IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A17 of 2015**

BETWEEN: **JOHNAS JEROME PRESLEY**
Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE STATE OF SOUTH AUSTRALIA
Respondent

APPLICANT'S SUBMISSIONS

PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. In the event that special leave is granted by an enlarged Court, the issues presented by the appeal may be summarised by reference to two inquiries.

2.1 Unreasonable verdict

Did the CCA err by failing to make an independent assessment of whether, in light of the evidence of intoxication, the prosecution had excluded rational hypotheses arising from the evidence other than that the applicant was party to a joint enterprise to act with murderous intent, or alternatively that he actually foresaw the possibility that another might so act but nevertheless participated in some lesser criminal enterprise? Was the verdict unreasonable or not supported by the evidence?

2.2 Extended joint enterprise

Should this Court revisit the proposition, established by *McAuliffe v The Queen* (1995) 183 CLR 108, that liability for murder pursuant to the common law doctrine of extended joint criminal enterprise is established by proving that the accused merely foresaw the possibility that another participant to an unlawful joint enterprise might act either with intent to kill or to cause grievous bodily harm? If so, should the law be restated consistently with *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC; [2016] UKPC 7.

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PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3. The applicant has considered whether a notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV CITATION

4. The Court of Criminal Appeal's judgment is now reported: *R v Presley, Miller and Smith* (2015) 122 SASR 476 (**CCA**).

PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

Introduction

5. The applicant Presley, together with Betts, Miller and Smith, was found guilty by jury verdict of the murder of Clifford Hall. Betts, Miller and Smith were also found guilty of aggravated causing harm with intent to cause harm[1] to Wayne King. Presley pleaded guilty to the offending against King at his arraignment (CCA [2]).

6. The prosecution case was that Presley was part of a group of Aboriginal men who attacked and killed Hall and assaulted King shortly before 11 pm on 12 December 2012 at Grant Street, Elizabeth Park (CCA [3]).

7. It was not in dispute that it had been Betts who fatally stabbed Hall. In the early hours of 13 December 2012, he directed police to the location of the knife in a drain at the rear of a property at 30 Butterfield Road. The case against Presley in respect of murder was put on the basis that Betts, Presley, Miller and Smith were part of a joint enterprise that had as its object, or within its contemplation, an attack on Hall with weapons accompanied by an intention to cause grievous bodily harm[2] (CCA [6]). The prosecution case was also left to the jury on the footing of extended joint enterprise.

8. It is broadly accurate to observe that: (1) there was an "initial altercation" involving Betts, Presley, Hall and King, on the other; (2) Betts and Presley then returned to 33 Hayles Road; and (3) shortly afterwards a group of Aboriginal males including Betts, Presley, Smith and Miller returned to the scene whereupon Hall was stabbed by Betts and King was hit by Presley with a baseball bat ("second altercation") (CCA [32]-[33]).

9. However, it is critical to appreciate that there was evidence to the effect that (1) the time between the two altercations was very short and likely a matter of minutes; (2) as many as five or six Aboriginal persons may have been involved in the "second altercation", which in fact appears to have involved separate affrays involving Hall and King; (3) the eyewitness descriptions of those involved in the assault upon Hall (as distinct from King) were inconsistent and inconclusive; (4) there was no direct evidence that Presley knew Betts was carrying a knife and indeed none of the several eyewitnesses even saw a knife; and (5) Presley (and others) were heavily intoxicated throughout.

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1 Contrary to s 24 of the *Criminal Law Consolidation Act* 1935 (SA).

2 The prosecution did not allege an agreement or understanding to kill Hall (SU38).

10. The evidence from which the prosecution sought to establish either a joint enterprise to act with murderous intent, or an inference that Presley must have foreseen the possibility that another would act with murderous intent, in fact reveals a chaotic sequence of events over a short period of time involving intoxicated, aggressive and erratic conduct of a group of young people. The salient aspects of the evidence and the summing up at trial on these matters are described below, principally by reference to the trial judge's summing up (**SU**).

Betts, Presley and others are drinking heavily

11. There was evidence from Presley's girlfriend (Amii Turner, referred to in evidence as 'Belle') that on the day in question, Betts had arrived at 33 Hayles Road where Presley lived and they walked to the bottle shop and bought a 700 ml bottle of Jack Daniels (SU135). She went to sleep during which Betts and Presley bought another bottle, of Bundaberg rum (SU 135). In his record of interview Presley said that he had also been drinking 'Passion Pop' (in addition to the Jack Daniels) (SU145).

12. The witness Gary Willis said that on 12 December 2012, while it was still light, he drove Miller and Smith from the Elizabeth Tavern to Hayles Road where Betts and Presley were drinking. The group sat down and were drinking West End Draught and Presley then went to the Elizabeth Tavern and returned with a bottle of Bundaberg rum, by which time it was dark. He said that later, Betts, Presley and another female went out on foot a second time, saying they were going to buy marijuana (SU131). Willis himself was drunk and had been drinking for two days (SU132).

The first altercation

13. Betts, Presley and Belle had left 33 Hayles Road in search of cannabis. As the group walked back towards Hayles Road, Betts urinated against the fence by 12 Grant Street (CCA [8]).

14. There was no evidence to suggest that any of the accused were previously known to Hall or King (SU63). Hall and King had been sitting together on King's front porch[3].

15. Hall approached Betts and Presley at the entrance to the laneway and indicated his displeasure at them urinating in public. Hall was joined by King and Hall's neighbours Anita Bateman, Todd Finlay-Smith and his partner Kalena Oldenhampson and Pamela Turner, each of whom gave evidence.

16. Presley told Hall that he and Betts were only seeking to purchase cannabis and waved $25 in the air. Hall expressed disapproval and although accounts of what was said differed[4], voices were raised and abusive language was used towards Betts and Presley,

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3 King said that he went to get another beer from his 'man cave' just prior to the altercation (SU64).

