The Liability of Parties to Unlawful Killing under the Criminal Code

GEORGE BRANDIS*

In the States of Queensland and Western Australia, the law determining the liability of parties to criminal offences is to be found in ss.7, 8 and 9 of their respective Criminal Codes. Section 7 provides, *inter alia*:

> When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
> (a) Every person who actually does the act or makes the omission which constitutes the offence;
> (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
> (c) Every person who aids another person in committing the offence;
> (d) Any person who counsels or procures any other person to commit the offence.

The terms of s.7 are qualified by s.8:

> When two 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.

Finally, s.9 provides that:

> When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.
> In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

The bulk of the judicial exegesis of these provisions is to be found in three cases: *Brennan* v. *R.* (1936) 55 C.L.R. 253, *R.* v. *Solomon* [1959] Qd. R. 123, and *Stuart* v. *R.* (1974) 4 A.L.R. 545. All three cases relate to defendants charged with unlawful killing—the former case involved a conviction for manslaughter, the latter two concerned convictions for murder. This article will attempt an analysis of the approaches taken to the interpretation of ss.7, 8 and 9, particularly in their relationship to the offence of unlawful killing, in each of the three cases. Upon the basis of this analysis, conclusions will be drawn as to the present status of the law relating to complicity in murder and manslaughter in Queensland and Western Australia.

Brennan's case, which occurred in 1936, was the first substantive discussion by the High Court of ss.7 and 8. The facts of that case, in brief, are that Brennan, in company with two other persons, formulated a plan to rob a jeweller's shop; that he kept watch outside while his confederates executed the robbery; that they were obstructed by a caretaker; and that they assaulted

* Law Student, University of Queensland

the caretaker, inflicting injuries from which he later died. Brennan was charged with the murder of the caretaker under the provisions of s.277 of the Western Australian Criminal Code. The analogous provision of the Queensland Code is s.302, which provides, *inter alia*:

> . . . a person who unlawfully kills another under any of the following circumstances, that is to say,—
> (1) If the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person grievous bodily harm;
> (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
> (3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
> . . . is guilty of murder.

"Unlawful killing" is defined by ss.291 and 293 of the Queensland Code (Western Australia—ss.268 and 270); and is made an offence by s.300 (Western Australia—s.277), which provides that

> Any person who unlawfully kills another is guilty of a crime, which is called murder, or manslaughter, according to the circumstances of the case.

Section 303 (Western Australia—s.280) supplies the definition of manslaughter:

> A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.

The jury found Brennan guilty of manslaughter, thus impliedly negativing the requirement of s.302(2)—the provision under which the initial charge of murder was laid—that the act was of such a nature as to be likely to endanger human life.

Brennan appealed to the Court of Criminal Appeal (Western Australia), and then to the High Court, on the grounds of misdirection by the trial judge, who told the jury that, so long as Brennan was a party to the plan of robbery, he must, *ipso facto*, be guilty of any offence committed by his confederates in the prosecution of the original offence. It was contended on behalf of Brennan that, while this direction was correct in terms of s.7, s.8 was the whole basis of his liability, and that since he claimed that he was not a party to any plan involving interference with the caretaker, a direction on the basis of s.7 was incorrect.

Starke J., discussing ss.7 and 8, made two significant points. First, with respect to s.7, he held that, to be liable under this provision (in Brennan's case, s.7(c)), the aider must be fully aware of what was involved in the plan, and only if he was thus aware of the proposed assault upon the caretaker would he be liable for the consequences:

> [S]o far as the prisoner Brennan was concerned the fatal act must appear to have been committed strictly in the prosecution of the purpose for which the party was assaulted.[1]

However, if the aider were cognizant of his confederates' intentions, his liability is to the full extent of theirs. Thus, in a case of unlawful killing, since a simple

1. (1936) 55 C.L.R. 253, at 260.

common assault which results in death is sufficient to make the assaulter guilty of at least manslaughter, (a principle which has more recently been authoritatively stated by the Queensland Court of Criminal Appeal in *R.* v. *Martyr* [1962] Qd.R. 398, and by the High Court in *Mamote-Kulang of Tamagot* v. *R.* (1963–64) 111 C.L.R. 62), any aider who was a party to a plan involving *any* assault was equally liable, if the assault resulted in death. This is the import of Starke J.'s words:

> A person commits manslaughter who brings about the death of another by some unlawful act without any intention of killing him or even of hurting him . . . If the persons charged in the present case resolved to overpower the caretaker, should his presence hinder them in stealing from the shop, they all contemplated and intended the unlawful act, namely the assault upon the caretaker. And if the caretaker were killed in effecting this purpose, then all would be equally guilty, at least of the crime of manslaughter, and probably of murder if the caretaker were killed by violence which was likely to cause death or grievous bodily harm. The scheme involved the commission if necessary of an unlawful act upon the caretaker, and the parties much abide it fully and to the end.[2]

Thus, in short, Starke J. is saying that under s.7 an aider cannot be held responsible for an act of his confederates if he knew nothing of it; however, he is fully liable for any act of his confederates to which he was a party. Since, in a case of manslaughter, the killer is guilty even if his own act involved no more than common assault, if the aider was a party to mere common assault, he is fully responsible for any death which results.

