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**JURISDICTION** : CHILDREN'S COURT OF WESTERN AUSTRALIA  
IN CRIMINAL

**LOCATION** : PERTH

**CITATION** : THE STATE OF WESTERN AUSTRALIA -v- JN (A  
CHILD) [2015] WACC 1

**CORAM** : JUDGE REYNOLDS

**DELIVERED** : 20 FEBRUARY 2015

**FILE NO/S** : CCPE 3707 of 2014  
CCPE 440 of 2015  
CCPE 441 of 2015

**BETWEEN** : THE STATE OF WESTERN AUSTRALIA  
Prosecution

AND

JN (A CHILD)  
Accused

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*Catchwords:*

Criminal law - Common purpose - Whether each of robbery and deprivation of liberty was a probable consequence of an aggravated burglary - Whether offender withdrew or took all reasonable steps to prevent offence - Turns on own facts

*Legislation:*

*Criminal Code* s 8, s 391, s 392, s 400

*Result:*

Guilty - Aggravated robbery

Not Guilty - Deprivation of liberty

*Category:*

**Representation:**

*Counsel:*

Prosecution : Mr S Stocks  
Accused : Mr R Keeley

*Solicitors:*

Prosecution : Director of Public Prosecutions (WA)  
Accused : Rod Keeley Legal

**Case(s) referred to in judgment(s):**

Darkan v R [2006] HCA 34

State of Western Australia v Majok [2005] WASC 13

**JUDGE REYNOLDS:****Introduction**

1           On 20 February 2015 I found JN guilty of an offence of robbery committed in circumstances of aggravation, not including being armed, and not guilty of an offence of deprivation of liberty. I gave some key reasons for my findings on that day so that counsel for both the State and JN would be able to proceed straight away with the sentencing of JN and three other co-offenders. I said that I would follow-up the key reasons mentioned with full written reasons. These are those written reasons.

2           JN is charged with three offences, all allegedly arising out of an incident at Cannington on 18 November 2014. Charge No. 3707/14 alleges an offence of burglary with intent in a dwelling, Charge No. 440/15 alleges an offence of unlawfully detaining Filippo Mallozzi (Mr Mallozzi), and Charge No 441/15 alleges an offence of aggravated armed robbery, namely, that JN stole from Mr Mallozzi, with violence, \$50 cash and two bottles of alcohol, the property of Mr Mallozzi, and that at the time JN was armed with a dangerous weapon, namely a hatchet, and that JN was in company, and that Mr Mallozzi was over the age of 60 years.

3           Three other young persons are also before the Court, each charged with the same three offences arising out of the same incident. All of these other three young persons have pleaded guilty to the three offences.

4           I should mention that when the other three young persons were each charged with the three offences, JN was only charged with the one offence of aggravated burglary on a dwelling.

5           The three charges against the other three young persons and the one charge against JN were all made by police. Subsequently, the prosecution briefs for all four young persons were forwarded to the Office of the Director for Public Prosecutions (DPP) at the Children's Court, Perth. After assessing the briefs, and in particular the brief for JN, the DPP decided to also charge JN with the offences of deprivation of liberty and aggravated armed robbery. Accordingly, Charges 440/15 and 441/15 respectively, were made and they were listed before the Court for the first time on 9 February 2015. JN pleaded not guilty to both of those charges on that day.

6           All four young persons appeared before me for sentence on 9 February last. In relation to the other three young offenders, I heard the

facts and also submissions from their respective counsel and the prosecutor representing the State. I decided that before proceeding to sentence all four young persons, including JN, I would conduct the trial and determine the two outstanding charges of deprivation of liberty and aggravated armed robbery against JN. I wanted to put myself in the position of sentencing all four young persons at the same time for the full extent of their respective offending in relation to the incident, whatever that was found to be. In the circumstances, I expedited the listing of the trial and conducted it on 16 February 2015.

