HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM
THE COURT OF APPEAL OF THE SUPREME COURT OF SOUTH AUSTRALIA

No A17 of 2022

BETWEEN: MATTHEW BERNARD TENHOOPEN
Applicant

and

THE KING
Respondent

APPLICANT'S SUBMISSIONS IN REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

2. At RS [93]-[94], the Respondent describes the position for which it contends as affording s 12A "its ordinary literal meaning". However, the actual terms of s 12A say nothing "literal" about the application of EJCE principles to s 12A. The suggestion (see RS [109]) that Parliament in enacting s 12A has made some calculated "qualitative assessment" regarding the liability of people in the position of Tenhoopen is without foundation. The mantra of "text, context and purpose"[1] does not assist the Respondent.

3. It does not assist, in resolving the question of the interaction (if any) between EJCE principles and s 12A of the *Criminal Law Consolidation Act*, to point out that "Parliament explicitly turned its mind to the relevant thresholds" (cf RS [79]). The only "thresholds" addressed by s 12A (see RS [63]-[69]) relate to liability in the paradigm case of a primary offender who *commits an intentional act of violence* – ie, a person who chooses to take the risks associated with the commission of a *particular* act of

[1] At RS [59], the Respondent partially quotes from s 14 of the *Legislation Interpretation Act 2021* (SA) in support of its supposedly "purposive" construction of s 12A, but omits to mention s 14(2), which states: "This section does not operate to create or extend any criminal liability." In any case, the terms of s 12A do not support a conclusion that a "purpose" or "object" of the provision was to impose liability for murder on persons who merely contemplate the commission of *any* intentional act of violence, should a co-venturer cause the death of a person by *some* (potentially quite different) intentional act of violence.

violence in the course or furtherance of a relevant major indictable offence.

4. Indeed, two textual features of s 12A point strongly in the opposite direction. The first is the express application of s 12A to a person who "*commits*" an "*intentional* act of violence". This is not suggestive of a parliamentary intention that s 12A should impose liability for murder on all persons who merely foresee the possibility of the commission of an act of violence but who do not *intend* it, especially when the foreseen act might be entirely different from the act in fact committed and which in fact causes death.

5. The second relevant feature of s 12A is its confinement of liability to a person who commits an intentional act of violence *and thus causes the death* of another person. That is, it is not the commission of just *any* intentional act of violence that is relevant to liability of a principal offender under s 12A: it is the intentional commission of *the particular act* that causes the death of a person. A principal offender is not guilty of murder if they commit an intentional act of violence in the course of a relevant offence and a person happens to die from some other cause; they are guilty of murder only if they intentionally commit *the* act of violence that causes the person's death.

6. As explained at [51]-[56] of Tenhoopen's primary submissions, to apply EJCE liability on top of s 12A in the manner authorised by the trial Judge's directions in this case produces a complete disconnect between the *contemplated* intentional act of violence – the risk which the co-venturer knowingly ran – and the act of violence that was *actually committed* and which caused the death of the accused. That kind of disconnect does not arise with either joint criminal enterprise liability or accessorial liability.

7. In the case of joint criminal enterprise liability, if the primary offender's act is within the scope of the criminal enterprise – that is, within the scope of the parties' agreement – as is required for joint criminal enterprise liability, then the act is properly attributed to each of the parties to the agreement, and the parties' agreement to an enterprise that contemplates the commission of acts of a particular kind amounts to an intention to commit such acts, should circumstances arise that call for the carrying out of that aspect of their agreement. If an act done is within the scope of the agreement, and that act causes the death of a person, then each party to the agreement will properly be held liable for murder under s 12A in accordance with principles of joint criminal enterprise. (Conversely, though, if the parties' agreement contemplates only some particular act(s) of violence, and one of the parties then commits an entirely different act of violence, that was *not* the subject of the agreement, the other parties should not be held liable for murder under s 12A, because that different act of violence, not being within the

contemplation of the agreement, is not to be attributed to the other participants and cannot be said to have been intended by them.

8. In the case of accessorial liability (aiding or abetting, counselling or procuring), a secondary offender will be criminally liable for acts committed by the principal offender if, but only if, they provide assistance or encouragement with full knowledge of the conduct of the principal. So, a person may be liable for murder under s 12A if they encourage or assist a person to commit a particular intentional act of violence, in the knowledge that the person is committing that act of violence and is doing so in the course or furtherance of a relevant major indictable offence. But a person can only be liable on the basis of accessorial liability if they, with the requisite state of mind, encourage or assist in the commission of the actual intentional act of violence that causes the death of the accused.