This is, of course, subject to the qualification of s.8, which extends liability to offences to which an aider is not a party, but are the probable consequence of the prosecution of the plan to which he is a party. Starke J.'s judgement enunciates the principles that the test of liability under s.8 is an *objective* one:

> A probable consequence is, I apprehend, that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act; though it may be that the particular consequence is not intended or foreseen by the actor.[3]

The leading judgement in the case was given by Dixon and Evatt JJ. Their Honours adopted a similar attitude to s.7 to that taken by Starke J.:

> Under [s.7] the applicant was liable to conviction for manslaughter if it was established that the plan on which his confederates acted included some physical interference with the caretaker amounting to an assault, that in fact death resulted from such an assault, and that he remained on watch for the purpose of aiding them in carrying out that plan and so commit the assault, or that he counselled them to do so.[4]

The remainder of the judgement centred upon a consideration of s.8. The discussion gave rise to a number of significant conclusions. First, it was held by their Honours that

> 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.[5]

2. *Ibid.*
3. *Id.*, 260–61.
4. *Id.*, 263.
5. *Id.*, 264 (emphasis added).

The difficulty arose, however, that the implication of a verdict of manslaughter with respect to a charge under s.302(2) meant that the act was not one of such a nature as to be likely to endanger human life. In answering this difficulty, it was held that:

> notwithstanding the implications of the verdict, the death can be considered the probable consequence of the prosecution of the purpose if the purpose to which the applicant concurred made it likely that his confederates would, if necessary, use violence and such a kind and degree of violence as would probably cause death.[6]

Their Honours went on to discuss the test by which liability under s.8 was to be determined. There has been some controversy over the interpretation of the words of Dixon and Evatt JJ. on this matter—some commentators argue that the test prescribed in their joint judgement is a subjective one;[7] however a number of authorities—including the judgement of Gibbs J. in *Stuart's* case, interpret their words as indicating an objective test.[8] It is submitted that the former view is to be preferred, and that the test of liability under s.8 was viewed by Evatt and Dixon JJ. as *subjective*. It would seem that, since the test of liability under s.302(2) is *objective* (this point is in little doubt—the most recent of a long line of clear authorities is Gibbs J. in *Stuart*[9]). If their Honours held the test under s.8 to be *also* objective, then it would have been impossible for them to reconcile the verdict of the jury with the provisions of s.8, as they purported to do in the last-quoted passage.

It is further submitted that their Honours' statement that this explanation of the jury's verdict "must mean that upon the facts of such a case as the present, sec.8 adds little or nothing to sec.7"[10] would be inconsistent with an objective test for s.8. For, while s.8 would indeed be superfluous (as their Honours suggest) if the test were subjective, for it would add little to the subjective test already present in s.7, if the test under this section were objective, it would be incorrect to say that s.8 adds little or nothing to s.7. An accused could be unaware of any plan to assault, and thus be innocent under the latter section, yet if it were objectively a probable consequence of the plan to which he was a party, he would still incur liability under s.8. Hence, it would be inconsistent for Dixon and Evatt JJ. to hold that s.8 is superfluous, and at the same time to hold that it imports an objective test—on the contrary, the former is a conclusion which would only follow if they were to ascribe to s.8 a *subjective* test.

Apart from the inferences which may be drawn from other statements, there is yet more compelling evidence that the test taken by Dixon and Evatt JJ. in regard to s.8 is subjective—they say so expressly:

> The practical result is that the applicant would not be guilty of manslaughter unless he knew that his confederates whom he was aiding and abetting intended to commit at least a common assault upon the caretaker, or, supposing that they had not that actual intention, then unless *he foresaw* that to carry out the plan of shopbreaking they would probably so injure him that death might be likely to result.[11]

The use of the words "he foresaw" clearly expresses a subjective test.

6. *Ibid.*
7. This appears to be the view of Professor Howard, *Australian Criminal Law*, 2nd. ed., (Melbourne: Law Book Company, 1970), pp. 265–66.
8. *Stuart* v. *R.* (1974) 4 A.L.R. 545, at 559.
9. *Id.*, 556.
10. *Brennan's* case, 264.
11. *Id.*, 265 (emphasis added).

