HIGH COURT OF AUSTRALIA

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File Number:	P53/2021
File Title:	O'Dea v. The State of Western Australia
Registry:	Perth
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	11 Mar 2022

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P 53 of 2021

BETWEEN:

BRETT CHRISTOPHER O'DEA
Appellant

and

THE STATE OF WESTERN AUSTRALIA
Respondent

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APPELLANT'S REPLY

Part I: Publication

1. This reply is in a form suitable for publication on the internet.

Part II: Concise reply to the argument of the respondent

2. In relation to [2.3] of the respondent's submissions, the proper application of s10(c) of the *Interpretation Act* 1984 (WA) to s 7(a) of the *Criminal Code* requires the act or acts of each of the accused to "*constitute the offence*".

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3. As to the use by the respondent, including at [3] and [13] of the respondent's submissions, of the phrase the "*composite act*", the learned trial Judge did not direct the jury that they were required to be satisfied that the "*composite act*" was unlawful, but that the acts of the relevant individual accused were unlawful.

4. As to [4] of the respondent's submissions, the Court of Appeal stated at [114] that the concept of "*acting in concert*" for the purposes of joint criminal responsibility under s 7(a) "*connotes that the persons are acting in combination or are collaborating with each other or have joined forces.*" The trial Judge did not direct the jury that this is what "*acting in concert*" connoted, but said that it meant that the accused were acting together.

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Ground 1

5. The distinction drawn in ***Pickett***[1] between the effect of excuses under Ch V of the *Criminal Code* and the effect of justifications such as those found in Ch XXVI of the Code, is relevant not only to the question of whether an accused is an aider under s 7(c) of the *Criminal Code*, but is relevant to the issue of liability of an accused under s 7(a).

6. In ***Pickett*** the Court was considering the attribution of acts to the appellant not only as an aider under s 7(c), but also as an enabler under s 7(b), and as a party to an unlawful common purpose in the prosecution of which an offence was committed
10 of such a nature that its commission was a probable consequence of the prosecution of such purpose pursuant to s 8 of the *Criminal Code*.[2]

7. What was held in ***Pickett*** with respect to the distinction between excuses and justifications was applicable to the attribution of the acts or omissions by an actor to *"each category of person referred to in paras (a) to (d) to be a person who may be charged with the offence constituted by the act or omission."* [3] As to [10] of the respondent's submissions, there was no specific mention of "*aider*" at [66] in ***Pickett***, and what said in ***Pickett*** was not confined to the position of an aider under s 7(c) of the *Criminal Code*.

8. The appellant does not take issue with the proposition that the acts of the appellant
20 and co-accused "in aggregate" caused the relevant injury in the sense that it is not known which one or more of the acts caused the injury.[4]

9. For the purposes of s7(a) of the *Criminal Code*, the guilt of an accused is predicated upon conduct or acts by both accused while they are acting in concert. A finding of guilt relies on the attribution of the conduct of each accused to the other such that the conduct element comprises the acts of both accused. Unless the acts of both accused are unlawful, the necessary conduct element for liability is not

[1] ***Pickett v The State of Western Australia*** [2020] HCA 20.
[2] See ***Pickett*** at [1], [2], [14] and [102].
[3] ***Pickett*** at [66].
[4] Appellant's Submissions, [15].

established.[5] The suggestion that the question of unlawfulness is one of the 'prescribed circumstances' that was referred to in ***Barlow,***[6] is not consistent with the observations that were made in ***Pickett*** at [43] or at [102] to [104], and [110].

10. The only basis for liability that was left to the jury for the purposes of s7(a) of the *Criminal Code* was that the appellant and the co-accused had acted in concert. Based on the way in which the prosecution case was left to the jury, if either accused did not act unlawfully the conduct element would not be satisfied.

11. As to [24] of the respondent's submissions, the Court of Appeal considered the alleged separate acts of each individual accused as relevant in determining whether the particular accused acted unlawfully, rather than the joint conduct. (CAB 168; CA [173]-[174]).

12. There are matters other than the physical acts themselves that are relevant to the determination of whether the acts were unlawful. They include whether the acts were carried out for an unlawful purpose, which overlaps with the issue the subject of Ground 2.

Ground 2

13. A requirement, for the purposes of s 7(a), that there be an understanding or arrangement amounting to an agreement between two or more people to commit a crime is compatible with the provisions of the Code. In particular, s 8 ascribes criminal liability to a person in circumstances in which two or more persons form a common intention to prosecute an unlawful purpose, and an offence is committed of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose. By necessary implication, criminal liability will arise under s 7 where the offence committed is the very offence the subject of the unlawful common purpose.[7] In ***Barlow***[9] the Court held that s 8 *"complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention of the kind therein mentioned."*

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[5] See ***Pickett*** at [43], [51], [102], [103] and [110].
[6] ***R v Barlow*** ([1997] HCA 19; (1997) 188 CLR 1 at 9. ***Pickett*** at [53] and [109]. Respondent's submissions, [16].
[7] ***L v The State of Western Australia*** [2016] WASCA 101 at [40].
[9] ***R v Barlow*** ([1997] HCA 19; (1997) 188 CLR 1 at 9.

14. It was stated by Lucas J in ***R v Wyles*** [10], Hoare J concurring, that *"it is common for two or more accused persons to be charged with robbery, based on a common unlawful intention"*, in cases where the evidence shows that only one of them stole anything and only one of the others used or threatened violence. In the absence of such common unlawful intention, liability for robbery could not be established. This is consistent with the provisions of the Code.

15. As to the reference at [31] of the respondent's submissions to ***R v Webb; Ex parte Attorney-General*** [11], which involved an offence of attempted arson, that case did not invoke the notion of each accused doing one or more acts which together constituted the offence. There was only one act, namely that of setting fire to a towel. The leading authority in Queensland concerning the present pathway is ***R v Sherrington & Kuchler*** [2001] QCA 105.

16. In the recent decision of ***O'Leary v The State of Western Australia*** [2022] WASCA 4, after observing that "*the notion of acting in concert has been described by this court as acting in combination, acting together, collaborating or having joined forces",*[13] the Court of Appeal went on to hold[14] that acting in concert "*involves acting pursuant to an arrangement or understanding whether express or tacit*." Elsewhere in the decision the agreement or understanding was referred to as one that the accused persons would together physically attack the complainant.[15]

17. The trial Judge in the present matter found for the purposes of sentencing that the appellant understood Ms Dimer's screaming to convey that she was being attacked (CAB 109[11]-110[1]); that the appellant did not leave his house with the intent to unlawfully harm anyone (CAB 110[2]); that he did not seek to involve himself in the situation but felt he had no choice but to do so given Ms Dimer's screams for help (CAB 110[3]); that the appellant's acts were not part of a premeditated plan to unlawfully harm anyone (CAB 114[5]). Accordingly, it was open to the jury to make those same findings.

[10] ***R v Wyles; Ex parte Attorney General*** 1977 Qd R 169 at 178 A-B.
[11] [1990] 2 Qd R 275.
[13] At [75].
[14] Ibid.
[15] For example at [80], [82], [152], [158].

18. In those circumstances it was necessary for the trial Judge to direct the jury that they needed to find that at the point in time when the relevant injury was inflicted, there was an understanding or arrangement amounting to an agreement (which might be inferred) to act unlawfully.

19. As set out in the Appellant's Submissions, "*acting in combination*", or "*collaborating*" or "*joining forces*" do not themselves entail acting unlawfully in concert.

Dated: 11 March 2022

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