7           These are my reasons and decisions on each of those two further charges.

### **Factual matters not in issue as between the State and JN**

8           On 12 December 2014 JN pleaded guilty to the charge of burglary with intent in the dwelling of Mr Mallozzi. There is no issue as between the parties that the material facts in relation to the dwelling burglary include that:

1.       At about 4:00 pm on Tuesday, 18 November 2014, the other three young offenders, JR, AM and RN, were consuming alcohol with JN at a public park in Queens Park.
2.       All four young persons formed the common intention to break into a house on their way from the park to the Queens Park Train Station.
3.       AM waited across the road from the house that was burgled, keeping a look out whilst RN knocked on the front door. No one answered the door. RN walked around the side of the house and smashed a window to the garage area of the house. Once inside the garage he opened the door and entered the house. He was initially followed by one of the co-offenders, that co-offender being JN, and then the other two co-offenders followed shortly after.
4.       There is also no issue between the parties that JN is also before the Court for sentence for three other burglaries committed on dwellings and a burglary committed on a place, all of which occurred prior to this burglary on the dwelling committed on 18 November last year at Cannington. Further to all of that, and in particular in relation to the offence of burglary with intent on a place committed on 4 October 2014 at Cannington, namely, the

Cannington Community College, JN was referred by the Court on 28 October 2014 to a Juvenile Justice Team.

5. Accordingly, as at 18 November 2014, the date of the incident in Cannington, JN had already been before the Children's Court for the one offence of burglary on a place and had also committed the three other dwelling burglaries in September and October of 2014.

9 I mention this prior Court referral and the prior offending, because later I will need to deal with a submission made by counsel for JN, in relation to JN saying, at transcript page 15 in his record of interview with the police, that ". . . the guy (RN) was not listening and then I was like, no, and then just get out of here before this gets worse". Counsel for JN submitted that that statement could be reasonably inferred to mean that JN wanted to get out of the house because he did not want to add to the charge for which he had already been referred to a Juvenile Justice Team and also the other offences and thereby make his position worse. Of course, if there is a reasonable inference open in favour of an accused then an adverse inference should not be drawn. An adverse inference from those words is that JN meant that he wanted to get out of the house before the seriousness of the factual circumstances escalated in a way which would have involved some threat of violence or the use of violence towards Mr Mallozzi.

### **Evidence at trial for the charges of deprivation of liberty and aggravated armed robbery**

10 At the trial, the evidence presented by the State consisted of reading, without objection, the statement of the occupant of the house, Mr Mallozzi, and playing the DVD recorded interview of JN with police conducted on Wednesday, 19 November 2014.

11 At the time of the incident, Mr Mallozzi was 87 years of age and had been living at the house for 26 years. On the day in question he was living with his son as he had been recently hospitalised for a month. He was going to his house a couple of times per week and on this particular day he was expecting a plumber to attend the house to do some maintenance. At about lunch time he was sitting in his arm chair in the lounge room and had fallen asleep. The lounge room is next to the kitchen and the front door. The house was locked up.

12 Mr Mallozzi stated that he woke up because he heard some noises inside the house at around 3:15 pm. The noises were coming from several areas within the house. He thought that the noises were being made by the plumber. He saw a person in the kitchen and initially thought that he was the plumber. He then saw that this person, a male person, was holding a knife. He stated that this person held a knife to the side of his throat and demanded money. He added that while the knife was being held to his throat, two other males looked through his pockets and then around his arm chair. He stated that the male with the knife remained with him while the other two searched through and ransacked the house, which involved opening all of the cupboards and moving furniture.

13 Mr Mallozzi also stated that the males were inside the house for at least half an hour. He thought that he could not move or they would kill him. He stated that one of the two males searching the house found an axe which he had hidden behind the cupboard in the lounge room. He added that this male said to the other males "look what I have found, this is better than the knife". The other male yelled out that he had found the money, and then all three males left his house through the side door to the carport with one of the males carrying two brown paper bags each with a bottle of liquor inside.

14 Mr Mallozzi also stated that at the time of the incident he had just woken up from his sleep and was not wearing his glasses. He added that it was also fairly dark inside the room. Because of these factors he was not sure if he could recognise the males again.

15 For the purpose of these two decisions, a key matter of fact is that Mr Mallozzi only spoke about three males being in his house.

16 I do not propose to go through and set out in microscopic detail what JN said in his interview. Rather, I will refer to and comment on some particular parts of it while at the same time bearing in mind everything he said as a whole.