Hence the present writer is forced to disagree with the interpretation of the words of Dixon and Evatt JJ. favoured by Gibbs J. in *Stuart's* case, and with other learned authorities who hold that the test under s.8 taken in their joint judgement is objective. Gibbs J. quotes another passage from the judgement to support his statement:

> "The question posed by [s.8] is whether in fact the nature of the offence was such that its commission was a probable consequence of the common unlawful purpose and not whether the accused was aware that its commission was a probable consequence. This was recognized by all members of this Court in *Brennan* v. *R.* . . . Dixon and Evatt JJ. said (at 263–64) 'The expression "offence of such a nature that its commission was a probable consequence of the prosecution of such purpose" fixes on the purpose which there is a common intention to prosecute. It then takes the nature of the offence actually committed. It makes guilty complicity in that offence depend upon the connection between the prosecution of the purpose and the nature of the offence. The required connection is that the nature of the offence must be such that its commission is a probable consequence of the prosecution of the purpose.' ".[12]

However the above passage can, I submit, be read either to import an objective or a subjective test—it expressly states neither. In fact, it is merely expository of the contents of s.8, and, I suggest, so closely paraphrases those contents that to say that it indicates *any* test, objective or subjective, is to beg the question. When read in the light of the earlier passage (". . . unless he foresaw . . . "), I submit that the view taken by Dixon and Evatt JJ. of s.8 clearly expresses a subjective test.

However, if this be the case, the difficulty arises as to how this can be reconciled with the earlier statement that the consequence which must have appeared probable to render an accomplice guilty of manslaughter was the *death* of the caretaker. For, if death is probable, and the test under s.8 is subjective, it would seem impossible for an accomplice to be guilty of manslaughter, since by foreseeing that death was probable he would have satisfied the requirements of s.302(2), hence would have to be found guilty of murder, or be acquitted. Their Honours state that "under sec.8, he would be guilty of manslaughter only if the plan was of such a nature that the use of enough violence to cause death appeared a probable consequence of carrying it out."[13] If the previous arguments are accepted, and the judgement of Dixon and Evatt JJ. is interpreted as prescribing a subjective test for s.8, these two propositions are irreconcilable. The question is obscured by the fact that their Honours go on to say: "The practical result is that the applicant would not be guilty of manslaughter unless . . . he foresaw that to carry out the plan of shopbreaking would probably so injure the caretaker that death *might be likely* to result."[14] The use of the two terms "might" and "likely" in the same sense is confusing indeed, especially when considered in the light of the very different standards of probability ascribed to them in the later cases of *Solomon* and *Stuart*. The present writer is respectfully forced to the conclusion that the joint judgement of Evatt and Dixon JJ. is unclear and inconsistent in this regard.

In sum, the significance of *Brennan's case* is threefold. First, with respect to s.7, the whole court held that an aider was not liable for offences committed

12. *Stuart's* case, 559.
13. *Brennan's* case, 265.
14. *Ibid.*

by his confederates if he was not a party to them (Starke J. holding that this was subject to an objective test of probability in s.8); however, if he were a party, then his liability was to the same extent as that of his confederates. Thus, in a case of unlawful killing, a person is guilty of manslaughter if he willed no more than common assault; if his accomplices are a party to a plan involving common assault, they are liable for the consequences to the same extent as the doer of the act, since the common assault—should it result in death—was their common willed act. Secondly, it was held by Dixon and Evatt JJ. that, to be liable for manslaughter under s.8, death must have been a probable consequence of the prosecution of the unlawful purpose. Finally, the Court was divided over the test for liability under s.8, Starke J. holding that it was objective, and Dixon and Evatt JJ. holding that the accused must himself foresee the probable consequences of the plan to be liable for offences to which he was not a party; and, by virtue of this view, being drawn to the conclusion that this "must mean that upon the facts of a case such as the present, sec.8 adds little or nothing to sec.7."[15]

It is submitted that the majority were incorrect in holding the test under s.8 to be subjective, and that this proposition is very difficult to reconcile with their additional conclusion that death, if foreseen, will make the accomplice liable for manslaughter (and not murder). If these statements are read in the light of s.302(2), the inconsistency is apparent. It is suggested that while to approach taken by the Court to s.7 is correct, the attitude of the majority to s.8 is inconsistent and ambiguous.