4 While some witnesses such as Bateman (SU89) and Turner (SU98) did not recall King or Hall being abusive, King recalled Hall using the phrase 'black cunts' (SU77). Turner recalled Hall saying 'go piss in the park like all the other ferals' (SU93). Oldenhampson said Hall probably did use the word 'cunt' when he was telling the Aboriginal men to go away on the first occasion (SU107); she said that the two Aboriginal men were not abusing or trying to provoke Hall and King, but were just looking to buy a bag of marijuana (SU107). Finlay-Smith said both Hall and King were yelling using swear words (SU121).

and, although some witnesses including King said otherwise[5], it seems Betts was punched to the mouth and Hall was seen to push one of the Aboriginal men (CCA [9]).

17. Although it is not in dispute that Presley was present at the first altercation it is relevant to note that the descriptions of the two Aboriginal men given by the eyewitnesses differed both as to physical appearance and clothing[6], making it difficult to reconcile purported later identification by the witnesses of the same men as involved in particular aspects of the second altercation, and critically, the assault upon Hall.

Betts and Presley return to 33 Hayles Road

18. Accounts varied but it is apparent that only a short period of time passed between the 'first altercation' and the return of a group of Aboriginal males to the scene (CCA [12]). Some witnesses thought it was a very short period: Turner thought the time could have been as little as one minute (SU99) (cf. CCA [12]), Finlay-Smith thought the period was two to three minutes (SU128).

19. Willis gave evidence that during the period that Betts and Presley were at 33 Hayles Road, Presley had said "let's go back and see what these people – go and see what the problem is" (CCA [10]). He said that Presley (carrying a baseball bat), Betts, Miller and Smith left the premises, and he followed them in his car (CCA [10]).

20. In his record of interview (Ex P44), Presley said that when he returned to the house he was angry and others were trying to calm him down, and he hit the walls of the house with a baseball bat (SU173). He did not see anyone else grab anything. He said that he ran down the road towards the laneway (SU146). There was some evidence to the effect that those who went from Hayles Road to the scene of the assault travelled separately[7].

21. Willis did not see that Betts had a knife with him when he left; indeed no eyewitness to any of the events gave evidence of seeing Betts holding a knife (SU63, SU218-219)[8].

He said that as the two Aboriginal men left Hall was yelling 'you black cunts' and that sort of thing (SU122). In his record of interview Presley said that one of the men approached Betts and Presley and punched Betts in the chest and the lip and they said 'Black dog, black cunt, fuck off, we don't want drugs in this area' (SU144).

5 King denied that any force was used (SU78). Finlay-Smith, however, observed King hit one of the two Aboriginal men with a clenched fist to the man's jaw (SU122) and gave evidence that King had subsequently told him he would not be very popular if he disclosed this and that if he did 'no-one will get a victims of crime' (SU129).

6 Bateman thought both men present during the first incident were not very big and about 5 foot 4 inches (SU90). King described the taller person in the first incident as not wearing a top and wearing a white baseball cap (SU64) but Bateman referred to a person wearing a red basketball singlet and a red or pink headband (SU84). Turner described the man who had not urinated as about the same height as the others and wearing a red short-sleeved T-shirt with a tattoo of a teardrop or a star on his cheek (SU95). Finlay-Smith described the taller man as wearing a long-sleeved grey jumper (SU126).

7 There was evidence that at least three men left running separately to the scene, separate by some distance (Eylander T937, 940), while others may have followed after by car (Strobl T692, Willis T822).

8 In its summary of argument on the special leave application, the respondent acknowledged there is no direct evidence that Presley knew Betts was armed with a knife (para [5]).

The second altercation

22. Although at trial there were four men charged with the murder of Hall, it is a striking feature of the evidence that many of the prosecution witnesses reported seeing a larger number of Aboriginal males present[9].

23. Further, the evidence as to the way in which the assaults involving King and Hall occurred was divergent. The accounts are summarised at CCA [13]-[17].

24. There was no issue that Presley had hit King with a baseball bat. According to King, the assault on him was about 20 metres away from the assault on Hall[10]. The prosecution sought to establish that Presley also participated in the assault on Hall, relying on evidence of Bateman and Turner, from the existence of tramline pattern bruising on Hall's arm consistent with a long thin object such as a pole or a baseball bat and from spots of blood on Presley's shorts (CCA [37]-[41]).

25. However:

    25.1 Bateman's identification to the effect that someone she saw assaulting Hall was the man from the first incident who had not been urinating was based on the person's clothing and not his face, and was of a person wearing a red singlet (SU90-91). Further, Bateman's evidence appeared to suggest that neither of the two involved in attacking King were involved on the assault on Hall[11];

    25.2 Turner's evidence was that a man wearing silver shorts but no top kicked Hall during the assault and that that man had a silver pole and was hitting Hall with it (SU97). But she also said that this man was not present during the first incident (SU100), and the shiny bright silver metallic basketball style shorts she described differed from the dull grey cloth shorts of Presley[12];

    25.3 the evidence of other witnesses did not support the theory that Presley[13], or a topless Aboriginal man[14], was assaulting Hall;

    25.4 Dr Willis conceded the bruising could have been caused by mechanisms other than a bat or pole[15]. Given the number of people potentially involved[16], and the

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9 Bateman said there looked to be about five or six people in the group of Aboriginal men who returned to the scene (SU84). Turner saw six to eight Aboriginal men (SU96). Oldenhampson saw between four and six Aboriginal men (SU104, SU107). A witness Anne-Marie Buckfield saw a group of about half a dozen people of Aboriginal descent (SU120). Finlay-Smith observed about five or six people in the laneway (SU123).

10 T257; King said he could see little of the assault on Hall.

11 T364: "as far as I know they were still with Jack right up until they ran away". No other witness described seeing any of the men involved in the assault on King as having become involved in the assault on Hall.

12 T477-478.

13 Finlay-Smith had seen Presley at a fish and chip shop (T595) but did not describe him as being involved in the assault on Hall (T649).

