both the physical *and* mental elements of the principal's offence.[227] As such, for a secondary party to be guilty of murder in such a case, they would need to foresee the principal's "reckless" state of mind. But for a secondary party to be guilty of manslaughter under s 66(2), it need not be proved that they knew or foresaw the principal's reckless state of mind. It need only be proved that they foresaw, in the relevant sense, that death by unlawful act could ensue from prosecution of the unlawful purpose. A distinction remains.

[229] While I resist the notion that the application of s 66(2) in its terms, and without the addition of the gloss the Crown contends for, produces illogical results, I accept that in the case of murders charged under s 168, the application of s 66(2) results in complex directions. This troubled Tipping J when he was contemplating directions to a jury in *Greening.* But he concluded this complexity was inevitable since Mr Mason had to foresee a murder to be guilty of that offence under s 66(2) and a killing is an essential ingredient of murder. He thought that if there was a solution to the complexity, it lay with the legislature. I agree.

How should juries be directed in relation to "probable consequence" (foresight of the offence)?

[230] Te Matakahi invited this Court to take the opportunity of this appeal to review the proper approach to the meaning of "probable consequence", as over time the courts have read down "probable consequence" to mean less than it should. The trial Judge in this case directed the jury that "probable consequence" means that "there was a 'substantial or real risk', or that it could well happen". It was common ground that this approach is consistent with authority. In *R v Gush* the Court of Appeal rejected "more probable than not" as an explanation of the meaning of probable consequence,

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[226] Crimes Act, s 167(b). The Crown in this case also submits that the distinction with s 167(d) will be undermined; on this latter point see the reasons of Glazebrook J below at [308].

[227] *Ahsin*, above n 203, at [102(e)] per McGrath, Glazebrook and Tipping JJ.

adopting "could well happen" instead.[228] In *R v Piri* Cooke P revisited the issue.[229] The appeal in that case did not involve s 66(2) but rather a murder charged under s 167(b) and (d) of the Crimes Act, provisions in which the phrase "likely to cause death" is employed. Cooke P discussed dictionary definitions of the word "likely" used in s 167(d), and "probable" in s 66(2), noting that they are variable in meaning. He said:[230]

> Each can mean, in an appropriate context, more probable than not, but that is certainly not the only available meaning. This may be simply illustrated by noting that the *Concise Oxford Dictionary* includes in its definitions of *likely* "Such as may well happen … probable".

The Court rejected a mathematical formulation. As Cooke P said, "[a] fine calculation that the odds were against it, although the risk was plainly there, is no defence".[231] The Court unanimously agreed upon a formulation: "a real risk, a substantial risk, something that might well happen".[232]

[231] This is the law as it stands today in New Zealand. It was confirmed by this Court in *Ahsin v R*,[233] and this Court has subsequently declined to revisit the issue,[234] observing that the Court would not normally overrule a previous decision, especially one that reflects a longstanding test, unless there was evidence that the current law is causing difficulty in its administration or injustice in its outcome.[235]

[232] In my view it is time to revisit the standard direction as articulated in *Gush*, amended in *Piri* and confirmed many times since then. It is to ask too much in this area that an appellant demonstrate that the definition's application is causing injustice. This is not an area of the law where subsequent forensics can demonstrably prove an injustice — the direction at issue is as to proof of the defendant's subjective state of mind. I consider it is enough if the appellant makes the case that the direction has

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228 *R v Gush* [1980] 2 NZLR 92 (CA) at 94.
229 *R v Piri* [1987] 1 NZLR 66 (CA).
230 At 78 (emphasis in original).
231 At 78.
232 At 79 per Cooke P, 84 per McMullin J and 84 per Somers J.
233 *Ahsin*, above n 203.
234 *Uhrle v R* [2016] NZSC 64, (2016) 28 CRNZ 270 at [5], n 6. However, I highlight that the definition of "probable" was not central to this Court's decision in *Uhrle*, which was concerned instead with the inapplicability of *Regina v Jogee* [2016] UKSC 8, [2017] AC 387 to the statutory test in s 66(2) generally.
235 *Stretch v R* [2020] NZSC 128 at [9].

strayed from the statutory language used to establish liability. Here I am satisfied that is the case.

[233] The language selected by Parliament was "probable" — not "possible". The threshold for liability was set to ensure that defendants were held liable for what they knew were the probable consequences of prosecuting their unlawful plans. In common usage, "probable" describes a higher standard of likelihood than "possible". In common usage, something that is probable is likely. In the law, and this is after all a legal context, something that is probable is more likely than not to happen.[236]

[234] It is appropriate to measure the expressions currently used — "could (or may) well happen", or a "real or substantial risk" — against this standard. How are the expressions currently used to assist juries with the concept of the phrase "probable consequence" commonly understood? What is immediately apparent is that they are vague as to meaning and are likely to take on different meanings for different individuals and in different contexts. What they may convey to one person may be different to what they convey to another. This is in itself troubling if these directions are offered by way of clarification of the statutory language. But the principal difficulty with them, as the intervener points out, is that they clearly encompass mere possibility.

[235] Given that the basis of the extension of criminal liability in s 66(2) is foresight that a probable consequence of prosecution of the common purpose is the commission of the charged offence, the jury's understanding of what that means is critical. The language of "could well happen" and "real or substantial risk" is too far removed from the statutory test and, moreover, is likely to add uncertainty to, rather than clarify, that statutory test. In my view neither of these clarifications should be used.

[236] Is it possible to give a clarification that better explains the test for liability? I have said that "probable" means "more likely than not". While it is useful to remind ourselves of that when attempting to arrive at an alternative form of words to explain "probable consequence", I do not suggest that it is appropriate to offer to juries "more

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[236] *Spellacey v Solicitor-General* (2003) 21 CRNZ 140 (CA) at [58]; and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [102].

likely than not" as a clarification. This is because mathematical odds are ill suited to assisting a jury with the task they are asked to undertake under s 66(2).

[237] Te Matakahi suggests the following:

> Knowing something to be a probable consequence means that the secondary party knew the offence was a likely outcome on the facts known to him or her at the time.

[238] The word "likely" has the advantage over current formulations in that it is a synonym for "probable" and is therefore, in my view, clearly to be preferred to the guidance approved in *Ahsin*. I note that the reasons of the majority refer to the guidance to trial judges used by the courts in Victoria, Australia.[237] This guidance also offers the word "likely" as an acceptable synonym. It then goes on to state that if further assistance is sought by the jury it could be explained to them that the word "probable" is used in contrast to what is "merely 'possible'", and that they should refrain from equating the word with a "balance of probabilities" test. This is, in my view, good guidance on the directions to be given to juries in s 66(2) cases, and it should be adopted in New Zealand.