Some twenty-three years after the decision in *Brennan*, major departures were made in the interpretation of ss.7, 8 and 9 by the Queensland Court of Criminal Appeal in *R.* v. *Solomon*. Solomon, and two confederates, formed a plan to rob one White. Solomon was a party to the whole plan, which included common assault, and, in fact, Solomon admitted hitting White once. Thus, according to the view of s.7 taken in *Brennan's case*, he would clearly have been guilty of any unlawful killing which resulted. However, he claimed that he had urged his confederates "not to knock him about". White later died as a result of injuries received. Solomon and his confederates were tried on a charge of murder. He appealed against his conviction to the Court of Criminal Appeal on the ground that the trial judge had misdirected the jury as to the application of ss.7 and 8, and that the death of White was an act which had occurred independently of the exercise of his will. Solomon thus introduced the defence of involuntariness into the consideration of ss.7 and 8. This defence is provided for by s.23 of the Queensland Criminal Code, which states, *inter alia*:

> Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

The Court (Mansfield C.J., Philp and Mack JJ.) unanimously agreed that the trial judge had misdirected the jury by telling them that they could not find Solomon guilty of manslaughter under s.8. The central issue discussed by the Court was the application of s.23 to ss.7, 8 and 9. This led the majority of the Court (Philp J., with whom Mansfield C.J. concurred) into conflict with the High Court's decision in *Brennan*. The Court further held that the test of liability under s.8 was objective, thus conflicting with the majority of the High Court in the earlier case.

15. *Id.*, 264.

Philp J., who delivered the majority judgement, pointed out that s.23 had not at all been considered in *Brennan's case*; and that, while impliedly excluded by the terms of ss.8 and 9, it was not excluded by s.7. Thus, liability under s.7 must be read subject to the exculpatory provisions of s.23. This led his Honour to the conclusion:

> Reading s.7(c) with s.23 it is apparent that if A aids B in B's commission of the offence of robbery A is criminally responsible for the robbery, but if he does not willingly aid him in the commission of a homicide done in the course of the robbery A is not criminally responsible for the homicide . . . Section 23 makes it plain that if B does an act which is done independently of the will of A the latter cannot be criminally responsible for that act. Similarly, under s.7(d)—if A counsels or procures B to commit an offence A is liable only for the actual offence he has consciously counselled or procured.[16]

The critical flaw of this view is that it totally ignores the effect of ss.8 and 9 of the Code in extending criminal liability beyond acts which are consciously willed by accomplices. This point was made by Gibbs J. in *Stuart*.[17] Furthermore, Philp J. is himself inconsistent on the point, for soon after, he states that

> Criminal responsibility for acts occurring independently of the will of the accused is provided for (*inter alia*) in ss.8 and 9 . . . [These sections extend] the criminal responsibility of persons who have made a concert to commit an offence. They are responsible not only for the concerted—the willed—offence, but also for such offences—but only such offences—as are objectively the probable consequence of the prosecution of the concert. Section 9 similarly extends the criminal liability of the counsellor or procurer to include responsibility for unwilled offences which are objectively the probable consequence of the counselling or procuring.[18]

This is a correct statement of the operation of ss.8 and 9. It will be noticed that Philp J. differs from Evatt and Dixon JJ. by taking an objective test of liability under s.8, which, I submit, is the correct viewpoint. However, the most significant aspect of this passage is the clear inconsistency with his earlier statement concerning the application of s.23. Obviously, the two cannot stand together. The only way of reconciling the two statements is to regard the latter as being intended to qualify the former—yet, if this be the case, the former would be rendered quite meaningless, for it expresses a principle directly contrary to the latter statement. It is the implication of Philip J.'s next statement, however, that the two may be reconciled in such a manner:

> In my view, s.7 is not intended to create responsibility for unwilled *acts* arising out of a plan or concert. The creation and limitation of responsibility for unwilled *acts* arising from a plan or concert is to be found solely in s.8.[19]

However, he goes on to argue, disapproving *Brennan's* case:

> If Brennan was a party to a plan whereunder force which might endanger human life would be used he would have been guilty of homicide if Walsh had killed the caretaker by the use of such force because Brennan had willed the use of such force and so aided in the commission of homicide.
> But if the plan to which Brennan was a party was merely to tie up the caretaker and Walsh in tying up the caretaker had struck him a blow which resulted in his

16. *R.* v. *Solomon* [1959] Qd.R. 123, 128.
17. *Stuart's* case, 560.
18. *Solomon's* case, 129.
19. *Id.*, 130 (emphasis added).

> death how could it be said that Brennan aided in delivering that blow—how could be said that he had willed the blow and so willed the commission of the offence of homicide?
> . . . Unfortunately s.23 was neither cited nor considered by the High Court. I cannot but feel that if it had been considered the operation of s.7 would be held to limit the criminal responsibility of an aider to responsibility for the actual *offences* he had willed and that responsibility for unwilled offences committed in the prosecution of the plan must be judged according to s.8.[20]

It will be noticed that in the first passage quoted above, Philp J. uses the word "acts" in describing the class of unwilled conduct for which an aider is not responsible under the terms of s.7. However, in the following passages, he uses the word "offences" synonymously.