17 On an overall assessment of JN and what he said in the interview, it is my firm view that he sought to minimise his involvement and to distance himself from what happened inside the house. There are a number of internal inconsistencies in his accounts on why he went into the house, what parts of the house he went into before he left it, and when he first saw Mr Mallozzi inside the house. On my assessment, the longer the interview went, JN shifted his position and gave more detail on the circumstances.

18 For example, initially JN spoke about RN going inside the house in a way that strongly suggested that he, JN, was not actually close to RN at that time. He also initially said that he went (inside) after (RN) to call on RN to go, and that he did that from inside the lounge room and without progressing anywhere else in the house beyond the lounge room because he had noticed an old man sleeping on the couch.

19 Later during the interview, JN spoke about being with RN and helping him to remove glass from the broken window to then enable RN to get inside without cutting himself. JN also spoke about RN asking him, when they were standing outside near the broken window, if he was going to come in and him saying that he would. JN also told the police that he followed RN through the window and into the garage and then into the house itself. He then spoke about himself and RN walking through the lounge room without seeing Mr Mallozzi and then into another room where RN was searching for something to steal.

20 JN then went on and told the police that it was only after that and when he was walking back through the lounge room that he noticed Mr Mallozzi. He said that Mr Mallozzi woke up and looked at him and then closed his eyes. He then went on to say that it was after he had seen the old man, that he then told RN who was in the room chasing money and stuff in the draws, to leave and also that he was going to leave. JN told police that he said to RN "let's leave" and that RN said "no". He told the police that he then actually left the house and went outside.

21 As I have previously mentioned, early in the interview, at transcript page 15, JN told the police that "the guy [RN] was not listening and then I was like no, and then just get out of here before this gets worse".

22 When considering what JN meant when he said those words, it is also necessary to take into account and consider what he later said in the interview at pages 18 and 19 of the transcript, namely:

**Question:** ... How long did you continue walking after on after you spoke about doing houses?

**Answer:** Uh, to go in there is like because I didn't want to [indistinct] in that time because I had curfew you know. I had my, I had a court date and whatever.

And I didn't want to add more stuff on there you know. So I could say in my, in my own way it's like I follow you know. I just went and like I, I [indistinct] with that property, but I went inside to call the guy back. Because the guy wasn't listening to

me. So I came back outside. And then I stay outside like for fifteen minutes you know waiting for them to come out of the house, but they didn't come back you know. And then it was like [indistinct] like if I have some stuff like that. And then because I was outside with some other guy too. We're just having a cigarette and the guy left. And then I was like "no, I can't stay here too and leave before the stuff gets worse you know."

23 I will set out my findings on this issue later.

24 When JN went back outside the house, he met up with the other two, JR and AM. They were with a male, a stranger, on the other side of the street having a smoke.

25 At transcript page 21 JN also said to the police:

". . . And then when I got there they were likes what's good inside? They're like there, I was like there is nothing. The only thing is good we should leave. And then they was like how come the other boys still inside there? I'm like well call him he doesn't want to come. And then them boys went and then they was in there like . . . More than twenty minutes, thirty minutes to be honest. Because I was waiting there for fifteen minutes and then I left. I like I left them in the inside there."

Later at page 47 of the transcript JN was asked and said:

**Question:** What else did you tell them?

**Answer:** That's all I told them. and then they started laughing.

**Question:** You didn't tell them about the elderly man that's in the house.

**Answer:** Yeah, I didn't tell them nothing you know."

26 While referring to passages from the transcript of the interview, I should add that in relation to a different factual issue, namely the use of a knife, at transcript page 35 when the police told JN that they believed a knife was used, JN said that he did not see one, but indicated that he had heard about the use of a knife later after the incident. The police did not ask JN any questions about a hatchet.

**The law and the issues arising pursuant to s 8 of the Criminal Code**

Section 8 of the *Criminal Code* (the Code) provides as follows:

**"8. Offence committed in prosecution of common purpose**

- (1) When 2 or more persons form a common intention to prosecute an unlawful purpose on 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.
- (2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person –
  - (a) withdrew from the prosecution of the unlawful purpose; and
  - (b) by words or conduct, communicated the withdrawal to each other person with whom the common intention to prosecute the unlawful purpose was formed; and
  - (c) having so withdrawn, took all reasonable steps to prevent the commission of the offence."