Risk of over-criminalisation

[239] I close consideration of these two issues with this observation. Both of the issues I have focused on in this judgment address what I consider is an expansive interpretation of s 66(2) which risks over-criminalisation — over-criminalisation in the sense of criminalisation beyond the scope of what is contemplated by s 66(2) itself. Troublingly, given the rights at issue, it is in each instance a judicial interpretation which departs from the words of the legislation. It does so in a way which increases the reach of the provision and enlarges criminal liability beyond its traditional conceptual and moral foundations.

Was a weapons direction necessary?

[240] The majority finds that on the facts of this case the jury should have been directed that they needed to be satisfied that the appellant knew that a knife would be

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[237] Above at [85].

carried in the course of the prosecution of the common purpose.[238] I agree that such a direction was necessary.

[241] I also agree that we do not need to introduce into New Zealand's jurisprudence doctrines such as "fundamental difference" or "overwhelming supervening act".[239] This is not because they are inconsistent with our statutory scheme — they are not. The importance that the majority places upon the scope of the common purpose drives at just the same concern — that criminal liability not be imposed in circumstances where the threads of foreseeability have become tenuous.

[242] I agree with the majority that the better protection against this is through the formulation of the scope of the common purpose. As to justification for a judge stepping in to give a weapons direction, I consider that can be found in the role of the judge as gatekeeper of a fair trial. As William Young P observed in *Vaihu*, sometimes:[240]

> … it will not [be] possible for a rational jury to infer the required knowledge in relation to a particular defendant unless sure that that defendant was aware that members of his party were armed.

In such circumstances where a weapons direction is not given, a resulting guilty verdict may be unreasonable.[241] This is the context in which judges typically come to address the issue of weapons directions.

[243] Therefore, while I agree that generally the trial judge should formulate the common purpose in their directions to the jury in accordance with the Crown's case (and in this case, the Judge was wrong to pitch it lower), that is subject to the duty of the judge to ensure a fair trial. This may require a judge to intervene where the common purpose is pitched so low that, on the facts as proved, it could not properly support a conclusion that the defendant foresaw the probability of the charged offence.

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238 Above at [142], [143](c) and [144].
239 Above at [69].
240 *R v Vaihu* [2009] NZCA 111 at [88].
241 Criminal Procedure Act 2011, s 232(2)(a).

Disposition

[244] I would allow the appeal on the grounds that the jury should have been, but were not, directed that to convict Mr Burke of manslaughter under s 66(2) of the Crimes Act, they needed to be satisfied that he knew a killing was a probable consequence of the prosecution of the common purpose. I note that Mallon J, although reaching the same view in relation to the direction to the jury, nevertheless said she agreed with the Court of Appeal majority that the appeal should be dismissed.[242] In her view a conviction was inevitable even if the jury had been directed on the requirement for proof of knowledge. It was inevitable because, she said, Mr Burke knew the principal offender was taking a knife to the planned assault on the victim.

[245] I identify two issues with this analysis. First, in sentencing Mr Burke, the trial Judge accepted that the Crown had not established that Mr Burke knew for sure that Mr Webber had a knife on him at the time, only that Mr Burke knew that Mr Webber's possession of a knife was a distinct possibility.[243]

[246] There is a second difficulty with this approach to the error in the Judge's summing up. Even if there had been proof that the appellant knew that the other offender was carrying a knife, there were other factual matters the jury should have had the opportunity to weigh with the assistance of proper judicial direction, such as the evidence that this was an internal disciplinary matter within the gang. In short, it is not possible to conclude that the outcome of the trial was unaffected by (what I consider to be) a misdirection as to the requirements of proof for the charge of manslaughter under s 66(2).

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242 CA judgment, above n 176, at [185] per Mallon J dissenting.
243 *R v Burke* [2021] NZHC 136 (Osborne J) at [14].

GLAZEBROOK J

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Introduction

[247] I agree with O'Regan, Williams and Kós JJ (the majority) that the appeal must be allowed, and with giving the parties an opportunity to comment on any consequential orders.[244]

[248] I write separately because I take a different view from the majority on whether foresight of death is required for there to be liability for manslaughter under s 66(2) of

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244 See above at [174].

the Crimes Act 1961.[245] Like the Chief Justice, I consider that the Crown is required to prove beyond reasonable doubt that the defendant knew a killing was a probable consequence of the prosecution of the common purpose.[246]

[249] This means that I disagree with the majority's conclusion that all that is required is proof beyond reasonable doubt that Mr Burke knew that it was a probable consequence of the prosecution of the common purpose that Mr Webber would, in the course of implementing the common purpose, assault Mr Heappey with the weapon.[247] I agree with the Chief Justice that this is an unacceptable gloss on the statutory wording.[248]

[250] It follows that I, like the Chief Justice, also reject the Crown's submission that all that is required for liability for manslaughter under s 66(2) is proof to the requisite standard that the defendant foresaw non-trivial harm as a probable consequence of the prosecution of the common purpose.[249]

[251] On the meaning of "probable consequence", I see no need to depart from the long line of caselaw so recently affirmed in *Ahsin v R*.[250] I agree with the majority that there is merit in the Victorian bench book suggestion that it may be helpful to a jury for the direction to state that the word "probable" in s 66(2) is used in contrast to merely "possible".[251]

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245 See the reasons of the majority above at [145]–[172].

246 Mallon J reached the same conclusion: *Burke v R* [2022] NZCA 279, (2022) 30 CRNZ 387 (Brown, Mallon and Moore JJ) [CA judgment] at [155].

247 Set out above at [143](f). The common purpose is defined by the majority as being to give Mr Heappey a mean hiding involving the infliction of serious harm.

248 See above at [181].

249 As such I also reject the applicability in New Zealand of the Australian and Canadian cases relied on by the Crown: *The Queen v Trinneer* [1970] SCR 638; *R v Creighton* [1993] 3 SCR 3; *R v Jackson* [1993] 4 SCR 573; *Murray v The Queen* [1962] Tas SR 170 (TASCCA); *Stuart v The Queen* (1974) 134 CLR 426; and *The Queen v Barlow* (1997) 188 CLR 1. I also agree with the majority's statement that caution is needed given that the Australian provisions are worded differently and certain Australian cases involve other statutory provisions not replicated in New Zealand: above at [136] and [169]. The relevant Canadian provision has an objective requirement, in contrast to s 66(2) (although the majority considers that this does not affect the applicability of caselaw under it: above at [162], n 162).

250 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [101] per McGrath, Glazebrook and Tipping JJ. On this I agree with the majority: see above at [88].

