HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA: **No. A14/2022**

ADELAIDE REGISTRY

BETWEEN:

BENJAMIN JOHN MITCHELL

Appellant

And

THE KING

Respondent

APPELLANT'S REPLY

Part I: CERTIFICATION OF SUITABILITY

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: REPLY TO THE ARGUMENT OF THE RESPONDENT

2. There are several matters that warrant a reply. The first is the factual submissions the respondent makes concerning Mr Mitchell. The second concerns the trial judge's directions about a "smack on the back of the leg". The third is that, should the appellants submissions be accepted, it would require the reopening or overruling of the decision of this court in *McAuliffe v R* (1995) 183 CLR 108 (*McAuliffe*). The fourth concerns the operation of s.12A CLCA and its intersection with the common law doctrine of extended joint criminal enterprise (EJCE). The submissions by the respondent should not be accepted.

Facts concerning Mitchell: respondent's submissions [5],[11]

3. The respondent submits (at [11]) that evidence given by one witness (Carson) of what was said to her about Mitchell's involvement is inadmissible evidence *against* Mitchell. Although the evidence of one co-accused is not admissible *against* a co-accused, the evidence of Ms Carson, a Crown witness, can be evidence in *favour* of a co-accused. So, Ms Carson's evidence of what was said, could support Mr Mitchell's case.

The "smack" to the back of the leg: respondent's submissions [14-16]

4. The appellant respectfully disagrees with the respondent's assertion that the above remark by the trial judge was only used as a device to illustrate the differing requirements as to liability for murder and constructive murder.

5. The appellant refers to directions given by the trial judge on pages 50-51, 61, 63, 69, 269, 270, 277, 278 of the Joint Core Appeal Book (**JCAB**) concerning "*an* intentional act of violence". It may be significant that the jury asked for further directions from the trial judge about three matters including, a "further explanation of contemplation and intention for our understanding" (JCAB at 268).

Does McAuliffe require reopening or overruling? respondent's submissions [3], [17]-[44]

6. As to the respondent's third principal submission (at respondent paragraph [3]), that acceptance of the appellants submissions would require the reopening and overruling of the decision of this court in *McAuliffe*, the appellant submits that is not correct.

10 7. The facts and relevant passages from the decision in *McAuliffe* are set out in the appellant's principal submissions. It is, however, worthwhile re-emphasising the following. *McAuliffe* is a straightforward example of the application of the principles concerning joint criminal enterprise and *not* extended joint criminal enterprise. As such, *McAuliffe* says nothing expressly about the application of extended joint criminal enterprise to constructive murder. Rather, the central question in *McAuliffe* was whether, even if the intentional infliction of grievous bodily harm was not *part of their* common purpose, if a co-accused *contemplated* the intentional infliction of serious bodily harm as part of their common purpose, that was *sufficient* for the purposes of imposing liability on them for murder: the court held that it was.

20 8. The respondent's argument seems to be: (1) an accused person can be convicted of common law murder if he or she intends to inflict serious bodily harm, even if they do not intend death; (2) a secondary participant can be convicted of murder under the doctrine provided they have the requisite foresight of serious bodily harm: (3) requiring a different foresight (i.e. death or an act capable of causing death) for constructive murder would create an incoherence in the law. Thus, in respondent's paragraph [36] it is stated:

"None of the decisions in *McAuliffe, Gillard, Clayton* and *Miller* require that the co-venturer, **in addition** to contemplating the intentional infliction of grievous bodily harm as a possible incident of the enterprise, must contemplate an act causing death, or an
30 act capable of causing death, as the appellants variously contend". (bold added)

9. So much may be literally correct. In any event, the point raised by the appellant can be considered without requiring *McAuliffe* to be reopened or overruled because the issue raised by the appellant is: what must be foreseen by a co-accused in cases of

constructive murder where an element of the offence is that the act of violence causes death? None of the decided cases in this court have authoritatively addressed that issue.

10. Moreover, the respondent's submission (at [36]) should be considered against what this Court said in *Miller* v *R* (2016) 259 CLR 380 at 387 [1]:

"… in this context, the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime *and foresees that death or really serious bodily injury* might be occasioned by a co-venturer acting with *murderous intention* and he or she, with that awareness, continues to participate in the agreed criminal enterprise." (*italics added*)

11. Thus, for liability to attach in the context of common law EJCE, it is *necessary that* there is *foresight* that death or really serious bodily injury might be occasioned by a co-venturer acting with *murderous intention*. (cp. respondent's submissions at [37]). As re-emphasised later in the court's reasons in *Miller*: in the paradigm case, the necessary foresight is that a party to the enterprise may commit *murder* and with that knowledge continue to participate: (at [45]). Foresight of an intentional act of violence is not the equivalent of foresight *of murder*. If the former was the only requirement, it may be asked rhetorically, what happens to the distinction between assault and murder and murder and manslaughter.