14 Oldenhampson had a good view of the assault but did not see anyone topless assaulting Hall (T560, T563). As to Presley not wearing a top, see McQuade (T776-778), Strobl (T690). See also T137, T140.

fact that Turner saw a man using a pole, the bruising alone is a speculative basis for inferring the involvement of Presley, and the baseball bat that was found did not yield sufficient DNA for profiling (CCA [30);

25.5 the blood spots on Presley's shorts were consistent with him facing away and being some distance, possibly up to 4 or 5 metres from Hall, not facing him as one might expect if participating in an assault on him[17].

Subsequent events

26. Presley's girlfriend who had remained at the house remembered Presley and Betts yelling (SU137), and Presley, Betts, Miller and Smith going off their heads (SU211).

Knowledge of weapons

27. The prosecution relied on the fact that the length of the knife was 33 cm and likely to have been seen, but in fact none of the witnesses saw a knife, including Willis (SU218-219). Willis had only seen Presley take the baseball bat. Presley used the baseball bat in assaulting King but, critically so far as the question of intent is concerned, did not take advantage of the possibility of inflicting really serious bodily harm on King. Presley had said that he did not see Betts stab Hall (SU146-147). He first learnt of that when he was at the Elizabeth Police Station when Betts told him this (SU173, SU212).

28. There was evidence of the use of a shovel but no evidence as to where it came from and it is possible it came from Hall's premises and was collected at the scene[18]. A 'Passion Pop' bottle was involved but whether that was planned to be used as a violent weapon is entirely speculative. Any inferences as to awareness that others had weapons and that really serious harm was likely to be inflicted must also be considered in the context of the evidence of intoxication.

Evidence of intoxication

29. Willis said that all of the men were drunk that evening (SU133). He said a few people, including Smith, had been smoking marijuana that night (SU134). After the second incident Willis said that Betts seemed drunk and said "I think I stabbed a guy in the guts", and when asked if he was sure said he did not know (SU132). King said the two Aboriginal men involved in the first incident were affected by alcohol (SU78). Bateman described the person who was not urinating as staggering a bit (SU82). Finlay-Smith said the two Aboriginal men in the laneway during the first incident were drunk (SU128). Another witness, Alan Chattenton, who saw two Aboriginal men and an Aboriginal female prior to the first altercation said they seemed to be drunk or intoxicated in some way (SU137).

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15 T1361; Dr Willis also observed no bruising consistent with Bateman's claim (T297) of seeing three men kicking him.

16 Further, if Presley was to be identified as not wearing a top, it is noteworthy that Oldenhampson observed a man enter Finlay-Smith's yard with a baseball bat who was wearing shorts and a top (SU105).

17 Donnelly (T1488, 1490-1491). The pattern was consistent with a cast-off type pattern, as one would expect from blood being cast from the end of a long, thin type weapon, such as a pole or a bat (SU213).

18 T236.

30. Presley was observed at 11.52 pm outside the Hayles Road residence in an agitated, unsettled state, screaming and swearing (SU212).

31. Officers McCaffrey and Webber gave evidence he was affected by alcohol when they saw him at Hayles Road shortly after 11.30 pm (SU221).

32. Presley undertook an alco-breath test at 3.00 am on 13 December 2012 which suggested 0.122 mg of alcohol per litre of blood. Presley's blood sample was taken at 8.30 am the following morning and he had a blood alcohol concentration of 0.054 mg of alcohol per litre (SU173).

33. A pharmacologist Dr Majumder gave evidence that a person with a blood alcohol concentration of that order approximately 10 hours after the event would likely to have had a concentration of over 0.2% at the time of the event (SU180). A person with that concentration would appear intoxicated, may sway and have slurred speech, may have appreciable deficits in terms of their perception of events occurring around them, and would have impaired decision-making processes to some degree (SU180).

Summing up

34. In summing up with respect to Presley, the learned trial judge gave directions regarding joint criminal enterprise and extended joint criminal enterprise reflecting *McAuliffe*, reiterating earlier directions (SU208-209), before turning to the evidence relied upon by the prosecution (SU209-216).

35. Intoxication was mentioned in connection with his summary of the defence submissions (SU220-221). After mentioning the evidence he said (SU221-225):

> It is a matter for you whether you consider whether Mr Presley was intoxicated by alcohol at the time of these events. It is a matter for you, if you consider that he was intoxicated, whether he was intoxicated to such an extent that the prosecution has failed to prove that he had the state of mind required to form an agreement or understanding to participate in a joint criminal enterprise with Mr Betts, and perhaps others, to inflict really serious bodily harm, or in the alternative, to commit some lesser crime and that he contemplated in that context the possibility that in the implementation of any agreement or understanding of that kind some other participant in the plan might intentionally inflict really serious bodily harm. ...
>
> In this context you must again consider what effect, if any, intoxication might have on your consideration of whether Mr Presley was party to an agreement or understanding of that kind. If you are satisfied that there was such an agreement, then you must consider whether the assault to which Mr Presley agreed was dangerous in the sense that a reasonable person in the position of the accused would have realised that it would expose one of those men in Grant Street to an appreciable risk of serious injury. ...
>
> Finally, if you are satisfied of the above matters, you must next consider whether the killing of Mr Hall was unlawful, that is not in lawful self-defence. Again I suggest that will not cause you much difficulty at this stage. You will only consider whether Mr Presley is guilty of manslaughter on the basis of joint criminal enterprise if you have found that the prosecution has excluded self-defence on the part of Mr Betts beyond reasonable doubt. ...
>
> If you are not satisfied that the prosecution has proved each element of the crime of manslaughter against Mr Presley on the basis that he was party to an agreement to commit an unlawful and dangerous act as a result of which Mr Hall was killed, in the way I have described, then you must find him not guilty of manslaughter.

> In this regard I repeat the direction I gave a moment ago concerning the evidence in relation to Mr Presley's state of mind and the relevance to his state of mind of intoxication, should you be satisfied he was intoxicated at the relevant time.