This, I suggest, is the key to understanding Philp J.'s point of view. He regards the act for which a person may not be held responsible under s.7 (and not be held responsible *at all* if it is not an objectively probable consequence under ss.8 and 9) as the *offence* itself. In fact, in the penultimate passage quoted, Philp J. goes so far as to suggest that an accomplice is not criminally responsible for manslaughter unless he "willed the commission of the offence of homicide." This view, the present writer respectfully submits, is patently false. As Windeyer J. said in the case of *Mamote-Kulang of Tamagot* v. *R.* (1964) 111 C.L.R. 62:

> Section 23 does not, in my opinion, alter the elements or ingredients of any particular offence created or defined by the Code . . . The peculiar essence of the offence [of manslaughter] is the absence of an intent to kill . . . It is therefore not the point, I think, to say that the accused did not intend to kill, unless we are to say that a person cannot be guilty of manslaughter unless he intended to kill the person whom he in fact killed. To say that would be to subvert the definitions of both murder and manslaughter in the Code and to obliterate the distinction it makes between . . . murder and manslaughter.[21]

Furthermore, the general adoption of what has been called a 'wide view' of the term "act" (where it appears in s.23 of the Criminal Code) is today of dubious validity since the general trend away from this point of view in the High Court which culminated in the case of *Kaporonovski* v. *R.* (1973) 47 A.L.J.R. 473. The point is also made by Burbury C.J. in a Tasmanian case which anticipated the view of the High Court in *Kaporonovski, Murray* v. *R.* [1962] Tas. S.R. 170:

> Philp J.'s view that in the case of manslaughter constituted by unlawful killing by an unlawful act a principal in second degree is not criminally responsible unless in addition to intending to aid or abet the commission of the unlawful act he wills the commission of the homicide is clearly not sustainable since the decision of the High Court in *Vallance* v. *R.* (1961) 108 C.L.R. 56. [And *a fortiori* is unsustainable since *Kaporonovski.*] In that case a majority of the High Court held that in [s.23] . . . the "act" for which a person is not criminally responsible unless it is voluntary and intentional is the physical action of the person charged and not the complete *actus reus.*[22]

Philip J. then discussed liability under s.8. The anomaly of Dixon and Evatt JJ.'s judgement is ascribing a subjective test to s.8, yet holding that an accomplice would be guilty of manslaughter if death were a probable

20. *Id.*, 130–31 (emphasis added).
21. (1964) 111 C.L.R. 62, 83.
22. [1962] Tas. S.R. 170, 185.

consequence, is obviated in this case since the Court ascribed to s.8 an objective criterion of liability. However, Philp J. went further than this, and held, disagreeing with the opinion expressed in *Brennan's case*, that to be liable for manslaughter under s.8 "some act which *might kill* [must be] a probable consequence."[23] This view was adopted by Jacobs J. in *Stuart*.

The minority judgement of the Court, delivered by Mack J., accords very closely with the decision in *Brennan's case*. His judgement was mainly concerned with a consideration of s.7 of the Code, and discussion of s.8 was only incidental to this. Mack J.'s judgement reconciles the decision in *Brennan* with the objections taken to it by Philp J. that it failed to consider the implications of s.23:

> A person who has not intent to kill or inflict grievous bodily harm but who merely had an intent to strike a blow of lesser severity, i.e. common assault, is guilty of manslaughter if the assault causes the death of the person assaulted. What I have said of course is subject to s.23 of the Code which provides *inter alia* that a person is not criminally responsible for an event which occurs by accident. It would not be a defence or an excuse if the doer set up in the circumstances I have outlined that the death occurred independently of the exercise of his will. [Under s.7] every person who aids another person to do the act which constitutes the offence is a principal offender . . . [thus] the aider could be guilty of manslaughter if the plan between himself and the doer was to do common assault. The killing would be excused if it were an event which occurred by accident but it would not be excused as being something occurring indepedently of the will of the aider.[24]

Mack J., by holding that a defence to a charge of manslaughter resulting from an intentional common assault is not available under the 'first limb' of s.23 implies rejection of the view that to be liable for an act, the consequences must be intended (the 'wide view') which is the basis of Philp J.'s assertion that *any* assault is not sufficient to make an aider who is a party to it liable for unlawful killing, but that it must be an assault which might result in death. However, Mack J. overcomes the gap in *Brennan's case* in failing to consider s.23, by demonstrating that even in cases where the initial act is wilful, it can still apply should the event occur by accident. Such would be the case where, between the act of common assault and the death of the victim, there supervened a *novus actus interveniens*.

