IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No. 17 of 2016

BETWEEN:

JOHNAS JEROME PRESLEY
Applicant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

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

Part II: STATEMENT OF ISSUES

2. The Respondent accepts the issues identified by the Applicant (AS [2][3]) arise in relation to the question of special leave to appeal and submits that the answer to each question is "no". Accordingly, special leave to appeal should be refused.

Part III: NOTICES UNDER s 78B OF THE JUDICIARY ACT

3. The Respondent considers that no notice is required to be given pursuant to s 78B of the *Judiciary Act 1903 (Cth).*

Part IV: FACTUAL BACKGROUND

4. The facts are accurately summarised in the judgment of the Court below.[1] The Applicant does not dispute the accuracy of that summary. The Respondent also relies on the factual summary in his written submissions filed in relation to the matter of Miller. The following factual matters are noted in addition to those facts.

5. As to the Applicant's agreement to a JCE to assault Mr Hall, there is unchallenged evidence that the Applicant returned to the Applicant's house after Mr Betts had an initial altercation with Mr Hall[2] and that when the Applicant arrived at the Applicant's house,

[1] [2015] 122 SASR 476 at AB1763-1769:[2] – [34]; AB1769:[35] – [41]
[2] AB615

Office of the Director of Public Prosecutions
Level 7, 45 Pirie Street
Adelaide, SA, 5000

Telephone: 0882071529
Fax: 0882071799
Ref:

he said words to the effect *"Let's go back and see what these people – go and see what the problem is"*.[3]

6. There is unchallenged evidence that the Applicant and Mr Betts left the Applicant's house together with the two other accused (Mr Miller and Mr Smith)[4] on foot.[5]

7. On the way out from leaving the Applicant's house, the Applicant admits going to Grant Street with a baseball bat in his possession.[6] There is unchallenged evidence that Mr Betts had a knife during the assault on Mr Hall; that this knife was 332 mm long;[7] and it was open to infer was taken from the Applicant's house (a cutlery drawer had been removed from its position in a cupboard and found on the floor of the kitchen in the Applicant's house.)[8] Therefore, it was open to the jury to infer that Mr Betts had this knife from the walk to Grant Street and given the size of the knife, to infer that the Applicant knew that Mr Betts was carrying a knife.[9] As such, it was open to the jury to consider the fact that Mr Betts was carrying a knife was not something that he would hide from the Applicant, given that the Applicant was himself holding a baseball bat.[10]

8. There is evidence that another Applicant (the Crown says Smith) was carrying a shovel;[11] and that this Applicant was carrying a shovel to, and had it at, Grant Street.[12] It was open to the jury to infer that the Applicant knew that another accused was carrying a shovel.

9. As to the Applicant's involvement at the scene itself, the Applicant pleaded guilty to count 2. It was clear, therefore, that he was at the scene. There is eyewitness evidence that there were four people around Mr Hall assaulting him.[13] There are four accused. There is expert evidence that Mr Hall was hit by something consistent with a baseball bat.[14] The Applicant admits he was holding and using a baseball bat.[15] There is eyewitness evidence that someone meeting the Applicant's description, and having a "silver pole", was hitting Mr Hall with that pole as well as stomping on Mr Hall's stomach.[16] There is eyewitness evidence identifying the Applicant as being at the scene and being *"involved in the beating of [Mr Hall]"*;[17] as well as someone meeting his description kicking and hitting Mr Hall.[18] Many blood-like spots were observed on the outer rear left leg of the grey shorts seized

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[3] AB616:T5-11
[4] AB616:T12-19
[5] AB617-618
[6] AB616:T23-29; AB631-632
[7] AB913
[8] AB1117
[9] see AB1118
[10] cf PS [21]
[11] [2015] 122 SASR 476 at [14][32]
[12] [2015] 122 SASR 476 at [14]
[13] AB246; AB252-253; see also AB383; AB 545 [2015] 122 SASR 476 at [16][17]
[14] AB1769
[15] AB1769; [2015] 122 SASR 476 at [35]
[16] AB383
[17] AB259
[18] AB252 read with AB289; see also AB322

from the Applicant.[19] There is evidence that the blood stains may have come from "*more than one event sending the blood into the air*".[20] That blood was matched to the deceased. Expert evidence was led that this meant that the Applicant was in close proximity to the attack upon Mr Hall.[21]

10. As to the Applicant's intoxication, there is evidence that the Applicant's blood alcohol level, when it was taken at 0830 on 13 December 2012 was 0.054%.[22] Further, there is no evidence that the Applicant's blood contained drugs.[23] The Applicant's blood was not taken directly after the assault, so the Applicant's actual level of intoxication as measured by its alcohol content was unknown. *Assuming* that no alcohol was consumed between the confrontation and taking the blood sample the blood alcohol level was likely to have been about 0.2%. There was no evidence as to the Applicant's experience with drinking, but there was evidence that if a person is more experienced at drinking, the degree of mental impairment that they suffer as a result of drinking may be less than that of an inexperienced drinker.[24] There is expert evidence that in determining the effect that alcohol has actually had on a person, an observation as to that person's conduct is "important",[25] as a person's reaction to alcohol will depend on the person – it is an individual thing.[26] There is eyewitness evidence that the Applicant did not appear as intoxicated as Mr Betts.[27]

11. There is unchallenged evidence that the Applicant returned from Grant Street with Mr Betts and the other accused.[28]