36. This followed upon earlier general directions regarding intoxication. The trial judge first introduced the topic by saying that questions of intoxication "may be relevant" to issues concerning proof intention or state of mind (SU11), and later (SU39) that:

> It is a matter for you whether the evidence proves intoxication. Further, it is a matter for you whether it is proved that intoxication deprived the accused of the requisite state of mind. You must weigh that evidence in deciding whether you are satisfied that the prosecution has proved the requisite state of mind to prove murder on the basis of joint criminal enterprise.
>
> The second way in which murder can be proved against an accused who did not inflict the fatal blow is extended joint criminal enterprise. A person might reach an agreement or understanding with others to simply assault a person, but in the course of that assault one of the parties goes beyond the scope of the agreement or understanding and commits the crime of murder. In that situation a person can still be guilty of murder if, when he agreed to commit the crime of assault, he foresaw the possibility that in the course of that assault the other party to the agreement might unlawfully kill the deceased with murderous intent or intentionally inflict really serious bodily harm and the accused continued to participate in the joint venture with that degree of foresight.

37. As part of the directions regarding extended joint enterprise[19], he again said (SU43):

> In this context, I provide the same direction about intoxication and proof of the requisite state of mind that I gave a short time ago in relation to joint criminal enterprise. Are you satisfied any of the accused were intoxicated at the time it is alleged an agreement or understanding to commit the crime was formed? If so, did the intoxication deprive any of them a state of mind whereby they agreed to the criminal enterprise or had the requisite contemplation that the intentional inflict of really serious bodily harm might occur?

Appeal to the CCA

38. As relates to Presley, the CCA rejected a challenge to the directions concerning extended joint enterprise (CCA [74]-[80]) and manslaughter (CCA [81]-[88]).

39. In respect of intoxication the CCA recounted that Presley had complained of the adequacy of the directions concerning intoxication and the ways in which it was relevant (CCA [89]) but was critical that the complaints had not been raised below or explained with specificity (CCA [91]). The Court set out the directions and said that they could not fairly be criticised (CCA [95]).

40. After addressing three other discrete complaints regarding the directions (CCA [96]-[105]), the Court considered the complaint that extended joint enterprise had been left, and that the verdict was unreasonable. They said (CCA [107]-[109]):

> The issue for consideration is whether it was open on the evidence for the jury to conclude that Presley was part of the group who had at least agreed to cause harm. It is to be recalled that Presley did not deny that he had been armed with a baseball bat and had used it during the second confrontation. Further, in his record of interview, Presley made reference to weapons he thought were held by others.
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> In our view, there was sufficient evidence for the jury to find an extended joint enterprise involving Presley. The bare assertions of insufficiency, inconsistency and confusion do not

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19 There was a later clarification regarding onus (SU48).

make out a basis for suggesting there was any error on the part of the Judge in his decision to leave extended joint enterprise as a matter for the jury.

Unreasonable or Cannot be Supported Having Regard to the Evidence

The final ground of appeal advanced by Presley was that the verdict was unreasonable or cannot be supported having regard to the evidence. Earlier in these reasons we have set out the prosecution case against Presley of his presence and participation. We have identified the evidence led in the trial to support this case. In our view, the evidence allowed the jury to conclude that Presley was present and did participate in the attack on Mr Hall and that he did so with the necessary criminal intent.

10 41. Presley's application for special leave (regarding the CCA's failure properly to address the evidence of intoxication) was referred to an enlarged Court on 12 February 2016: [2016] HCATrans 17. Subsequently, Presley filed a summons seeking to re-agitate a special leave ground relating to *McAuliffe*, and to amend his grounds of appeal to this Court.

PART VI SUCCINCT STATEMENT OF ARGUMENT

Overview

42. Unreasonable verdict

The CCA failed to conduct a proper independent assessment of the evidence. Because proof of a relevant agreement or a foresight of the possibility that another would act
20 with murderous intent was a matter of inference from circumstantial evidence, it was required to consider whether in the short sequence of events that unfolded, in view of Presley's intoxication combined with his age, circumstances and highly charged emotional state, rational hypotheses inconsistent with the requisite agreement or foresight had been negatived.

43. Extended joint enterprise

This Court should revisit the doctrine of extended joint enterprise as articulated in *McAuliffe v The Queen* (1995) 183 CLR 108 (***McAuliffe***) and, following the recent decision in *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC 8; [2016] UKPC 7 (***Jogee***), it should be held that it was a misdirection to instruct the jury that
30 they might convict Presley for murder if they were satisfied he was party to an agreement to commit an assault and (merely) foresaw the possibility that a party to the crime that Betts might act with murderous intent.

Unreasonable verdict

The test

44. Presley submitted to the CCA that the verdict was unreasonable or could not be supported having regard to the evidence, within the meaning of s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA).

45. As was held in *M v The Queen* (1994) 181 CLR 487 at 492-494 (Mason CJ, Deane, Dawson and Toohey JJ), this required more than a consideration as a question of law

whether there was evidence to support the verdict. The question is one of fact which the court must decide by making its own independent assessment of the evidence[20] and by determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand"[21]. In considering whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses[22]. However, in most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.

46. The Court must make an independent assessment of the evidence, both as to its sufficiency and its quality[23].

47. Presley's submissions to the CCA placed particular reliance on the evidence of Presley's intoxication with a view to demonstrating that it could not safely be inferred in all the circumstances either that Presley was party to any agreement to act with murderous intent or that he actually foresaw the possibility that Betts might so act. The CCA erred by failing to undertake an independent assessment of the evidence by relating the evidence on intoxication to the evidence relied upon by the prosecution from which that agreement or knowledge was said to be able to be inferred. The Court did not consider whether inferences or hypotheses consistent with innocence had been negatived as reasonable possibilities.

Intoxication

48. The significance of intoxication to the question of the intent (or knowledge) required to be proved in order to establish the elements of an offence is not limited to the question of capacity, and it is a mistake to focus upon the question of capacity.

49. It was held in *The Queen v O'Connor* (1980) 146 CLR 64 that, in the case of murder, evidence of intoxication is relevant not only to the question of voluntariness (or basic intent with respect to the acts or omissions bringing about the victim's death) but to the question of whether the accused had the requisite mental element (so-called specific intent[24]). To focus upon incapacity is liable to lead to a subtle but real reversal of the onus of proof, as Wood CJ at CL (with whom James and Adams JJ relevantly agreed) observed in *R v Esposito* (1998) 45 NSWLR 442 at 476[25].