Mack J.'s formula for ascertaining liability under s.7 is expressed thus:

> In all cases under s.7(c) it is necessary first to ascertain what was the plan and this is the basis of criminal responsibility. Was violence to be used and if so what violence? If what is done goes beyond the plan the aider is not liable under this section but he may be responsible under s.8. If on the other hand by carrying out the plan e.g. common assault, death results, both the doer and the aider are guilty of manslaughter unless the death was "an event which occurred by accident" (s.23). The aider will not be excused under s.7(c) if he shows that he intended no more than common assault but he will not incur criminal responsibility under this subsection for the death if the agreement made by him was that no violence was to be used.[25]

It is submitted that this passage is the best and most complete statement of criminal responsibility incurred by aiders under s.7 yet to appear in the limited body of case law on the subject.

23. *Solomon's* case, 131.
24. *Id.*, 134–5.
25. *Id.*, 135.

In sum, the significance of *Solomon's* case is the introduction of s.23 into considerations of the liability of accomplices. The majority of the Court, however, applied s.23 too widely, by firstly holding that it applied across-the-board to *all* acts which were unwilled by accomplices, hence ignoring altogether the effect of ss.8 and 9 (although Philp J. attempted an unsatisfactory rationalization on this point); and, secondly, by impliedly adopting a 'wide view' of the word "act" where it first appears in s.23, and holding that unless an accomplice foresaw that homicide might result from the plan, he could not be guilty of manslaughter. This proposition, resulting from the application of s.23, ignores the fact that s.7 imposes upon all parties to an offence liability to the full extent as that of the person who actually commits the offence.

Hence, since the actual doer of the act would be liable for manslaughter if he intended nothing more than common assault (*Martyr, Mamote-Kulang*), by virtue of s.7 an accomplice who is a party to *any* assault resulting in death must, (subject to Mack J.'s observations on the effect of accident), *ipso facto* be liable for manslaughter. It is in the failure to recognize this that Philp J. errs. Mack J., on the other hand, does recognize this principle, while successfully reconciling it with s.23 by adopting a narrower view of the word "act", yet holding that an accidental death, albeit one arising from an initial common assault comprehended in the plan, however subsequently supervened by an unforeseen and unforeseeable *novus actus interveniens*, would still be excused through the operation of s.23. It is strongly submitted that the latter view is to be preferred.

With reference to s.8, an objective standard of liability is adopted by the whole Court in *Solomon's* case, and the anomaly in *Brennan's* case apparent in the requirement that *death* must be *foreseen* is amended to the requirement that *an act which might kill* must be *objectively probable* in order to create liability for manslaughter with respect to an accomplice.

The most recent case in which the application of ss.7, 8 and 9 to ss.302 and 303 has been considered is that of *Stuart* v. *R.* The applicant was found guilty of murder, and, having failed in an appeal to the Court of Criminal Appeal (Queensland), sought leave to appeal to the High Court. The facts of the case are that Stuart had counselled one Finch to set fire to a night club, which he knew to be full of people at the time, in the prosecution of the unlawful purpose of extortion. Hence, the charge lay under s.302(2). It was claimed on behalf of the defendant that murder was not any part of the plan. The trial judge told the jury that they could base a conviction under s.302(2) upon either s.7(d) in combination with s.9, or upon s.8. In appealing to the High Court, it was contended, *inter alia*, that the latter direction was incorrect.

Although *Stuart's* case is significant for a number of comments made on various matters germane to the Code definition of murder, its principal importance to our present purposes lies in a number of comments made, *obiter dictum*, by Gibbs and Jacobs JJ., in which the judgement of Philp J. in *Solomon* was subjected to critical analysis. Furthermore, it may be noted that the view that the criterion of liability in s.8 is an objective one was common ground among all Justices who addressed themselves to the point, and hence, it is the view of the present writer that, notwithstanding the dubious interpretation of Dixon and Evatt JJ. in *Brennan's* case, the fact that s.8 imports an objective test may now be taken as settled law.

Gibbs J. disapproved the interpretation of liability under s.7 put forward by the majority in *Solomon's* case on two grounds—firstly, that certain

statements as to the application of s.23 to s.7 ignored the effect of ss.8 and 9; and, secondly, that the wide view of the word "act" in s.23 taken by Philp J. could not stand in the light of *Kaporonovski's* case (*supra.*). In considering the relationship between ss.7(d) and 9, Gibbs J. expressed an attitude which closely resembles that adopted in *Brennan*, and by Mack J. in *Solomon*:

> The question whether one confederate has counselled another to commit an offence requires a consideration of what the former urged the latter to do. If the latter then does commit an offence which is different from that which he was counselled to commit, the former is made liable by the combined effect of ss.7(d) and 9 provided that the facts constituting the offence are a probable consequence of carrying out the counsel. Stuart having counselled Finch to light the fire at the time and in the manner he did was liable if the offence of murder actually committed by Finch was a probable consequence of carrying out the counsel.[26]