12. Furthermore, when it comes to the elements of s.12A CLCA, the intentional act of violence must cause the death (even if death is not intended). *If* one is to overlay the doctrine of EJCE on the statutory requirements then, consistently with the minimum requirements of the common law doctrine of EJCE, it would appear to be *necessary that* there is foresight of an act causing death or an act capable of causing serious bodily harm or death *when* the perpetrator has murderous intention. The trial judge's direction - that all that was required was foresight of "*an*" intentional act of violence *simpliciter*, is not *sufficient* for liability to attach given those predicates.

13. That submission does not involve questioning the authority of *McAuliffe or Gillard or Clayton or Miller* but rather their acceptance. It recognises that any overlay must satisfy the requirements of common law EJCE where death results from an intentional act of violence done with murderous intent.

Respondent's submissions on s.12A CLCA: [53]-[73]

14. The appellant relies upon its principal submissions as to the correct statutory interpretation of s.12A CLCA and also agrees with the submissions by the other appellants about the construction of s.12A CLCA.

15. The essential point about s.12A CLCA is that *the person* who commits the intentional act of violence that causes the death of another is guilty of murder. In common law felony murder cases, the act causing death had to be within the scope of the common purpose too: see e.g. *The Queen* v *Jogee* [2017] AC 387 at [23] (compare respondent at [83]). One can readily understand why the common law moved away from the harshness of the common law felony murder rule because, a finding of guilt was usually followed by death by hanging. On the facts here, the Crown case was that the foundational offence did not involve acts of violence.

Constructive murder and displacement of the common law principles: respondent [74]-[97]

16. The respondent puts the position thus in paragraph [77] of its submissions: "[i]n order to construe s.12A as *displacing* the common law principles of complicity …" (italics added: see also respondent paragraph [79]). The appellant submits that, "displacement" assumes that the doctrine would or could otherwise operate, whereas the question to be decided is: can the doctrine – given its *sui generis* nature - operate *harmoniously* with s.12A CLCA, and, if so, what must be foreseen? The appellants, for their respective reasons, have argued otherwise.

17. Reliance upon common law principles of accessorial liability (respondent's submissions at [78]) which did not consider the specific situation now under consideration does not really advance matters. As mentioned, EJCE is a *sui generis* form of liability with its own distinct content and rationale: *Miller* (2016) 259 CLR 380 at 398[34].

18. The authorities referred to by the respondent do not address s.12A CLCA and are not, therefore, of direct application. The most that can be said of them is that, in broad terms, there has been an assumption that the common law principles of complicity can apply in cases where the actual decisions did not depend upon the application of EJCE as articulated in the decisions of *McAuliffe* and *Miller*.

19. The respondent seeks to summarise the basis of the appellants argument in paragraph [95] but the argument is not put in that way. Rather the argument is given the requirements of the doctrine as expressed by the court, the lesser standard of conduct in s.12A CLCA, i.e. an intentional act of violence simpliciter, cannot support the attraction of the doctrine to its operation.

Content of EJCE in the context of constructive murder: respondent's [98]-[111]

20. The appellant disagrees with the statement in respondent's paragraph [99] that the grounds seek to change the threshold of violence required for s.12A CLCA. On the

contrary, s.12A CLCA requires an act of violence that causes or results in death. It is artificial to separate out the requirement of an act of violence from its consequences (cp. respondent submissions at [107]). An act of violence without the consequence of death does not result in an offence under s.12A CLCA.

21. For the reasons given in the appellant's principal submissions, it is foresight of the incidental *crime* coupled with continued participation that results in the liability of the secondary participant. The respondent's submissions have the effect of divorcing the act of violence from its consequence; but in the leading authorities that have considered the doctrine, the relevant foresight is that of murder being committed: see e.g. *Miller* (2016) 259 CLR 380 at 387[1], 390[10] and 402[45] and to speak of foresight of "murder" involves foresight of death occurring.

22. The heart of the respondent's argument (at submissions [108]) that, excluding proof of foresight of death as a consequence of the intentional act "*maintains the link with the liability of the principal*" omits the statutory requirement in s.12A CLCA that the intentional act of violence causes the death. In other words, the true link involves recognition that the primary participant has caused the death of another; something less than that fails to have regard to the statutory requirements.

Conclusions

23. For the reasons given above and in his principal submissions: (1) this court is not being asked by the appellant to reopen and overrule *McAuliffe*: (2) the appellant considers that *McAuliffe* and *Miller* contain correct statements of the doctrine; (3) however, in neither case was the court required to address the interaction of the doctrine with s.12A CLCA. Similarly, the appellant submits that the court should not accept the respondent's submissions that foresight of "an" intentional act of violence is sufficient for the imposition of liability, on a secondary participant, for constructive murder.

Dated 7 October 2022

Andrew Tokley KC
Counsel for the appellant Mitchell.
Mobile:0416 054 029
Email: andrew.tokley@5wentworth.com