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20 Referring to *Morris v The Queen* (1987) 163 CLR 454.

21 Referring to *Hayes v The Queen* (1973) 47 ALJR 603 at 604.

22 Referring to *Whitehorn v The Queen* (1983) 152 CLR at 686, *Chamberlain v The Queen (No. 2)* (1984) 153 CLR 521 at 532, 621, *Knight v The Queen* (1992) 175 CLR 495 at 504-505, 511.

23 *Morris v The Queen* (1987) 163 CLR 454 at 473, referred to with approval in *SKA v The Queen* (2011) 243 CLR 400 at [14].

24 Barwick CJ observed (at 86) that although murder does not fit the definition of a crime of specific intent, it is consistently so treated.

25 See the summary of the authorities in this area in *R v Gardiner* [2013] SASCFC 53 at [159]-[193] per Peek J, with whom Nicholson J agreed.

50. The relevance of intoxication in establishing beyond reasonable doubt the state of mind required to prove murder, in whichever of its various forms is relevant, is established by the authorities[26].

51. In a case where the accused carries out the physical acts and is tried as the principal, it is contrary to fundamental principle to hold that evidence of intoxication not amounting to incapacity is irrelevant to criminal responsibility where the commission of the crime requires a special intent. In the case of such a crime the issue is not whether the accused was incapable of forming the requisite intent, but whether he had in fact formed it. It is not enough to tell the jury that the Crown must prove beyond reasonable doubt that the accused had in fact formed the requisite special intent; they should also be told that the fact that the accused was intoxicated may be regarded for the purpose of ascertaining whether the special intent in fact existed[27].

52. It is critical to relate the evidence of intoxication to the question of whether an inference of intention or knowledge can safely be drawn. In *R v Shinner* (1994) 176 LSJS 14, King CJ (with whom Millhouse and Debelle JJ agreed) said:

> I am left with an uneasy impression that the jury may not have been sufficiently aware of the precise issues which they had to resolve as to the appellant's state of mind and the bearing of his intoxication upon those issues. ... There was ... an issue for the jury as to whether the appellant intended to make contact with the head. The inference might readily be drawn from the appellant's actions if he were sober. The inference might not as readily be drawn in the light of his intoxicated state as it would be, if he were sober. If he did intentionally and repeatedly kick the deceased's head, the inference that he intended at least grievous bodily harm might readily be drawn if he were sober. It might be less readily drawn by reason of his intoxication.
>
> Despite the accuracy and completeness of the learned judge's treatment of the general questions of the mental elements of the crimes and of the topic of intoxication, I am by no means convinced that the jury would have appreciated the bearing of intoxication on the precise issues which they had to resolve. I think that a proper explanation of the defence required that the jury's attention be specifically directed to the significance of intoxication in considering the critical issues to which I have referred.

King CJ made similar remarks in *R v Wingfield* (1994) 176 LSJS 14 (Bollen and Mullighan JJ agreeing). Both cases were referred to with approval in *R v Williamson* (1996) 67 SASR 428 at 447-448, and in turn were approved by the Victorian Court of Appeal as being consistent with NSW authority in *The Queen v Faure* [1999] 2 VR 537; [1999] VSCA 166 at [25] (Brooking JA, with whom Winneke P and Ormiston JA agreed)[28].

53. In the case of accessorial liability relying upon a joint enterprise, intoxication is no less significant. Just as proof of specific intent in the case of a principal offender will ordinarily be a matter of inference, in the case of joint enterprise, the existence of an agreement, and in the case of extended joint enterprise, proof of actual foresight of a possibility that another will act with murderous intent, will ordinarily be (and was here) a matter of inference from circumstantial evidence.

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26 See, eg, the authorities referred to in *R v Grant* (2002) 55 NSWLR 80; [2002] NSWCCA 243 at [32]-[39].

27 *Viro v The Queen* (1978) 141 CLR 88 at 111-112 per Gibbs J, with whom Stephen J (at 129), Jacobs J (at 147) and Aickin J (at 172) relevantly agreed.

28 See also *The Queen v Gill* (2005) 159 A Crim R 253; [2005] VSCA 321.

54. In considering whether the requisite inferences could be drawn beyond reasonable doubt, and thus whether other hypotheses consistent with either manslaughter or an acquittal were not negatived beyond reasonable doubt, the evidence of intoxication was of critical importance. As Barwick CJ said (in a different context) in *Pemble v The Queen* (1971) 124 CLR 107 at 120:

> The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. ... Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind. They need also to be reminded that the accused's circumstances are relevant to the decision as to his state of mind; for example his age and background, educational and social, his **current emotional state and his state of sobriety**. They should be expressly told that they need to be satisfied beyond reasonable doubt that he must have foreseen, and in that sense did foresee, the consequences of the act he contemplated. (Emphasis added.)

55. There was no direct evidence as to the existence of the scope or terms of any understanding or arrangement to which Presley was a party. One witness described Presley having said they should "go and see what the problem was". The existence and terms of any agreement to act with the intent to commit murder was a matter of inference from circumstantial evidence.

56. In respect of extended joint enterprise, there was no direct evidence as to what Presley foresaw as a possible incident of any arrangement to which he was a party. Whether Presley foresaw the possibility that Betts or another would act with intent to kill or cause grievous bodily harm was a matter of inference from circumstantial evidence. It therefore attracted the principles discussed in *Knight v The Queen* (1992) 175 CLR 495, in which Mason CJ, Dawson and Toohey JJ said (at 502) that in such a case the facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference; in the inculpation of the accused person the evidentiary circumstances must bear no other reasonable explanation[29].

57. Intoxication was relevant not only to the question whether an inference of foresight of a possibility could be drawn based on facts observed or known to Presley, but to the question whether it could be inferred that relevant subsidiary facts (such as that Betts had a knife) were known to Presley. There was no direct evidence that Presley knew Betts had a knife. Even if it were open to be inferred that Presley foresaw that a knife might be used, if it were not proved that he foresaw that it might be used with murderous intent, manslaughter was a viable verdict[30].