The other significant development in *Stuart* was the reconciliation, in the judgement of Jacobs J., of the conflicting propositions in *Brennan* and *Solomon* as to the nature of the consequences which must be objectively probable to make an accomplice liable for murder or manslaughter under s.8. As has been pointed out, it is inconsistent to suggest, as do the majority in *Brennan*, that the test under s.8 is subjective, yet an accomplice will be guilty of manslaughter if he foresees the probability of death. In *Solomon*, Philp J. attempted to overcome this difficulty by requiring that not death, but an act which *might* kill, must be the objectively probable consequence of the prosecution of the unlawful purpose, to render the accomplice liable for an unlawful killing to which he was not a party—in this case, manslaughter. If, however, death was objectively a *likely* result, then, according to s.302(2), an accomplice would be guilty of murder.

It appears that Jacobs J. approves Philp J.'s distinction between "might" (implying *possibility* and hence liability for manslaughter), and "likely" (implying *probability* and hence liability for murder):

> If, [in *Brennan*], the actual assaulters of the nightwatchman had used more force than was contemplated in the common purpose, if, let us say, the common purpose involved no more than simple assault, the fact that a probable consequence of the prosecution of the common purpose was not the likely death of the nightwatchman would not have the result that the look-out man was not at all guilty of the unlawful killing. He would, in my opinion, be guilty of the unlawful killing if the probable consequence of the common purpose was the possibility of death occurring as a result of simple assault. The probable consequence was this possibility but not the likelihood of endangering human life. He would be guilty of manslaughter even though not guilty of the murder of which his confederates might be found guilty.[27]

In other words, Jacobs J. is saying that, given the scenario in which A and B consciously assault the caretaker with such force that death is *likely* to result, and it in fact does result, hence they would be guilty of murder under s.302(2); but C's involvement in the unlawful purpose is limited to agreement to a plan involving simple assault which *might*, but (given his state of knowledge) was not *likely* to, cause death; A and B would be guilty of murder, but C, although guilty of manslaughter by virtue of s.7 since he was an accomplice to a plan involving *some* assault, would not be guilty of murder because, to his knowledge, death was not *likely* to result. In terms of s.8, he is guilty of manslaughter because the *possibility* of death is a probable

26. *Stuart* v. *R.* (1974) 4 A.L.R. 545, 561.
27. *Id.*, 567–68.

result; he is not guilty of murder because the *probability* of death is *not* a probable result. This distinction demonstrates the gradation of different states of responsibility implied by the two words "likely" and "might". In Jacobs J.'s judgement, the two terms are accorded qualitatively different meanings, in contrast to the judgement of the majority in *Brennan's case*, where they are employed synonymously.

This view would, however, seem to imply that the test of liability under s.8 is subjective, since it necessitates a consideration based upon the accomplice's state of knowledge. Jacobs J., however, disposes of this problem by refining the definition of the 'objective test':

> The probable consequence is the consequence which would be apparent to an ordinary reasonable man in the position of the applicant, that is to say, in his state of knowledge. The test is thus an objective one in the sense that it is not a question whether the applicant recognized the probable consequence, but it is an objective test *applied to the state of the applicant's knowledge of the facts.*[28]

This formula enables Jacobs J. to hold consistently to the view, expressed *per totam curiam* in *Brennan*, and by Mack J. in *Solomon*, that an accomplice will be liable for manslaughter if he was a party to a plan which involved *any* assault; and yet meet the objections of Philp J. that this view ignores the provisions of s.23.

Furthermore, it extends the application of s.23 to s.8 beyond its 'second limb' (accidental events), which Mack J. thought was the maximum extent of its operation given the strict terms of s.7. Jacobs J.'s analysis enables the 'first limb' (unwilled acts) a restricted operation, by reducing murder to manslaughter in the case of plans in which an accomplice is a party to simple assault, but a more serious assault resulting in death occurs independently of the exercise of his will. Hence, Jacobs J.'s conception of the word "act" is not so wide as was Philp J.'s, for it does not look to the event or the effence, as did his view of the operation of s.23. Therefore, notwithstanding the narrowing of the interpretation of the 'first limb' of s.23 by the High Court in *Kaporonovski's* case the Jacobs view (although not the Philp view) is still valid law. This attitude marks the evolution of the judicial exegesis of ss.7, 8 and 9 in their application to ss.302 and 303 at its most advanced stage, and, I submit, most successfully addresses the problem raised in *Solomon* of reconciling the extension of the criminal liability of accomplices under ss.7, 8 and 9 with the limitations of liability required by s.23. The judgement of Jacobs J. in *Stuart* v. *R.* may therefore be seen as a concise and accurate statement of the present-day law on the subject. Yet it is by no means exhaustive, and no complete picture of the contemporary law on the subject of the liability of parties to unlawful killing under the Queensland and Western Australian Criminal Codes will be had without reference to all three of the seminal cases on the subject.