251 Above at [88].

[252] On the issue of whether the offence was committed in the prosecution of the common purpose and the effect of the Judge's directions in this regard, I agree with the majority that this is one of those cases where additional directions should have been given and, in particular, a weapons direction.[252] In this case, it is clear that Mr Heappey did not die from a "mean hiding". He died from multiple stab wounds inflicted by Mr Webber. In the circumstances of this case (intra-gang conflict and only two active participants in the common purpose), it is difficult to see how the jury could be satisfied that the stabbing was in the prosecution of the common purpose unless they were satisfied that Mr Burke knew that Mr Webber had a knife. This may not be obvious to a jury unless a weapons direction is given.[253]

Structure of my reasons

[253] I start these reasons by setting the scene, including outlining the relevant directions given by the Judge. I then explain why foresight of a killing is necessary for liability under s 66(2), starting with an analysis of the statutory wording, followed by an examination of the caselaw and commentators. After that, I discuss possible issues that have been raised with requiring foresight of death, before summarising the reasons for my view that foresight of death is required.

Setting the scene

Background

[254] Mr Burke was convicted of manslaughter after a jury trial. The victim was Mr Heappey, who died from stab wounds administered by Mr Webber. Mr Webber and Mr Burke had been deputed by Mr Waho, the president of the Christchurch chapter of the Nomads gang, to punish Mr Heappey for the disrespect shown to Mr Waho

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252 The majority agrees that a weapons direction was necessary on its approach: above at [142], [143](c) and [144].

253 A weapons direction in this case would have averted some of the ambiguities that arise when considering how the jury read the trial Judge's directions. For example, the issue of reconciling the jury's finding that the stabbing occurred in the prosecution of the common purpose with the finding that Mr Burke did not know that Mr Webber had a knife: see the reasons of the majority above at [28]–[30] and [75]–[76].

regarding a dispute Mr Heappey had with Mr Waho's stepdaughter. Mr Heappey had allegedly agreed to submit himself to this punishment.[254]

The directions to the jury

[255] At trial, the Judge directed the jury on both murder and manslaughter[255] and on both s 66(1) and s 66(2). To find Mr Burke guilty of manslaughter under s 66(2), the Judge's question trail[256] required the jury to be sure that there was a shared understanding or agreement between Mr Burke and Mr Webber to inflict a physical beating or "hiding" on Mr Heappey (question 16) and that they had agreed to help each other and participate to achieve this (question 17). The jury were also required to be sure that the stabbing of Mr Heappey occurred in the course of carrying out the common goal (question 18) and that Mr Burke knew it was a probable consequence of carrying out that common goal that Mr Webber would assault Mr Heappey (question 19).

[256] The jury were then asked whether they were sure Mr Burke knew that Mr Webber was in possession of a knife at the time of the assault (question 20). If they were sure about the knife, they were directed that they had to be sure (question 21) that Mr Burke knew that Mr Webber knew the assault would be dangerous (which the Judge defined as being likely to cause harm that was more than trivial).[257] If they were not sure about the knife, then they were directed not to answer question 21 but to move to question 22, which required them to be sure that Mr Burke, despite not knowing Mr Webber possessed a knife, knew that Mr Webber knew the assault would cause harm that was more than trivial. It is not clear to me why the focus in questions 21

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254 For more details see the reasons of the majority above at [13]–[20]. That Mr Heappey had acted disrespectfully was apparently further compounded when he did not present himself for punishment at the time agreed.

255 The defence referred to manslaughter as a possibility in closing. The Crown did not. I agree with the comment of the majority above at [51] that it is unfortunate the prosecutor did not address the possibility of a manslaughter verdict in her closing address.

256 Set out in the reasons of the majority above at [27].

257 The majority comments that it is unclear why the trial Judge (in relation to questions 16, 19 and 21) described the common purpose as to inflict violence causing non-trivial harm as opposed to serious violence: above at [50]. In my view one explanation for this is that the prosecutor took the same position as to the law that the Crown does in this Court: that the legal position is that all that is required to be convicted of manslaughter is a common purpose to inflict non-trivial harm and that therefore the common purpose did not need to be set higher than that.

and 22 was on Mr Burke's appreciation of Mr Webber's state of mind rather than on Mr Burke's own appreciation of whether or not the assault would be dangerous.[258]

Basis for sentencing

[257] The trial Judge sentenced Mr Burke on the basis that he was guilty as a party[259] under s 66(2).[260] The trial Judge stated that he was not ignoring the fact that Mr Burke was involved in a plan to administer a physical beating to Mr Heappey in circumstances where Mr Burke knew that Mr Webber was the gang's enforcer and a person prone to violence, and that they were both operating in a methamphetamine-fuelled environment.[261] The trial Judge was not, however, satisfied that Mr Burke knew Mr Webber had a knife, although the Judge proceeded on the basis that Mr Burke would have known it was a distinct possibility.[262]

Jury findings on knowledge of knife

[258] The majority evaluates the points made on appeal on the basis that it is possible the jury also proceeded on the basis that Mr Burke did not know Mr Webber had a knife.[263] I agree that this is appropriate.

The statutory wording

Culpable homicide

[259] Section 160(1) of the Crimes Act provides that homicide may be either culpable or not culpable. Homicide is culpable, under s 160(2)(a), when it consists in the killing of any person by an unlawful act.[264] Unless it is infanticide (s 178), culpable

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258 The majority in a footnote says that the words "Mr Webber knew" seem superfluous but says that "nothing turns on this": at [27], n 12. It is true that the arguments before us did not address this point, but it is clear that the question of whether Mr Burke knew about Mr Webber's state of mind is different from the question of what Mr Burke himself foresaw. It is the latter which is the focus of s 66(2).

259 Although s 66 does not refer differently to the individual who commits the primary offence and other defendants, I will follow the majority's use of the terms "party" and "principal" for ease of comprehension: see above at [23].

260 *R v Burke* [2021] NZHC 136 (Osborne J) at [13].

261 At [13].

262 At [14]; and see the reasons of the majority above at [17], [28] and [61].

263 Above at [54] and [57].

264 Section 160(2)(b)–(e) outlines certain other situations not relevant here.

homicide is either murder or manslaughter.[265] Homicide that is not culpable is not an offence.[266]

Manslaughter

[260] Under s 171, culpable homicide not amounting to murder is manslaughter (unless it is infanticide).

Murder

[261] Under s 167(1), culpable homicide is murder in each of the following cases:

> (a) if the offender means to cause the death of the person killed:
>
> (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
>
> (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he or she does not mean to hurt the person killed:
>
> (d) if the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting any one.

[262] Under the extended definition in s 168, culpable homicide is also murder in a number of other instances, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue. These instances include if an offender means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in s 168(2), including robbery, burglary, sexual violation and arson.[267]

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265 Section 160(3).
266 Section 160(4).
267 Section 168(2)(f) and (j)–(l).