27 It was submitted by counsel for JN that JN withdrew from the unlawful purpose and took all reasonable steps to prevent the commission of the offence of robbery. It was further submitted that therefore, even if a robbery was a probable consequence of the unlawful purpose, JN could not be criminally liable for the robbery because it happened after he had withdrawn and taken all such reasonable steps.

28 Further, in relation to JN having withdrawn from the unlawful purpose, it was submitted that at the time of his withdrawal the only other person who was party to the unlawful purpose, the burglary on the dwelling, was RN and not JR and/or AM. Accordingly, it was submitted that pursuant to s 8(2)(b) of the Code, JN only had to communicate his withdrawal to RN, and not to JR and/or AM. Further to that, it was also submitted that JN had communicated his withdrawal to RN by trying to persuade RN to leave, by telling RN that he was leaving, and by actually leaving himself.

29 In relation to s 8(2)(c) of the Code, which requires the person having so withdrawn to take all reasonable steps to prevent the commission of the offence, it was submitted by counsel for JN that when considering this particular requirement, JN's age is a factor which should be weighed into

the overall consideration. JN was only 15 years and 10 months of age at the time. It was further submitted that a person as young as JN was at the time of the incident, could not be reasonably expected to contact the police and thereby incriminate himself.

30 The prosecutor submitted on behalf of the State, that a robbery is an offence of such a nature that its commission was a probable consequence of the unlawful purpose, namely the burglary on the dwelling, that JN did not withdraw from the prosecution of the unlawful purpose, and that anyway, JN did not take all reasonable steps to prevent the commission of the offence.

31 I should add that "the offence" in the context of the requirement in s 8(2)(c) of the Code is the offence which is a probable consequence of the prosecution of the unlawful purpose. Therefore, in the context of this particular case, the offence to be prevented is the offence of robbery.

32 The issues raised in this particular case essentially need to be considered in two parts. First, in the circumstances of this particular case, is a robbery an offence of such nature that its commission was a probable consequence of the prosecution of the unlawful purpose of the burglary. Secondly, if the answer to that question is "yes", then has the State satisfied me beyond reasonable doubt that JN did not withdraw as provided in s 8(2)(a), or that he did not communicate his withdrawal as provided in s 8(2)(b), or that he did not taken all reasonable steps as provided in s 8(2)(c).

### **Analysis of the law and the facts**

33 In relation to the first part just mentioned, I wish to explain the meaning of the words "probable consequence" as provided in s 8 of the Code.

34 In *Darkan v R* [2006] HCA 34, the High Court considered the meaning of the expression "a probable consequence" as used in s 8 and s 9 of the *Criminal Code* of Queensland. At pars 78, 79 and 81 of the Judgment of Gleeson, CJ; Gummow, Heydon, Kirby and Crennan JJ, their Honours said, amongst other things:

"The difficulty in defining a probable consequence is that once it is accepted that probable does not mean 'on the balance of probabilities' and that it means more than a real and substantial possibility or chance, it is difficult to arrive at a verbal formula for what it does mean and for what the jury may be told.

...

The expression 'a probable consequence' means that the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen.

...

Where it is necessary or desirable to explain the meaning of the expression 'a probable consequence' to a jury, a correct jury direction under s 8 would stress that for the offence committed to be 'a probable consequence' of the prosecution of the unlawful purpose, the commission of the offence had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose."

35 It can be noted that I have referred to robbery as being the offence of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose and not to an offence of aggravated robbery or an offence of aggravated armed robbery. Sections 391 and 392 of the Code provide as follows:

**"391. Term used: circumstances of aggravated**

In sections 392 and 393 –

*Circumstances of aggravation* means circumstances in which –

- (a) immediately before or at or immediately after the commission of the offence –
  - (i) the offender is in company with another person or persons; or
  - (ii) the offender does bodily harm to any person; or
  - (iii) the offender threatens to kill any person; or
- (b) the person to whom violence is used or threatened is of or over the age of 60 years."

