



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: A16/2022  
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IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY

BETWEEN:

BENJAMIN JOHN MITCHELL,  
ALFRED CLAUDE RIGNEY,  
AARON DONALD CARVER

Appellants

and

MATTHEW BERNARD TENHOOPEN

Applicant

and

THE KING

Respondent

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## RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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### Part I: Certification for publication

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

### Part II: Outline of the propositions to be advanced in oral argument

2. **The appellants' grounds relating to the interaction between murder and the principles of complicity require the re-opening of *McAuliffe* (and by extension its repeated affirmation in *Gillard, Clayton and Miller*)**

- Proof of murder against a principal offender does not require proof of an intention to kill or foresight of the victim's death. *McAuliffe v The Queen* (1995) 183 CLR 108 held that a participant in a joint criminal enterprise who foresaw the infliction of grievous bodily harm as a possible incident of the venture would possess the requisite intention for murder. The dicta in *McAuliffe* was reaffirmed in *Gillard v The*

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*Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 81 ALJR 439; and *Miller v The Queen* (2016) 259 CLR 380. The appellants' submissions that a participant in a joint criminal enterprise must foresee the possibility of the victim's death, or an act capable of causing death, in order to possess the requisite intention for murder require the re-opening of *McAuliffe* and *Gillard*, *Clayton* and *Miller*.

- This Court has previously heard challenges to the doctrine of extended joint criminal enterprise and has, in each instance, reaffirmed that the doctrine forms part of the common law of Australia.

10    **3. Extended joint criminal enterprise attributes to co-venturers acts within his/her contemplation, irrespective of “authorization”**

- To focus on notions of “authority”, as the appellants do by invoking the language of derivative liability, overlooks the way in which the doctrine of extended joint criminal enterprise apportions liability between co-venturers: *Gillard v The Queen* (2003) 219 CLR 1. A co-venturer in a joint criminal enterprise shall be held liable for acts that were within his/her contemplation, irrespective of whether he/she authorised the acts.

**4. The construction of s 12A of the *Criminal Law Consolidation Act* (SA)**

- 20    • The application of well-settled principles of statutory construction do not justify reading additional words into, or otherwise departing from, the ordinary, textual meaning of s 12A of the *Criminal Law Consolidation Act* (SA).

**5. The applicability of common law principles of complicity to s 12A**

- 30    • Historically, common law principles of complicity applied to the common law offence of felony murder. Section 12A does not, by clear and unambiguous language, expressly or impliedly exclude, or modify, the operation of those common law principles. An appeal against conviction for murder by way of s 12A, where the conviction was based on the principles of aiding and abetting or joint criminal enterprise, was dismissed in *Arulthilakan v The Queen* (2003) 78 ALJR 257.
- In circumstances where s 12A does not clearly and unambiguously modify or displace common law principles of complicity, there is no basis for interpreting the

provision as modifying or displacing the allied common law doctrine of extended joint enterprise.

**6. The content of extended joint criminal enterprise liability in the context of constructive murder**

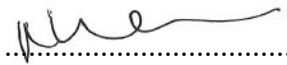
- Once it is accepted that common law principles of complicity apply to statutory murder by way of s 12A, it follows that those same principles define the liability for co-venturers for acts within their contemplation.
- A co-venturer in a joint criminal enterprise to commit aggravated serious criminal trespass who foresees the infliction of an intentional act of violence, and who participates notwithstanding, is liable for statutory murder according to the ordinary application of the doctrine of extended joint criminal enterprise.

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Dated: 6 December 2022



J P Pearce KC



R I Walker

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