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29 Referring to *Martin v Osborne* (1936) 55 CLR 367 at 375 (Dixon J).

30 *Gillard v The Queen* (2003) 219 CLR 1. Knowledge on the part of one criminal that his companion is carrying a weapon is strong evidence of a common intent to use violence, but is not conclusive: Professor Glanville Williams, *Criminal Law, The General Part* (1961, 2nd ed) at 397. Indeed, even where there is a joint intent to use weapons to overcome resistance or avoid arrest, the participants might not share an intent to cause death or really serious harm: *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC 8; UKPC 7.

The CCA

58. The CCA failed to consider whether in light of the evidence on intoxication the verdict was unreasonable or could not be supported by the evidence. The CCA observed that no complaint was made to the judge regarding the summing up concerning intoxication and summarised the judge's direction on the issues just mentioned (CCA [91], [93]-[94]). It was said that the summing up could not be fairly criticised (CCA [95]).

59. Then, when considering the ground of appeal that the verdict was unreasonable, the CCA simply said that having regard to the evidence led in the trial to support the prosecution case, it "allowed the jury to conclude that Presley was present and did participate in the attack on Mr Hall and that he did so with the necessary criminal intent" (CCA [109]).

60. With respect, this did not constitute an independent assessment of the quality and sufficiency of the evidence to negative inferences as to Presley's intention or state of mind which were inconsistent with guilt of murder by joint enterprise or extended joint enterprise.

61. The CCA did not pose for itself the question whether, having regard to the fact that on the evidence Presley was a heavily intoxicated young indigenous male, and bearing in mind the lack of direct evidence that he knew Betts had a knife, it could be safely inferred that he had either agreed to an enterprise involving murderous intent or had actually contemplated that Betts might so act. That is to say, the Court did not properly and independently consider whether it felt a reasonable doubt that other hypotheses (consistent with innocence or manslaughter) were excluded.

62. In this context the CCA was required to direct itself to the evidence of intoxication and the likely effect upon perception and comprehension that it may have had in the circumstances which obtained, together with the fact that Presley was an 18 year old Aboriginal male in an emotionally charged state[31].

63. Further, the way in which the CCA's conclusion was expressed did not consider or address extended joint enterprise and since that may have been the basis upon which the jury found Presley guilty, it begs the question whether the CCA addressed the real issues at all.

64. It is submitted that, even taking the prosecution case at its highest, and accepting that it could be found that Presley would have seen Betts' knife, and that Presley actually participated in the assault on Hall, it does not follow, in the case of a person with a blood alcohol concentration of over 0.02, that they must have actually foreseen the possibility that the knife might be used with intent to commit murder. But the case is not to be considered on the evidence at its highest, and there is every reason to have regard to the patent inconsistencies in the eyewitness accounts, as detailed earlier.

65. Had the CCA properly undertaken an independent assessment it would have entertained a reasonable doubt, and it was one the jury ought to have shared. Their actual verdict

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[31] Exhibit P41.

may be noticed but cannot be conclusive having regard in particular to the fact that the trial judge's directions regarding intoxication tended to subtly reverse the onus, and to pose the question whether Presley was intoxicated and, if some such threshold had been crossed, whether it *deprived* him of the requisite state of mind or intent (thus tending to suggest that but for intoxication such a finding was likely). Further, for reasons to be advanced in relation to the reconsideration of *McAuliffe*, it is in the nature of extended joint enterprise that it carries with it a grave risk of hindsight reasoning.

Extended joint enterprise

The existing law: Australia

66. In *McAuliffe*, the Court summarised the authorities relating to joint enterprise and remarked that while it had been decided in *Johns v The Queen* (1980) 143 CLR 108 (***Johns***) that a party to a joint enterprise is liable for an act which was within the contemplation of both himself and the principal as an act which might be done in the course of carrying out the primary criminal intention (an act contemplated as a possible incident of the originally planned joint venture), it was not expressly decided whether liability would attach where the commission of an offence lay outside the scope of the common purpose but was nevertheless contemplated as a possibility in the carrying out of the enterprise by a party who continued to participate in the venture with that knowledge (at 113-115).

67. The Court also noted that no explicit answer to that question was provided by the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168 (***Chan Wing-Siu***) but that remarks made by Sir Robin Cooke suggested that liability would be imposed in such a case (at 116-117).

68. The Court continued (at 117-118):

> There was no occasion for the Court [in *Johns*] to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind. But there is no other relevant distinction. As Sir Robin Cooke observed, the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties. **That is in accordance with the general principle of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it.** (Emphasis added)

69. In *Gillard v The Queen* (2003) 219 CLR 1 (***Gillard***), the issue upon which the appeal turned was the failure by the judge to leave manslaughter to the jury. As Hayne J (with whom Gummow J relevantly agreed) noted (at [113]) neither party had submitted that the law relating to complicity should be re-expressed. He went on to say (at [115]) that the view that liability of participants in a joint criminal enterprise is not confined to offences which it is shown the parties have agreed will be committed was not a uniquely Australian view – referring to *Chan Wing-Sui*. He noted that with limited exceptions a change to the law had not been proposed by law reform agencies (at [116]). Kirby J

described and considered some of the criticisms that had been made of *McAuliffe* and the analysis of the issue of accessorial liability in various law reform bodies (at [50]-[52]), concluding that they revealed significant doctrinal problems with current authority (at [53]).

70. In *Clayton v The Queen* (2006) 231 ALR 500; [2006] HCA 58 (***Clayton***), the majority (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) declined an invitation to reconsider *McAuliffe* for several reasons, including that the applicants could not point to any other court of final appeal abolishing or modifying by extended common purpose by replacing foresight of the possibility of a murderous assault with foresight of the probability of such an assault (at [18])[32].