**"392. Robbery**

A person who steals a thing and, immediately before or at the time of or immediately after doing so, uses or threatens to use violence to any person or property in order –

- (a) to obtain the thing stolen; or
- (b) to prevent or overcome resistance to its being stolen,

is guilty of a crime and is liable –

- (c) if immediately before or at or immediately after the commission of the offence the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed, to imprisonment for life; or
- (d) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years; or
- (e) in any other case, to imprisonment for 14 years."

36 The reason that I have only referred to robbery, is that sections 392(a) and (b) of the Code create the offence of robbery. Absent any circumstance of aggravation as provided in s 391, such as being in company, or a victim of the actual or threatened violence being of or over 60 years of age, and also absent the provisions of s 392(c) applying such that the offender was not armed with any dangerous or offensive weapon or instrument or pretended to be, then the statutory maximum penalty of 14 years imprisonment as provided in s 392(e) applies for an offence of robbery.

37 Accordingly, in cases of robbery, whether an offender is in company, the victim is of or over 60 years of age, and/or the offender is armed, are circumstances which go to penalty and so to sentencing, and not to the threshold issue of whether or not a person is criminally liable for an offence of robbery. In saying that, I adopt the reasoning of Murray J in the case of the *State of Western Australia v Majok* [2005] WASC 13.

38 Approaching the matter in the way just mentioned, a key issue in this case is not whether an aggravated robbery or an aggravated armed robbery is a probable consequence of the unlawful purpose of the aggravated burglary, but rather whether a robbery is a probable consequence of the aggravated burglary. When deciding that issue it is necessary to consider the particular factual circumstances of the aggravated burglary.

39 If in this particular case I find that a robbery is a probable consequence of the aggravated burglary, I would then need to move on and consider for the purpose of sentencing JN, whether or not he was in company, the age of the victim to whom the violence was used or threatened, and also whether or not he was armed or knew that a co-offender was armed or would arm himself.

40 In the circumstances of this particular case, I find that JN knew that Mr Mallozzi was in the house when he first entered the lounge room of

the house. On my overall assessment of JN and what he said in his interview and what Mr Mallozzi said about the layout of his house, I find that JN entered the house immediately behind RN. They both entered the house intending to steal property from inside the house. They walked across the lounge room and to the other rooms of the house to do that. I have no doubt that both of them, and particularly JN, would have been looking around as soon as they entered the house from the garage. Mr Mallozzi would have been clearly visible to both of them in his arm chair in the lounge room. It was late afternoon. It was not night time. I have no doubt that JN saw Mr Mallozzi soon after he first entered the lounge room and before he went to one of the other rooms looking for property to steal. Anyway, before JN left the house, he clearly knew that Mr Mallozzi was inside. Indeed, I accept and find, that JN knowing that Mr Mallozzi was in a chair in the lounge room, was the catalyst for JN eventually deciding to leave the house.

41 In my view, whether or not an offence of robbery was a probable consequence of the unlawful purpose, namely, the aggravated burglary, does not fall to be determined by considering whether or not, subjectively, JN thought that the seriousness of the burglary would or could escalate to a threat of violence or use of violence against Mr Mallozzi. Accordingly, when JN spoke in his interview about it getting worse, whether he meant his position in relation to the number of cases for which he would have to be dealt with by the Children's Court, or whether he meant the seriousness of the particular burglary itself escalating to include a threat of violence or the use of violence against Mr Mallozzi, is relevant in deciding the issue of whether JN withdrew but not the issue of probable consequence.

42 That said, I nevertheless wish to add that I find that when JN said ". . . just get out of here before this gets worse" as set out on page 15 of the transcript of the interview, he meant that he should get out of the house before something serious happened involving some threat of violence or the use of violence against Mr Mallozzi.

43 I am also of the firm view and find, that the initial statements made by JN in the passages on pages 18 and 19 of the transcript of the interview to which I have earlier referred, to the effect that he did not want to add to his list of charges to be dealt with by the Court, were said by him in an attempt to try and mislead and to also minimise his involvement in the burglary for the purpose of avoiding responsibility for the threat and use of violence committed against Mr Mallozzi.

44 It is also my firm view and I find that when JN spoke at the end of those passages about leaving "before the stuff got worse", he was again referring to leaving the house before something serious happened involving some threat of violence or the use of violence against Mr Mallozzi.