9. At RS [69], the Respondent submits that s 12A establishes "Parliament's determination" that "people who commit an intentional act of violence *in a way that causes the death of another* in the course or furtherance of another sufficiently serious criminal offence, may be held criminally responsible as murderers". That appears to be a description of the intended operation of s 12A *in relation to a primary offender* – ie, the person who themself commits a particular "intentional act of violence". It is immediately apparent, however, that the application of EJCE principles to s 12A, in the manner contemplated by the trial Judge's directions in this case, departs radically from that suggested intention. Far from producing liability for murder for a person who commits an intentional act of violence in a way that causes the death of another, it renders a person liable for murder if they contemplate a co-venturer committing an intentional act of violence, *irrespective* of whether the *contemplated act of violence* causes the death of another (and, indeed, irrespective of whether the contemplated act is even committed at all), if a co-venturer in fact commits *any* intentional act of violence (no matter how different from what was contemplated) and *that* act causes the death of another.

10. At RS [108], the Respondent submits (emphasis added):

> To limit secondary liability to where the co-venturer contemplates the commission of <u>an</u> intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more (other than abortion) but excluding proof of foresight that death might be the consequence of such intentional act, maintains the link with the liability of the principal … .

But in truth, imposing liability for murder when all that is contemplated is *an* intentional

act of violence, and not *the* intentional act of violence that in fact causes death, does *not* "maintain the link with the liability of the principal". The principal is only liable for the murder if death is the consequence of the actual act of violence which the principal both intends and commits. The principal is not liable just for committing (let alone contemplating) *any* act of violence irrespective of whether it is the act that actually causes the death of another.

11. So unjust and improbable is it that a co-venturer who contemplates the commission of *any* kind of act of violence should be held liable for murder if death results from *some other* act of violence (even one completely different from the act that in fact caused death), that the Respondent on at least two occasions appears to have misdescribed the effect of its own position. At RS [100] it is said (emphasis added):

> … [T]he relevant question … is whether or not a participant in a joint criminal enterprise has contemplated as a possibility that a co-venturer would commit an intentional act of violence while committing the foundational offence. If the participant does, and if that intentional act of violence committed by the co-venturer results in the death of another, then liability under s 11 via s 12A and the extended joint criminal enterprise pathway is established.

12. At RS [101] it is submitted (emphasis added):

> … An accused's liability requires the prosecution to establish that there was a joint criminal enterprise to commit a foundational offence, and that in the course and furtherance of that foundational offence, a participant commits an intentional act of violence that causes the death of another. Provided that the intentional act of violence (which, as a matter of fact, causes the death of another) is within the contemplation of the members of the enterprise, the respondent submits,

13. The operation of EJCE principles in relation to s 12A as described in these passages is not reflected in the directions given by the trial Judge in this case. If the Respondent did actually accept that these were accurate descriptions of the way the doctrine of EJCE applies to s 12A, this would closely reflect the submission advanced at [73]-[77] of Tenhoopen's primary submissions. That submission is barely engaged with by the Respondent but is rejected at RS [110].

14. At RS [44], the Respondent submits that acceptance of the appellants' contentions would "generate incoherence with the fault element for murder". But, it is respectfully submitted, that is not correct. The relevant states of mind necessary for primary liability for murder at common law, on the one hand, and liability through EJCE, are not the same on any view. For the primary offender, the relevant state of mind is intention to commit grievous bodily harm or death (or knowledge that grievous bodily harm or death

is the probable result of their act). For the offender potentially liable through the doctrine of EJCE, the relevant state of mind does not involve intention or knowledge, but foresight of a possibility. To the extent that "coherence" is necessary or desirable, it lies in the fact that what the secondary offender must contemplate includes that the primary offender may do an act *with the fault element for murder*. No-one disputes that that is a requirement for EJCE. The question is whether that is sufficient by itself or whether contemplation of the possible result (death) should also be required. If it is required, that does not create any "incoherence" with the fault element for murder; it is just another respect in which liability under EJCE principles differs from liability of the primary offender who performs the act that causes death.

15. Finally, the submission at RS [14]-[15] purports to "dispose of the point" arising from the trial Judge's direction that an "act of violence" could relevantly be a smack or strike to the back of the leg by asserting that Doyle JA was right to say that this "was not a case that tested that aspect of s 12A". But this misses the point. The appellants' arguments are not concerned with the fact of whether one of the five men committed an intentional act of violence. At least one of them *did* commit an intentional act of violence, striking the deceased in the head, which caused his death. The important point is that the jury were told that Tenhoopen and each of his co-accused would be guilty of murder if they had *contemplated the possibility* of the commission of *any* act of violence – including, as the trial Judge's directions suggested, something as trivial as a mere smack to the back of the leg. It was made clear that *all* that was necessary was contemplation of *any* act of violence, not an act of violence of the kind that actually killed the deceased, or of a kind likely to kill or normally capable of killing anyone.

Dated: 7 October 2022

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