71. Kirby J would have granted special leave (at [33]). In his view the time had come to re-express the Australian law of extended common purpose liability, at least in homicide cases, so as to restore greater concurrence between moral culpability and criminal responsibility; to reduce doctrinal anomalies and asymmetries; and to reduce the risk of miscarriages of justice in the instant case (at [41]). "This part of the common law is in a mess", he said (at [43]).

72. Kirby J observed that:

72.1 the oldest authority of the High Court cited by the prosecution in support of extended common purpose liability was *Johns* and the current law was "scarcely a law of great antiquity" (at [70]-[71]);

72.2 the strongest policy justification for the exceptional ambit of the present common law rule of extended common purpose liability was the concern with criminal activities of groups or gangs, but the question remained whether the resulting formulation was too drastic a departure from the now ordinary requirements that the prosecution must prove that the intention of the accused went with his or her conduct, and whether it left adequate room for the offence of manslaughter in terms that were realistic and understandable (at [80], see also at [107], [109]-[110]);

72.3 while the submission that reform should be left to legislatures and law reform bodies had force (at [85]), there was nevertheless a need to reconsider the existing law.

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32 The majority also considered that: it had not been demonstrated that the application of the principles concerning extended common purpose had led to any miscarriage of justice in the case or more generally (at [15]); if there were to be changes in this area it would be necessary to examine whether what was actually being sought or achieved was an alteration to the law of homicide involving the distinction between intent to kill and intend to do really serious injury, or recklessness as to the possibility of death or really serious injury, which was considered to be a task for legislatures and law reform commissioners (at [19]); it would be necessary to examine the whole of the law with respect to secondary liability for crime (at [20]); the criticism that the law had become too complex was not supported by the facts of the case (at [21]).

73. Kirby J's favoured re-considering and re-expressing the principles because:

73.1 in all criminal offences, and particularly in the offence of murder, it is highly desirable that legal responsibility should generally accord with community notions of moral culpability (at [90]-[92]);

73.2 the current law permits the subjective element to be established by less than proof of actual intent; all that is required is that the relevant outcome must be foreseen as a *possibility* (at [94]) and many juries are likely to conclude that the fact that a murder *has* occurred shows that it was *possible* that it would, and it is then a small step to conclude the secondary offender foresaw, as a possibility, at least that in effecting the common purpose, the victim *might* suffer really serious harm with intent from the act of the principal offender;

73.3 subordinate offenders are sometimes weak, impressionable, vulnerable individuals whose will is insufficient to resist the unexpected, violent acts perpetrated by a ringleader (at [96]);

73.4 foresight is ordinarily no more than evidence from which a jury can infer the requisite intention; its adoption as a test for the presence of the mental element for murder is a seriously unprincipled departure from basic principle (at [97]);

73.5 re-expression carries the advantage of removing anomalies and unprincipled disparities (at [99]), some of which he then set out (at [100]-[105]);

73.6 the current law confined manslaughter almost to disappearing point (at [110]), removing the availability of a verdict to reflect notions of culpability in accordance with estimates of moral responsibility, and the sentencing discretion that manslaughter, as distinct from murder, usually carries (at [112]);

73.7 the current law is unduly complex; what jurors must make of the disparity between different modes of liability, and the nuances of the differences, is "best not thought about" (at [113]), and the complexities impose an unreasonable expectation upon trial judges (at [114]);

73.8 piecemeal statutory reform has been achieved but the law in the common law jurisdictions remains unchanged and is unconceptual, unduly complex and unjust (at [119]).

74. Kirby J considered that a formulation proposed by Professor Smith[33] should be adopted, namely, that the law should require an intention or even purpose on the part of the accessory that, in the event which has occurred, the principal should act as he did. The jury would need to be sure that the secondary offender either *wanted* the principal

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33 Professor Sir John Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 *Law Quarterly Review* 453 at 465.

offender to act as he or she did, with the intention which he or she had, or knew that it was virtually certain that the principal offender would do so (at [125])[34].

Jogee: reconsideration of *Chan Wing-Siu*

75. In *Jogee*, having traced the history of accessorial liability particularly as it applied to homicide leading up to and following it, their Lordships reconsidered and overturned the decision in *Chan Wing-Siu*, characterising it as a "wrong turn".

76. Although there was an overwhelming case for inferring that the appellants in *Chan Wing-Siu* foresaw the likelihood of resistance and that their plan included the possible use of knives to cause serious harm, it was noted that the decision of the Privy Council had rested on a wider principle whereby a secondary party is criminally liable for the acts of the primary offender of a type which the former foresees but does not necessarily intend. Their Lordships considered that there was no doubt that the Privy Council had laid down a new principle in *Chan Wing-Siu* (at [62]) and that the Privy Council's analysis of authority did not justify the approach it took.

77. In particular, its reliance upon a ruling in relation to an accomplice warning in *Davies v Director of Public Prosecutions* [1954] AC 378 was unjustified. Their Lordships said (at [40]):

> There is a major difference between saying that in the absence of evidence of knowledge of the knife there was no cause to give an accomplice warning, and saying that the knowledge of the knife and the possibility of its use would of itself constitute the mens rea needed for guilt of murder as an accessory.

78. Likewise, the Court considered that neither the decision in *Johns*[35] nor *Miller v The Queen* (1980) 55 ALJR 23[36] justified the broader proposition made in *Chan Wing-Siu*. The Court also considered a number of authorities subsequent to *Chan Wing-Siu*, including *R v Powell; R v English* [1999] 1 AC 1, in which it was recognised that the broader approach of contemplation (with tacit authorisation) dictated by *Chan Wing-Siu* gave rise to what might be though to be anomalies, but which were said to be justified by reference to considerations of policy (*Jogee* at [52]-[58]).

79. Their Lordships concluded (at [65]) that the decision in *Chan Wing-Siu* wrongly elided foresight with authorisation, and said (at [66]) that authorisation of crime B cannot automatically be inferred from participation in crime A with foresight of crime B. There could be no doubt that if D2 continued to participate in crime A with foresight that D1 may commit crime B, that is evidence, sometimes powerful evidence, of an

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34 Kirby J declined to adopt a test of probability rather than possibility, a test which would have produced a result similar to that adopted in the Code jurisdictions (at [123]).