Where does the law stand today? The only thing which may be confidently asserted is that the development from *Brennan* to *Stuart* has been anything but a logical, unilinear progression, with each case—indeed each single judge —expressing divergent views as to the metes and bounds of the liability of accomplices to unlawful killings done in the prosecution of planned offences. Furthermore, the latest expressions of judicial opinion in *Stuart's* case were, in their valuable comments upon *Brennan* and *Solomon*, largely confined to remarks made *obiter dictum*—and those by only two members of the Court.

28. *Id.*, 568 (emphasis added).

The present writer would conclude that, although the judgements have been too few, and too inconsistent, to provide a solid foundation for precise and dogmatic statements, in the light of *Stuart's* case, as well as comments made elsewhere (e.g. in *Murray's* case), and the greater certainty possible in comment upon s.23 following *Kaporonovski*, it is at least possible to attempt to divine the general trend of the interpretation of ss.7, 8 and 9.

I suggest that, today, two general schools of judicial thought, concerning section 7 and section 8 respectively, may be discerned. First, with respect to s.7, there is a retreat from the position taken by Philp J. in *Solomon* where he attempted to extend s.23 rather more widely than the terms of those two sections would themselves seem to permit, and towards the position taken in *Brennan*—than an accomplice, by willing *any* assault, must take the consequences which arise from that assault as if he were, in fact, the doer of the act himself. Since, if *he* committed the assault, it would be manslaughter, and since, by the terms of s.7, his liability is the same as that of the doer of the act, an assault which occurs with the knowledge and consent of an accomplice must be regarded as in fact the act of the accomplice himself. He is thus liable, should the assault result in death, for manslaughter—or, if, by applying the objective test in s.302(2), the assault was of such a nature as to be likely to cause death, he is guilty of murder. If, of course, a *novus actus interveniens* supplants the assault as the real cause of the death, a possibility canvassed by Mack J., none of the parties are liable by virtue of the 'second limb' of s.23.

With reference to s.8 (the test for which has clearly been established as objective), there has been a rejection of the view adopted in *Brennan* that death must be a probable consequence in order to render an accomplice guilty of manslaughter. The difficulties raised by this conclusion have been discussed at some length. For instance, how can this be reconciled, whether the test under s.8 is subjective *or* objective, with the clearly objective test in s.302(2)? It must follow that the distinction between murder and manslaughter is obscured by such a view. The principle enunciated in *Solomon's case*—the distinction between offences which *might* kill and which are *likely* to kill—seems far more consistent with the scheme of ss.302(2) and 303. It has been adopted by Jacobs J. in *Stuart* who refined it to a distinction between the possibility of death being a probable occurrence to render an accomplice guilty of manslaughter, and the probability of death being a probable consequence to render him liable for murder. Jacobs J. also explained the nature of the 'objective test' as dependent not upon the facts *simpliciter*, but upon what would be reasonable, given the accomplice's state of knowledge. This would seem to answer many of the objections to s.7 made by Philp J., which he attempted to obviate by the extension of s.23. In fact, a limited defence of involuntariness, under the first limb of s.23, is permitted by this formula, since the possibility of death may be, given an accomplice's state of knowledge, an objectively probable consequence, but where the probability of death is itself probable, he may be liable only for manslaughter, while his confederates, acting without his consent or reasonable expectation, may so act as to render themselves liable for murder.

In an area of the law which is still in the throes of evolution, the ebb and flow of judicial opinion makes generalization hazardous, and "firm" statements an invitation to renewed uncertainty and ambiguity. Yet an analysis without any attempt at synthesis is no analysis at all. As a broad statement, then, given the modifications made in *Stuart* and subject thereto, the general

approach of the High Court in *Brennan* seems to be good law with respect to liability under s.7; while, with respect to s.8, Philp J.'s distinction between degrees of probability ("likely" and "might"), tested objectively with reference to the accomplice's state of knowledge at the critical time, is generally the correct approach. The limited application of s.23 to circumstances which may truly be regarded as beyond the exercise of the will of the accomplice, or which may accurately be described as accidental occurrences and hence may act to displace, to some extent, the liability of all parties, seems to be settled. The general attitude would appear to be that, under s.8, an accused accomplice is given considerable latitude in establishing that he was not a party to the plan. But, once his knowledge of and concert in the plan is established, then he is, under s.7, responsible to the full extent of all other participants, since the act is not only that of the doer, but, by reason of his assent to the plan, his *own* act. Once complicity with the plan has been established, and as long as the Court is satisfied that the accomplice knew what was entailed in the plan, then, in the words of Starke J., "the parties must abide it fully and to the end."