Party liability

[263] Section 66(2) provides that:[268]

> Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to *every offence* committed by any one of them in the prosecution of the common purpose if the commission of *that offence* was known to be a probable consequence of the prosecution of the common purpose.

Analysis of the statutory wording

[264] It is clear from the statutory wording that, for there to be an offence of either murder or manslaughter, there must be a culpable homicide. In this case, there was a culpable homicide which resulted from an unlawful act (the stabbing).

[265] On the wording of s 66(2), a person is guilty of manslaughter if that person knew that culpable homicide (killing by an unlawful act) was a probable consequence (substantial or real risk)[269] of the carrying out of the common purpose and the act causing death was committed in the prosecution of (the course of pursuing)[270] the common purpose. In *Ahsin*, this Court found that s 66(2) requires "foresight of both the physical and mental elements of the *essential facts* of the offence".[271] It is hard to see how death is not an essential fact of manslaughter. Death is the essence of manslaughter in the sense that, for there to be manslaughter, there has to be a culpable homicide. Otherwise, in circumstances like this, the offence would just be an assault.

[266] This means that, on the basis of the statutory wording, for Mr Burke to be guilty of manslaughter under s 66(2) the killing would have to have been committed in the prosecution of the common purpose and he would have to have known that killing by an unlawful act was a probable consequence of the prosecution of the common purpose.

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268 Emphasis added.
269 *Ahsin*, above n 250, at [100]–[101] per McGrath, Glazebrook and Tipping JJ.
270 At [102(d)] per McGrath, Glazebrook and Tipping JJ.
271 At [102(e)] per McGrath, Glazebrook and Tipping JJ (emphasis added); and see the reasons of the majority above at [31].

Caselaw

[267] There is a series of New Zealand Court of Appeal cases, which have not been overruled, holding that foresight of a killing is required for a manslaughter conviction under s 66(2).[272] I discuss these cases first. I then deal with the s 66(1) cases and the cases relating to s 168 murder. I go on to discuss this Court's decision in *Edmonds v R*, before summarising the state of the caselaw.[273]

Foresight of killing cases

[268] In *R v Hartley*, the Court of Appeal said that, if murder were proved against a principal, a jury could find that "although a probable known consequence of the common purpose had included culpable homicide there was no anticipation of a killing done with murderous intent".[274] The Court considered that, in such circumstances, "it is likely that the accessory could properly be convicted of manslaughter".[275] The Court therefore confirmed that manslaughter was available as a verdict for a party where the principal was convicted of murder. This was, however, in a case where "culpable homicide" (or in other words a killing) was a "probable *known* consequence".[276]

[269] In *R v Tomkins*, the Court of Appeal confirmed that the offence for the purpose of s 66 "is rightly to be seen, simply and broadly, as culpable homicide".[277] The Court went on to discuss what would be needed for a person charged as a party to be guilty of murder or manslaughter. It held that, to be convicted of manslaughter, a party had

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272 None of these cases suggests that there is a distinction between cases involving s 167 and those involving s 168 of the Crimes Act 1961.

273 *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445.

274 *R v Hartley* [1978] 2 NZLR 199 (CA) at 203. *Hartley* was cited with approval in *R v Tomkins* [1985] 2 NZLR 253 (CA) at 254–255.

275 *Hartley*, above n 274, at 203. The Court of Appeal confirmed in *R v Hamilton* [1985] 2 NZLR 245 (CA) at 251–252 that a party may be guilty of manslaughter under s 66(2) while a principal is guilty of murder. In that case (which involved a shooting) the level of foresight required for manslaughter was not at issue, though foresight was at issue for s 167(b) murder. But the Court made some obiter comments (at 252) which have been interpreted as holding that a common intention to frighten and use less-than-lethal force would be sufficient to establish manslaughter: Bruce Robertson (ed) *Adams on Criminal Law (Volume I)* (looseleaf ed, Brookers, updated to 19 August 2013) at [CA66.26(2)(d)]. But this approach was not taken in *Hartley* (decided before *Hamilton*) or later that same year in *Tomkins*, above n 274.

276 *Hartley*, above n 274, at 203 (emphasis added).

277 *Tomkins*, above n 274, at 256. The Court gave a general explication of the law of manslaughter to justify its finding that it was open for the appellant to be guilty of manslaughter and to offer guidance as to the state of the law.

to know that "at some stage in the course of the carrying out of the criminal plan there was a real risk of a killing short of murder".[278]

[270] The majority distinguishes *Tomkins* on the basis that it dealt with a situation where the defendant knew knives were being carried and notes that the Court made it clear that its pronouncement did not cover all circumstances.[279]

[271] It is true that *Tomkins* involved the known presence of knives, but the Court in *Tomkins* based its conclusion on the statutory wording and the fact the offence is culpable homicide (and therefore involves a killing). Generally, carrying weapons, even as a threat or precaution, carries the risk that they will be used and thus the risk of serious injury or death, as the Court noted in *Tomkins*.[280] If the Court considered foresight of serious injury to be sufficient (which would have required a gloss on the statutory language), then it would have said so.[281]

[272] In *R v O'Dell*, the trial Judge had directed the jury on manslaughter under s 66(2) in accordance with *Tomkins*: that it was necessary for the defendant to foresee a real risk of killing short of murder.[282] This aspect of the direction was not at issue in the Court of Appeal, but the Court gave no indication of disagreement with the direction or the application of *Tomkins*.[283]

[273] The position in *Tomkins* was also approved by the Court of Appeal in *R v Hirawani*.[284] In that case the trial Judge, when dealing with the position under s 66(2), had "emphasised that the accused had to know there was a real risk of killing

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278 At 256. The Court also said that a party may also be guilty of manslaughter where "he foresaw a real risk of murder but it was committed at a time or in circumstances very different from anything he ever contemplated" but the jury are "satisfied that [the defendant] must have known that, with lethal weapons being carried, there was an ever-present real risk of killing in some way": at 256.

279 Above at [155].

280 *Tomkins*, above n 274, at 255, citing *R v Reid* (1976) 62 Cr App R 109 (CA) at 112. I note that situations where weapons are not carried would usually be less objectively dangerous (whatever the intentions as to the level of harm to be inflicted) and so it is difficult to see why the Court of Appeal might have contemplated a different test requiring a gloss on the statutory wording in circumstances where weapons are not carried.

281 The Court said that it did not intend its guidance to cover all situations (*Tomkins*, above n 274, at 256) but this is understandable as manslaughter covers a range of situations. In addition, Cooke P specified in *R v Renata* [1992] 2 NZLR 346 (CA) at 349 that *Tomkins* was specifically not directed at s 66(1): see also below at [278].