35 *Johns v The Queen* was explained as involving an orthodox application of the proposition that where a participant gives their assent to the infliction of grievous bodily harm, even though that may only be in the event that resistance is met, they have given their assent to a criminal enterprise which involved murderous intent (see *Jogee* at [43]-[44]).

36 *Miller v The Queen* was explained as involving a plan which included the possible murder of girls. It was not a case where there was a plan to carry out crime A, in which one party carried out crime B. The plan became illegal if and when the common purpose came to include murder as an eventuality (see *Jogee* at [45]).

intent to assist D1 in crime B, but it is evidence of such intent (or authorisation), and not conclusive of it.

80. Their Lordships said (at [74]):

> The dangers of escalation of violence where people go out in possession of weapons to commit crime are indisputable, but they were specifically referred to by the court in *Reid* [(1976) 62 Cr App R 109], when explaining why it was right that such conduct should result in conviction for manslaughter if death resulted, albeit that the initial intention may have been nothing more than causing fright. There was no consideration in *Chan Wing-Siu*, or in *Powell and English*, of the fundamental policy question whether and why it was necessary and appropriate to reclassify such conduct as murder that than manslaughter. Such a discussion would have involved, among other things, questions about fair labelling and fair discrimination in sentencing.

81. The Court rejected the proposition made in *McAuliffe* that a (sufficient) foundation for liability was the contribution made by D2 to crime B by continued participation in crime A with foresight of the possibility of crime B (at [76]).

82. Although recognising the significance of reversing a statement of principle of high authority, their Lordships persuaded it was right to do so (at [79]) because it had had the benefit of a fuller analysis of previous authority (at [80], because the law could not be said to be well established and working satisfactorily (at [81]), because secondary liability is an important part of the common law (at [82]), because in the common law foresight is ordinarily no more than evidence from which requisite intention may be inferred (and murder already has a relatively low mens rea threshold, meaning that extended common purpose savours of constructive crime) (at [83]), and because the rule brings the "striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal" (at [84]).

83. As re-expressed by them, the Lordships stated the following principles of relevance to the present case (at [96]):

> If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results. … The test is objective. … Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.

Reconsideration of *McAuliffe*

84. While there is no very definite rule as to the circumstances in which the Court will reconsider an earlier decision[37], it will be relevant if the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases[38], whether the earlier decision goes with a definite stream of authority and does not conflict with established principle[39] and whether the decision is manifestly wrong and whether its

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37 *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244 (Dixon J).

38 *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58 (Gibbs CJ).

39 *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309 at [68], *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 244 (Dixon J).

maintenance is injurious to the public interest[40]. Further, where public policy considerations intrude, the law may be more susceptible of development[41].

85. Here, the relevant law is not long-settled. As the Court acknowledged in *McAuliffe*, the outer limits of joint enterprise could not be said to have been settled by *Johns,* and significant reliance was placed upon the then-relatively recent decision in *Chan Wing-Sui*. That decision having now been disapproved, it is appropriate for this Court to review the soundness of the principle established in it. It can scarcely be said that parties have acted in reliance upon the law as described in *McAuliffe* in any way which would militate against its reconsideration.

86. Essentially for the reasons given by their Lordships in *Jogee* and by Kirby J in *Clayton*, the principle in *McAuliffe* should be reconsidered and it should be held that mere foresight of the possibility of another acting with murderous intent is insufficient to render the participant in a criminal joint venture guilty of murder. The principles should be restated consistently with the approach in *Jogee*. That also broadly accords with the approach preferred by Kirby J in *Clayton*. It does not precisely mirror the approach in the Code jurisdictions, but it reduces the extent of the divergence between the common law and the position in those jurisdictions.

87. Most fundamental is a question of whether foresight *ought* to be sufficient to adjudge a participant in a criminal enterprise guilty of murder (and the mandatory and significant sentencing regimes that follow). It is submitted that the proposition relied upon to justify liability on that basis in *McAuliffe* does not sit comfortably with the general philosophy of the attribution of responsibility in that it treats a person who foresees but does not intend a crime on an equal footing with a person who intends and commits a crime. It constitutes a disproportionate response to the entry into a criminal enterprise that can only be justified on policy grounds related to the discouragement of group offending.

88. The disproportionality is illustrated by the anomalous circumstance that a minor participant who foresees only the possibility of the intentional infliction of grievous bodily harm will be guilty of murder but the offender who acts alone and foresees that possibility by their own acts but does not intend it may not be guilty of murder.

89. Further, while it is not easy definitively to point to actual examples of miscarriages of justice by the operation of the principle (and the inquiry is, to a degree, question-begging), the process of inferring foresight of a possibility dependent upon the acts of others but not intended by a person is an inherently difficult and dangerous one, and the risks of hindsight are manifest[42]. The risk of a wrong verdict of murder when, in truth, only manslaughter is justified, is real.

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40 *Queensland v Commonwealth* (1977) 139 CLR 585 at 621-624, 626, 628.

41 *Esso Petroleum Co Ltd v Haper's Garage (Stourport) Ltd* [1968] AC 269 at 324 (Lord Pearce).

42 Compare the discussion in a different context in *Rosenberg v. Percival* (2001) 205 CLR 434 at [16] (Gleeson CJ).

PART VII APPLICABLE STATUTORY PROVISIONS

90. Section 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) provides:

> The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

PART VIII THE ORDERS SOUGHT

91. The applicant's application for special leave to appeal be granted.

92. The applicant's appeal is allowed.

93. The orders of the Court of Criminal Appeal be set aside, and in lieu thereof, it be ordered that:

    93.1 the appeal to that Court be allowed;

    93.2 the applicant's conviction for murder is quashed and a new trial is ordered;

    93.3 alternatively, the applicant's conviction for murder be replaced with a conviction for manslaughter.

PART IX ESTIMATE OF TIME REQUIRED TO PRESENT ARGUMENT

94. The applicant estimates that the presentation of his oral argument will require 1.5 hours.

24 March 2016

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