45 I now move on to pose and answer the question whether an offence of robbery is a probable consequence if an offender or offenders are inside a person's house to steal property at a time when an occupant is also inside the house? In my view the answer to that question is "yes". Further in my view, it is not necessary to consider whether the occupant is awake or asleep when the offender or offenders are inside the house or the proximity of the offender or offenders to the occupant when they are inside the house, in order to properly answer that question.

46 In my view, if an offender is inside a house with the intention of stealing some property and an occupant is also inside the house, then that is enough to give rise to a probable consequence that the occupant will do something to try and stop the offender from stealing the property and that the offender will at least threaten to use violence towards the occupant for the purpose of enabling him or her to leave the house with the stolen property. The existence of further particulars such as the occupant being awake or being in close proximity to the offender or offenders would enhance the probable consequence of a robbery.

47 I have reached this finding, noting but not relying on the provisions of s 400(1)(b) the Code, which provides that it is a circumstance of aggravation in relation to an offence of burglary if immediately before the commission of the offence the offender knew or ought to have known that there was another person (other than a co-offender) in the place. Clearly this circumstance of aggravation is legislative recognition that if an occupant disturbs an offender inside his or her house, then violence or the threat of violence by the offender towards the occupant could well happen.

48 I have not relied on the provisions of s 400(1)(b) at all in deciding this particular case because it is not alleged by the State. That may well be because JN was aware that RN first knocked on the front door of the house and that it was only after no-one answered that RN then went and broke and entered the house through a side window. On those facts, there would be merit in the argument that it would not be open to make a finding that s 400(1)(b) applied.

49           That said, on a consideration of the facts in this particular case, even though it could not be found that JN knew or ought to have known that another person (other than a co-offender) was inside the house, I find that upon JN entering the house and first entering the lounge room, he came to know that Mr Mallozzi was inside the house. Accordingly, in the case of JN, when considering whether a robbery was a probable consequence of the offence of aggravated burglary, it is necessary to take into account that when JN was inside the house committing the burglary, he knew that Mr Mallozzi was also inside the house.

50           In order for the State to establish that JN is deemed to have committed the offence of robbery pursuant to s 8 of the Code, in addition to establishing that the robbery was a probable consequence, it must also negative beyond reasonable doubt at least any one of the provisions of s 8(2)(a), (b) and (c). Pursuant to those provisions, in addition to JN having to withdraw from the prosecution of the burglary and communicate that by words or conduct to RN, JR and AM, he also had to take all reasonable steps to prevent the commission of the robbery.

51           It should be noted that s 8(2)(c) requires JN to have taken "all" reasonable steps and not just "a" reasonable step. With respect, I do not agree with the submission made by counsel on behalf of JN, that JN could not reasonably be expected to contact or cause some other person to contact the police to alert them of what was happening because of his young age and/or because by doing so he could or would incriminate himself in a burglary offence. Anyway, there is no direct evidence, or any sufficient factual basis for an inference to be properly drawn, that JN did anything at all to prevent the commission of the robbery against Mr Mallozzi.

52           I am satisfied that s 8(2) of the Code does not apply to JN. Combining this finding with my earlier findings, he is therefore deemed to have been a party to the robbery committed against Mr Mallozzi.

53           I wish to comment on the submission by counsel for JN to the effect that there were two distinct aggravated burglaries in this particular case. The first in time was committed by RN and JN. It came to an end when JN told RN that he was leaving and left the house. The second was committed by RN in company with both JR and AM after both JR and AM entered the house and joined up with RN. With respect, in my view there were not two distinct aggravated burglaries in this particular case. Rather there was one continuous offence of aggravated burglary and JN was a party to it from start to finish. Accordingly, I reject the submission

that pursuant to s 8(2)(b) of the Code that JN only had to communicate a withdrawal to RN and not also to JR and AM. In my view, pursuant to s 8(2)(b) JN also had to communicate a withdrawal to both of JR and AM. JN did not do that.

54 When at the park, all four young offenders formed a common intention to commit a burglary on the way from the park to the train station. While RN broke the window and went into the house first, closely followed by JN, with the other two JR and AM waiting outside, this burglary was committed in furtherance of that common intention entered into by all four of them. When JN came out of the house and met up again with JR and AM, JN remained fully aware of the common intention of all four of them.