282 *R v O'Dell* CA46/86, 28 October 1986 at 7–8.

283 At 8.

284 *R v Hirawani* CA134/90, 30 November 1990 at 4–5.

short of murder to be guilty of manslaughter".[285] The Court of Appeal considered that the trial Judge's summing up, notwithstanding a possible failure to direct the jury on the issue of knowledge of the weapon, was "otherwise adequate".[286] The trial Judge had stated the test for manslaughter in accordance with *Tomkins*.[287]

[274] I also refer to *R v Greening*, which was a ruling given in the course of a trial by Tipping J.[288] Tipping J stated that his approach to manslaughter would be based on *Tomkins*.[289] He did comment that he would have preferred to direct the jury that foresight of grievous bodily harm without foresight of the risk of death would be sufficient for a manslaughter conviction.[290] But he said that this was only had he been "[b]ereft of authority and statutory constraints".[291] Tipping J therefore recognised that, as held in *Tomkins*, the statutory wording required foresight of a killing (culpable homicide), even in the context of s 168 murder.

[275] In *Doctor v R*, the jury directions were challenged on the basis that the trial Judge had given the impression that the test of foreseeability was an objective one and that the directions failed to refer to the need to foresee the risk of killing as required by s 66(2) and as discussed in *Tomkins*.[292] The Court of Appeal summarised the position in *Tomkins* as follows:[293]

> … when the subjective foresight necessary to make the accused guilty of the murder as a party is lacking, nevertheless he will be guilty of manslaughter if the jury are satisfied he knew that, as knives were being carried, a killing could well eventuate – even by their use in some way or circumstances totally unexpected.

[276] Applying *Tomkins*, the Court of Appeal was satisfied that the Judge had "made it abundantly clear that what mattered was [Mr] Doctor's subjective appreciation of the risk of a killing".[294] The Court was also satisfied that "any shortcomings" in the

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285 At 4.
286 At 5.
287 At 5.
288 *R v Greening* (1990) 6 CRNZ 191 (HC) at 194–195. As noted by the Chief Justice above at [196], Tipping J did not in the end need to direct on this because of late guilty pleas.
289 At 195, referring to *Tomkins*, above n 274.
290 In this case, Tipping J's remarks related to the allegation that one of the defendants was guilty of s 168 murder as a party under s 66(2): at 194.
291 At 195.
292 *Doctor v R* CA366/92, 20 July 1993.
293 At 2–3, summarising *Tomkins*, above n 274, at 256.
294 *Doctor*, above n 293, at 5.

summing up that were challenged on the basis there had been a "failure to mention the risk of a killing" had been "fully corrected" in the further directions given to the jury which they had sought during their retirement.[295]

[277] *Tomkins* was also cited with approval in *R v Te Moni* and divided into three discrete propositions, of which the third includes the requirement that a real risk of a killing must be foreseen for a party to be guilty of manslaughter.[296]

Section 66(1) cases

[278] In *R v Renata*, Cooke P, writing for the Court, said that *Tomkins* "was not intended as a complete exposition of the law of manslaughter … in cases of joint enterprise", but he immediately clarified this statement by saying that "[i]n particular it was not directed at s 66(1)".[297] He drew a distinction between s 66(1), which "turns on actual agreement to commit or knowing participation in a particular criminal act" and s 66(2) which turns on "contemplation of a possible consequence".[298] The test for liability for a party under s 66(1) was held to be different. Cooke P said that, where one person unlawfully assaults another "by a *dangerous* application of force",[299] the principal is guilty of manslaughter even if death is caused in an unexpected way.[300] He said that no different principle applies to a secondary party under s 66(1)(b)–(d).

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295 At 5.

296 *R v Te Moni* [1998] 1 NZLR 641 (CA) at 649, discussing *Tomkins*, above n 274, at 256. As noted by the Chief Justice above at [195], *Te Moni* is not without its problems. The trial Judge had not directed the jury in accordance with *Tomkins*. The Judge had said that "having engaged in an enterprise which envisaged some degree of violence, albeit nothing more than fright, [the parties in question] will be guilty of manslaughter": at 648. Given that this aspect of the summing up was not at issue in the appeal and the fact that the Judge's direction (which was approved by the Court in *Te Moni*) did not accord with *Tomkins*, the majority of the Court of Appeal in this case was wrong to rely on *Te Moni* as supporting its view: CA judgment, above n 246, at [56]–[58] per Brown and Moore JJ.

297 *Renata*, above n 281, at 349.

298 At 349, discussed in the reasons of Winkelmann CJ above at [225].

299 At 349 (emphasis added). The requirement that an unlawful act be objectively dangerous to constitute manslaughter for a principal seems to be a gloss on the statutory wording, which only requires an unlawful act: *R v Lee* [2006] 3 NZLR 42 (CA) at [139]; and see also Matthew Downs (ed) *Adams on Criminal Law – Offences and Defences* (looseleaf ed, Thomson Reuters) at [CA160.05].

300 *Renata*, above n 281, at 349; and see the reasons of the majority above at [157].

R v Renata therefore distinguished *Tomkins* for the purposes of s 66(1). It did not qualify or limit *Tomkins* in its application to s 66(2).[301]

[279] As noted by the majority, the 2007 case of *R v Hartley* put a gloss on *Renata* in cases where the principal's act is totally different from that which the party was assisting.[302]

[280] Regarding s 66(1), New Zealand caselaw therefore proceeds on the basis that, to be a party to manslaughter under s 66(1), a party need only be intending to be a party to the unlawful act which caused the death (even if death from that unlawful act occurred in an unexpected manner), except in cases where the act causing death is "completely different from that which the [defendant] was assisting".[303]

Section 168

[281] The only cases qualifying the *Tomkins* line of authority requiring foresight of death under s 66(2) concern allegations that a defendant was a party to murder under s 168.

[282] *The Queen v Morrison* was a s 168 case which concerned a plan formed by Mr Morrison and Mr Wilson to escape police custody.[304] A police constable was killed in the course of the escape. While both men had attacked the constable with weapons (Mr Morrison with a broken broom handle), Mr Wilson's blows with a long-handled scrubber were found by the Judge to be the "real and ultimate" cause of death.[305] Mr Wilson pleaded guilty to the murder. Mr Morrison was found guilty of murder as a party after trial. Mr Morrison appealed against his conviction. The first ground

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301 The Court of Appeal in *R v Hardiman* (1995) 13 CRNZ 68 (CA) at 76 approved of *Renata*, above n 281, in the context of s 66(1). There are some remarks in *Hardiman* that could be interpreted as suggesting *Renata* also applied to s 66(2) but that subsection was not at issue in the case. In addition, *Hardiman* was at least in part a s 168 case. Further, manslaughter was "a very slender point" on the facts: at 77. For a discussion of *Hardiman*, see Gerald Orchard "Strict Liability and Parties to Murder and Manslaughter" [1997] NZLJ 93 at 94.

302 *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299 at [53]. The gloss is discussed in more detail in the reasons of the majority above at [103]–[110].

303 *Hartley*, above n 302, at [53].

304 *The Queen v Morrison* [1968] NZLR 156 (CA).

305 At 159.

related to the scope of the common purpose. The second ground related to the adequacy of the directions on manslaughter.

[283] The possibility of manslaughter was only raised briefly by the trial Judge.[306] The appellant submitted that the Judge should have directed the jury that manslaughter would be the appropriate verdict if the common intention had been to inflict harm short of grievous bodily harm.[307] The Court of Appeal found that there was no evidentiary basis for a finding such as this: once the common intention to use force to escape was accepted by the jury then it was clear that the force used would be such as to render the constable incapacitated via the infliction of grievous bodily harm.[308] The trial Judge had also directed that, if the common intention was not the infliction of grievous bodily harm, then the jury had to acquit altogether. The Court's only specific comment on this statement was that it seemed, on the facts, to be favourable towards the appellant.[309] Despite these references to grievous bodily harm, the question of the necessary degree of foresight for manslaughter was not directly at issue.

[284] *R v October* concerned two defendants who had been convicted as parties to s 168 murder under s 66(2).[310] Citing *Morrison* and *Hardiman*,[311] the Court of Appeal held that the convictions could be sustained given that the evidence supported a finding that the parties could have foreseen that one of the others could well cause grievous bodily injury for the purposes of committing the offence.[312] Professor Orchard commented that "it seems doubtful whether the evidence would have supported an inference that a killing was known to be a real risk", such that the application of *Morrison* and *Hardiman* was "essential for the decision".[313]

[285] Similarly, *R v Tuhoro* concerned a s 168 murder charge.[314] It relied on *Hardiman* and *Morrison* to find that it was not necessary for a party to s 168 murder

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306 At 160.
307 At 161.
308 At 161.
309 At 160–161.
310 *R v October* CA477/95, 31 July 1996.
311 *Morrison*, above n 304; and *Hardiman*, above n 301.
312 *October*, above n 310, at 13–14.
313 Orchard, above n 301, at 94. Though Orchard also noted that there does not appear to have been argument on this question.
314 *R v Tuhoro* [1998] 3 NZLR 568 (CA).

under s 66(2) to contemplate a risk of killing.[315] The Court of Appeal distinguished *Tomkins* on the basis that s 167 was not at issue.[316] Thus it saw the s 168 cases as different from the earlier line of authority and distinguished rather than overruled *Tomkins.*

[286] *R v Rapira* also concerned a s 168 murder charge.[317] In that case, the Court of Appeal said that a secondary party under s 66(2) would be guilty of manslaughter if they knew that the infliction of physical harm (which was more than trivial or transitory) was a probable consequence of the prosecution of the common purpose (in that case to rob).[318] The Court said, referring to *Renata* and *Hardiman*, that it is not necessary for the offence of manslaughter that death be intended or foreseen by a secondary party.[319]

[287] I comment that the passage which the Court of Appeal in *Rapira* cites from *Hardiman* is explicitly about s 66(1). Further, *Renata* only concerned s 66(1). Neither case, therefore, is authority for the proposition that foresight of death is not necessary for s 66(2).[320]

[288] The Chief Justice is of the view that these decisions relating to s 168 are wrong and that, based on the statutory wording, foresight of death is required in the case of both s 167 and s 168.[321] The Crown submits that the fact of the principal being guilty under s 167 or s 168 cannot logically affect a party's liability for manslaughter and that foresight of death is not necessary for either.

[289] I reject the Crown's proposition that foresight of death is not necessary where the principal is guilty under s 167 as this is contrary to the *Tomkins* line of cases and the statutory wording. I would prefer not to comment at this stage about the s 168

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315 At 571–573.
316 At 572.
317 *R v Rapira* [2003] 3 NZLR 794 (CA).
318 At [31].
319 At [32], referring to *Renata*, above n 281; and *Hardiman*, above n 301. The Court of Appeal in *Rapira* also relied on the definition of "offence" which was then located in Crimes Act 1961, s 2(1): at [31]. That definition was relied on to opposite effect by Cooke P in *Tomkins*, above n 274, at 256. In any event the definition was removed by the Crimes Amendment Act (No 4) 2011, s 6.
320 But see the comments on *Hardiman* above at [278], n 301.
321 See the reasons of Winkelmann CJ above at [200]–[203].

cases as this is not a s 168 case. There is force in what the Chief Justice says about the statutory wording applying equally to s 168 cases but it is also true that, under s 168, it is not necessary for the principal to intend death or even to possess subjective knowledge of the likelihood of death.[322] It may be arguable that the s 168 cases are distinguishable given that section's status as a special section expanding the definition of murder.

Edmonds

[290] In *Edmonds v R*, this Court expressly affirmed that foresight of death was not needed in the case of s 66(1) parties (citing *Renata*)[323] and where the case related to murder under s 168.[324] The Court left open the issue of whether foresight of death might be required for manslaughter under s 66(2) where a principal is convicted of murder under s 167.[325]

Summary of caselaw

[291] *Tomkins* is part of a long line of authority holding that subjective foresight of killing is needed for s 66(2) party liability for manslaughter if a killing equating to murder is not foreseen. This line of authority has not been overruled by the Court of Appeal. This Court in *Edmonds* left the issue open. Later cases are either under s 66(1), which has a different basis of liability, or concern party liability where a principal is charged under s 168, not where the principal is charged under s 167.

Commentators

[292] As indicated by the majority in the Court of Appeal, *Adams on Criminal Law* said at the time of the Court of Appeal decision, relying on *Rapira*, that foresight of death is not necessary for manslaughter liability under s 66(2).[326] Some other

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322 *Rapira*, above n 317, at [25]; and *Edmonds*, above n 273, at [26].
323 *Edmonds*, above n 273, at [27], n 22, citing *Renata*, above n 281, at 349.
324 *Edmonds*, above n 273, at [27].
325 At [27].
326 CA judgment, above n 246, at [63] per Brown and Moore JJ, citing Simon France (ed) *Adams on Criminal Law – Offences and Defences* (looseleaf ed, Thomson Reuters, updated to 9 March 2022) at [CA66.28(3)(b)].

commentaries broadly agree with *Adams*.[327] However, an earlier version of *Adams* acknowledges that it used to be thought, prior to *Rapira*, *Tuhoro*, *October* and *Hardiman*, that knowledge of a possible killing was necessary under s 66(2).[328]

[293] As noted above, the *Tomkins* line of authority has not been overruled. *Renata* and *Hardiman* were s 66(1) cases and the other cases cited, including *Rapira*, concerned s 168. To the extent that *Adams* and other commentators treat these cases as removing the statutory requirement for foresight of a killing under s 66(2) where s 167 is at issue, they are in error.