55 Going on what JN told the police during his record of interview, when he met up with JR and AM outside the house, both JR and AM were clearly interested in what RN was doing still inside the house. There is no issue taken by JN with the material fact that AM waited across the road as a lookout. Consistent with and pursuant to the common intention, which was still ongoing, both JR and AM went inside the house to join RN. JN was outside with them when they moved off to go inside the house. He did not tell them, or either of them in each other's presence, that he was withdrawing from the common intention. Also he did not tell them about Mr Mallozzi being inside the house. JN knew that both JR and AM were going inside the house in furtherance of the common intention that all four of them had earlier reached at the park. JN then waited outside for a considerable period of time for all three of RN, JR and AM to come out of the house. He waited knowing that Mr Mallozzi was inside the house and that the situation could well escalate to a threat of violence or the use of violence against Mr Mallozzi.

56 In addition to the State satisfying me that JN failed to satisfy the provisions of s 8(2)(c) of the Code, it has also satisfied me that JN failed to satisfy the provisions of each and both of sections 8(2)(a) and 8(2)(b) of the Code.

57 Finally and for completeness, I wish to say that even if there was merit in the submissions by counsel for JN that JN was only a party to a burglary with RN and that he only had to communicate his withdrawal to RN and that he did so, then he would still be guilty of the offence of robbery committed against Mr Mallozzi in circumstances of aggravation, but not armed, because, (1) a robbery was a probable consequence of that burglary; and (2) RN engaged in threatening violence against Mr Mallozzi

to steal property; and (3) JN took no reasonable step at all to stop that happening.

58 While I have found that JN is criminally responsible for the offence of robbery committed against Mr Mallozzi, I wish to add that the fact that JN left the house and did not actively participate in the violence committed against Mr Mallozzi is a very significant factor favourable to him in the context of sentence.

59 Having concluded that JN is a party to the robbery committed against Mr Mallozzi, it is now necessary for me to consider the circumstances of the robbery relevant to sentence. First, does the circumstance of aggravation of being in company apply? The answer to that question is clearly "yes". Secondly, was the victim, Mr Mallozzi, over 60 years of age? The answer to that question is clearly "yes". Thirdly, does s 392(c) of the Code apply for the purpose of sentence? Section 392(c) concerns the circumstance of being armed, which if applicable, elevates the statutory maximum penalty for the robbery to imprisonment for life.

60 There is no evidence at all that JN knew that any one of the other three offenders had a weapon, be it a knife or a hatchet or whatever, before each of them entered the house, or that any of them intended to try and obtain one once inside the house. Further to all of that, on the evidence, the common intention did not extend to someone using a weapon in the course of a burglary, despite as a matter of fact that actually happening. I am not satisfied that s 392(c) applies.

61 For all of these reasons I find that JN should be sentenced on the basis that he was a party to the robbery committed against Mr Mallozzi and that he committed it in the circumstances of aggravation, namely, that he was in company, and that the victim, Mr Mallozzi was over 60 years of age at the time. Such an offence committed in such circumstances carries a statutory maximum penalty of imprisonment for 20 years.

62 JN should not be sentenced for the robbery with the circumstance of aggravation of being armed also applying.

63 There is also the further charge of deprivation of liberty which needs to be determined. In my view, in the circumstances of this case, the offence of deprivation of liberty is not of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose, namely the aggravated burglary. Further, and particularly in relation to JN, the common intention did not include any intention to unlawfully detain any occupant of a house. Also there is not a

sufficient factual basis for an inference to be properly drawn that JN knew or ought to have known that one or more of the other three offenders would remain in the house for as long as they did.

64           The State has not satisfied me beyond reasonable doubt that s 8 of the Code deems JN guilty of the offence of deprivation of liberty, and so I find him not guilty of it.

### **Conclusions**

1.       I find JN guilty of the offence of robbery committed against Mr Mallozzi and that he should be sentenced on the basis that it was committed in circumstances of aggravation, namely, that JN was in company and that the victim, Mr Mallozzi, was over the age of 60 years at the time; and
2.       For the purpose of sentence, I find JN not guilty on the circumstance of being armed in relation to the robbery; and
3.       I find JN not guilty of the offence of deprivation of liberty.