[294] By contrast, Professor Orchard's view was that, under s 66(2), foresight of a killing is necessary for both murder and manslaughter because the relevant offence is culpable homicide, and it is an essential ingredient of culpable homicide that there is a killing.[329] Professor Tolmie takes a similar view.[330] I agree.

[295] Professor Orchard saw the issue as different under s 66(1) (including where the principal is guilty under s 168) where, based on *Renata*, it is enough that a party is intentionally assisting or encouraging[331] an unlawful (and, he added, dangerous) act from which death results.[332] He argued that strict liability is expressly provided for principals under s 168 and parties under s 66(1), but that this is not true of s 66(2).[333]

[296] *Garrow and Turkington on Criminal Law* cites *Tomkins* (and the enumeration of its principles in *Te Moni*) in its discussion of the level of foresight necessary for

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327 Simon France and John Pike *Laws of New Zealand* Criminal Law (online ed) at [85]; and AP Simester and WJ Brookbanks *A to Z of New Zealand Law* (online looseleaf ed, Thomson Reuters) at [20.6.5.3(5)].

328 Robertson, above n 275, at [CA167.23(2)]. Similarly, Bruce Robertson (ed) *Adams on Criminal Law* (2nd student ed, Brookers, Wellington, 1998) at [167.23(2)] states that foresight of killing "may" be necessary and cites *Tomkins*, above n 274; *Greening*, above n 288; and *Doctor*, above n 292.

329 Orchard, above n 301, at 93.

330 Julia Tolmie "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441 at 465–466. For a recent reiteration of the same claim see Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 584–585 and 587–588, although the text does say that the "overwhelming body of authority" is currently contrary to the position that foresight of death is required: at 585.

331 I use these terms to cover "aiding", "abets", "incites", "counsels" or "procures" in s 66(1).

332 Orchard, above n 301, at 93.

333 At 94.

manslaughter.[334] It cites *Renata* as emphasising that *Tomkins* was directed at s 66(2) rather than s 66(1).[335] It does not, however, cite *Renata* or *Rapira* as having overturned *Tomkins* in the case of manslaughter under s 66(2).

Possible issues with requiring foresight of killing

Crown submissions

[297] The Crown submits that what it refers to as a "purposive" approach should be applied to s 66(2), such that foresight of death is not required. The Crown also raises four possible issues with requiring foresight of death:

(a) it would mean a different test for liability for principals and secondary parties under s 66(2);

(b) it would mean a distinction between s 66(2) liability for manslaughter and s 66(2) liability for s 168 murder;[336]

(c) it would mean a different test for liability under s 66(1) and (2); and

(d) it would mean that the mens rea requirement for manslaughter would approximate that for reckless murder under s 167(b) and (d).

[298] There are also issues as to over-criminalisation and under-criminalisation.

Purposive interpretation

[299] The Crown maintains that it is taking a purposive interpretation. I do not agree. It is of course true that part of the purpose of s 66(2) is to broaden the scope of liability in certain cases, criminalising parties who would not otherwise be criminalised by s 66(1). But this is only where there the statutory requirements are met: where there is a common purpose, where the offence occurred in the prosecution of the common purpose and where a party has subjective appreciation of the commission of the

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334 Stephanie Bishop and others *Garrow and Turkington's Criminal Law in New Zealand* (online ed, LexisNexis) at [CRI66.14(i)].

335 At [CRI66.14(i)].

336 I have already discussed this point above in the context of caselaw.

offence as a probable consequence. A broad notion of the purpose of s 66(2) being to expand criminal liability to include joint enterprises cannot be used to remove or water down these clear statutory requirements. Purposive interpretation still requires the words of a statute to be interpreted and therefore does not allow them to be overridden.[337]

Different tests for principals and secondary parties

[300] The different test for principals and secondary parties under s 66(2) arises out of the statutory wording and the explicit mens rea requirement contained in s 66(2) of knowledge of the commission of the offence as a probable consequence, which in this context means knowledge of culpable homicide. As a matter of principle, it is not surprising that the secondary party, who did not cause the death, should only be convicted if there is foresight of death, unlike the principal, who committed the actual act that caused the death.

Different tests for liability under s 66(1) and (2)

[301] It is also not necessarily surprising if there are different tests for liability under s 66(1) and (2). As Professor Simester has noted, accessory liability under s 66(1) is based on knowledge of the essential elements that constitute the principal's offence and intent to assist or encourage the principal in light of that knowledge.[338] On the other hand, joint enterprise liability under s 66(2) effectively consists of two offences: the one committed by the principal and the party together and the further offence committed by the principal alone.[339] The basis of party liability in such a case is foreseeability.[340]

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337 Legislation Act 2019, s 10(1).

338 AP Simester "The Mental Element in Complicity" (2006) 122 LQR 578 at 583–590; and see also *Ahsin*, above n 250, at [82]–[83] per McGrath, Glazebrook and Tipping JJ. See also the comments of Cooke P regarding the distinction between s 66(1) and (2) above at [278].

339 Simester, above n 338, at 593.

340 At 594.

[302] Professor Orchard did not see different bases of liability under s 66(1) and (2) as anomalous:[341]

> Section 66(2) codifies a "wider principle" governing secondary liability … and it would not be anomalous if it were held that its seemingly clear terms demand more knowledge of likely consequences than is required of a principal, or an aider, abettor, counsellor or procurer [under s 66(1)].

[303] Professor Tolmie also does not see any anomaly in the different tests under s 66(1) and (2) either, due to the different bases of liability[342] and the fact that the secondary party's role under s 66(2) is likely to be more remote:[343]

> … the liability of the party is both more remote causally and may be considerably less in terms of mental culpability than the principal. Requiring foresight of death by the party limits liability for homicide (including … manslaughter) under s 66(2) to those cases where they committed to a course of offending in spite of knowing that they were risking, at the least, the accidental death of another human being. As it has been said, an "actus reus deficit is usually counterbalanced by a mens rea surplus".[344] It is worth noting that even in the absence of a homicide conviction, if the party foresaw the violence that caused the victim's death but not the death itself, they would still be liable as a party for the relevant interpersonal violence offence that resulted in death.

[304] For similar reasons to Professors Tolmie and Orchard, I do not see the presence of different standards between s 66(1) and (2) and between principals and parties under s 66(2) as arbitrary, anomalous or inconsistent. Rather, this distinction is based on the need to tailor the requirements so that offenders are not exposed to criminal sanction beyond their level of individual culpability. As the majority of the High Court of Australia stated in *Wilson v R*, the law must develop toward a closer correlation between moral and legal responsibility and should seek to confine the scope of constructive crime to what is "truly unavoidable".[345]

Reckless murder

[305] On the issue of maintaining a distinction with reckless murder, I accept the submissions made by Te Matakahi | Defence Lawyers Association New Zealand that,

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341 Orchard, above n 301, at 94.
342 Tolmie, above n 330, at 465–466.
343 At 466 (footnote substituted).
344 This quote is based on the original in Beatrice Krebs "Joint Criminal Enterprise" (2010) 73 MLR 578 at 590.
345 *Wilson v R* (1992) 174 CLR 313 at 327 per Mason CJ, Toohey, Gaudron and McHugh JJ.

to commit reckless murder, the offender must know that their actions are likely to cause death and still take the conscious decision to proceed. To be a party to reckless murder under s 66(2), the secondary party would need to know this was the mens rea of the principal. By contrast, for manslaughter the secondary party does not need to know anything about the principal's thinking. The secondary party must simply foresee that death may ensue. This means that a meaningful distinction remains.

[306] *Adams* suggests that the reckless element of s 167(b) is primarily useful in that it highlights that the risk taken must have no social utility.[346] My view is that the recklessness element is an added requirement and therefore provides a further basis of distinction with foresight of killing. The Court of Appeal has doubted the usefulness of the element, but it has also suggested that the recklessness element:[347]

> … may have been included to emphasise that what is required in the way of knowledge on the part of the offender is a conscious appreciation of the likelihood of causing death rather than a degree of knowledge on his part in some lesser or vaguer sense, as for example, possession of the necessary general knowledge to have appreciated the risk if he had paused to think about it.

[307] But the issue of whether the word "reckless" adds a distinct element is to some extent beside the point. Reckless murder requires conscious awareness of a risk and a subsequent decision to act on that risk, beyond mere inadvertence.[348] It requires "proof of the accused's actual appreciation of the risk at the material time".[349] Regardless of whether this mens rea requirement is rooted in the word "reckless" or in s 167(b) as a whole, the fact that a secondary party must foresee this mens rea in a principal is sufficient to distinguish reckless murder from manslaughter under s 66(2).

[308] The same point holds with regard to s 167(d). A party to murder under that section would have to foresee that the principal was going to do an act for an unlawful object that the principal *knows* is likely to cause death. A party to manslaughter would, by contrast, not need to foresee anything about the principal's mens rea.

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346 Downs, above n 299, at [CA167.06].
347 *R v Dixon* [1979] 1 NZLR 641 (CA) at 647.
348 At 647; and *R v Harney* [1987] 2 NZLR 576 (CA) at 579–581.
349 *Harney*, above n 348, at 579.

Over-criminalisation and under-criminalisation

[309] The Crown submits that requiring knowledge of the weapon and adding a requirement to foresee serious violence may mean that it is difficult to secure a conviction in group violence cases where it is unclear who knew of or used a weapon (the same point presumably also applies to requiring foresight of death).

[310] As to this, if the principal cannot be identified, then that is a failure of proof. The potential lack of a conviction of the principal through lack of evidence does not justify putting a gloss on the statutory wording to include all secondary parties. This would in fact lead to over-criminalisation. In any event, in cases such as this, the secondary party would be liable for the assault, which was the unlawful purpose agreed. This means that the secondary party would not be immune from criminal sanction. A secondary party might also be liable under s 66(1) based on the authorities outlined above.[350]

[311] In any event, while policy considerations in relation to the dangers of group violence may be relevant, they cannot justify departing from the plain requirements of s 66(2) in this case.

[312] The Crown replies to concerns about over-criminalisation by submitting first that manslaughter is flexible, encompassing varying degrees of culpability and allowing varying sentences to accommodate these degrees of culpability. Secondly it submits that the stigma attached to manslaughter should not be overstated: in particular, it is less than that attached to murder. It is also said that it is appropriate to recognise the seriousness attached to the taking of a human life.

[313] In my view a component of the stigma of manslaughter is the deliberate performance of acts which cause the loss of a human life, not the bare fact of the death alone. This is reflected in the requirement that unlawful acts which cause death must be objectively dangerous.[351] By contrast, a conviction for manslaughter under s 66(2) (absent foresight of death) risks attaching the stigma of taking a human life to someone

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350 See above at [278]–[280].
351 See above at [278], n 299.

who did not kill, did not encourage or aid in killing and did not even anticipate death. The requirement of foresight of death reflects the relevant fact that the s 66(2) party did not directly cause death. Nor did they, absent foresight, deliberately perform acts which aided or abetted a killing.

Summary

[314] Foresight of killing is required for a party to be convicted of manslaughter under s 66(2) where a principal has been convicted of murder under s 167. This follows from the plain wording of the statute: killing is an element of "the offence" (killing by an unlawful act)[352] for the purposes of s 66(2) and this is recognised (correctly) in the *Tomkins* line of cases and by some commentators, including Professors Tolmie and Orchard. The *Tomkins* line of cases has not been overruled. The New Zealand cases relied on by the Court of Appeal majority, the majority (in this case), the Crown and other commentaries like *Adams* concern different statutory provisions: s 66(1) and s 168.

[315] The position reached by the majority in this Court and that contended for by the Crown adds an unwarranted gloss to the statute. Any possible issues with requiring foresight of killing do not justify a departure from the plain wording of the statute. Indeed, a principled approach supports the opposite position.[353]

Result

[316] As indicated above, I agree with the majority that the appeal must be allowed, but for different reasons. Like the Chief Justice, I would allow the appeal because the trial Judge did not direct that the jury would have to be satisfied that Mr Burke foresaw a killing as a probable consequence of the prosecution of the common purpose.[354]

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352 Where the killing by unlawful act does not amount to murder.

353 See above at [299]–[300].

354 Above at [244]. Mallon J also would have required foresight of death but considered that Mr Burke would still have been found guilty even with this requirement: CA judgment, above n 246, at [185]. I agree with the Chief Justice's criticisms of Mallon J's approach: above at [244]–[246].

[317] I do agree with the majority that it is not possible to be sure, based on the assumed findings of the jury,[355] that Mr Burke would nevertheless inevitably have been found guilty of manslaughter as a party under s 66(1).

[318] I also agree with the majority that we should give the parties an opportunity to comment on any consequential orders.[356]

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355 See above at [258]. I note that I agree that the s 66(1) direction was made correctly in accordance with *Hartley*.

356 Above at [174]–[176].