Part V: APPLICABLE STATUTORY PROVISIONS

12. In addition to the provision identified by Applicant are those identified by the Applicant Smith.

Part VI: SUMMARY OF ARGUMENT

Proposed ground 1 – unreasonable verdict

13. The ground referred to this Court was confined to the issue of whether the verdict was unsafe by reason only of intoxication. Accordingly, the sole issue is whether this Court is satisfied that on the whole of the evidence, it was *open* to the jury to be satisfied beyond reasonable doubt of the Applicant's guilt having regard to evidence of the Applicant's

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[19] AB1770; AB900
[20] AB935
[21] AB1770
[22] AB839:T35-38
[23] AB833:T19-21
[24] AB1047; AB 1049-1050
[25] AB1051:T27-36
[26] AB1063-1064
[27] AB289
[28] AB619-620

intoxication.[29] In this regard, it is critical to remember that the jury had the benefit of seeing and hearing the witnesses, which is particularly relevant given the nature of the evidence that the jury were assessing in this case.[30]

14. The Court below considered the adequacy of the trial judge's directions on intoxication as that was one of the primary appeal grounds relied on before that Court by the Applicant.[31] In so doing, the Court recited all the arguments by the Applicant in relation to intoxication, the evidence as to his state of intoxication and the direction given to the jury.[32] Whilst the Court did not specifically refer again to the evidence of the Applicant's intoxication and his mental state in dismissing the appeal ground that the verdict was unreasonable or could not be supported having regard to the evidence,[33] it is clear that this was something the Court was alert to. There is no basis to contend that it was not taken into account.

15. It was clearly open for the jury to be satisfied beyond reasonable doubt of the Applicant's guilt and to have considered that the Applicant had the appropriate mental state to, respectively, enter into an agreement with the other accused to assault Mr Hall with the intent to cause him grievous bodily harm; or at least enter into an agreement with others to assault Mr Hall with the intent to cause him harm, with the foresight that in executing the JCE, another accused might intend to cause Mr Hall grievous bodily harm. It must be kept in mind that the Applicant need not be proven to have himself assaulted Mr Hall to be liable.[34]

16. It is clear, as set out above, that it was open to the jury to find that the Applicant had sufficient mental acuity to undertake various actions. He was able to walk with Mr Betts to Grant Street, where the initial altercation with Mr Hall occurred. Then, he was able to return (on foot) to his house, with Mr Betts. At his house, he was able to talk, and form the view that he, Messrs. Betts, Miller and Smith should go back to Grant Street to see what Mr Hall's problem was. He was able to turn his mind to whether to bring a weapon along with him, and indeed, that he decided to bring a baseball bat, as he and the group went back to Grant Street. There is evidence to suggest that the Applicant would have seen that Mr Betts was carrying a knife (it being difficult to conceal, being just over 33 cms), and that another Applicant was carrying a shovel. Then there is evidence that, along with the Mr Betts and the other applicants and their weapons, the Applicant walked to Grant Street.

17. At Grant Street, the Applicant admitted assaulting Mr King. There is numerous eyewitness evidence which places the Applicant at the scene also assaulting Mr Hall.

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[29] [2015] 122 SASR 476 at [67]
[30] see *M v The Queen* (1994) 181 CLR 487 at 492-493
[31] [2015] 122 SASR 476 at [89] – [95]
[32] [2015] 122 SASR 476 at [89] – [95]
[33] [2015] 122 SASR 476 at [109]
[34] *Huynh v The Queen* [2013] HCA 6; (2013) 87 ALJR 434

Analysis of Mr Hall's blood on the Applicant's shorts places him in close proximity to Mr Hall to (some or all of) the assault. There is then evidence that the Applicant was able to walk back, on foot, to his house, with the other accused.

18. Whilst it is accepted that the Applicant had been drinking, that in and of itself is insufficient to show, in the context of the evidence in this case, that it was not open to the jury to find that the Applicant had the requisite mental state to form the agreement required for JCE or to contemplate the matters required for EJCE (as identified above). The Applicant has not been able to point to any evidence which shows (other than the fact he had been drinking) that he was not able to form either mental states. One must keep in mind that they are not complex mental thought processes. The decision to go with others to see what someone's problem is, arming yourself with a baseball bat (let alone what the others were carrying), is evidence which suggests, strongly, he had an intention to cause something more than just harm to Mr Hall. The Applicant did not conceal the baseball bat. The nature of some of the other weapons used in the confrontation (being a shovel, a 332 mm knife and a bottle) makes it unlikely that they were able to be concealed. The Applicant and the other accused had no need to conceal the weapons from each other. It was open on the evidence for the jury to find that the Applicant was aware that at least some of the other accused were armed.

19. There is nothing in the evidence as to intoxication which leads to the conclusion that the jury *must* have entertained a reasonable doubt. Indeed, an assessment of all the evidence establishes that it was open for the jury to find that the Applicant was guilty of the offence; that he participated in the joint enterprise with his co-offenders as alleged, and if necessary foresaw the possibility that one of his group might act with the intent to cause grievous bodily harm.[35]

Proposed ground 2 – extended joint liability

20. The Respondent relies on, without repeating, the arguments made in the written response to the same proposed ground of appeal in the submissions in relation to the co-offender, Mr Smith.

21. In addition, the Respondent adds the following submission, which addresses additional arguments raised specifically by this Applicant.

22. The Applicant's submission for re-consideration, while it refers to the reasons of Kirby J in *Clayton* (PS [86]), in effect relies solely on *Jogee* (PS [85]). However the Applicant has not grappled with a number of issues which arise from that reasoning. The Applicant has not addressed the policy rationale underlying the principle, nor why the considerations referred to by the majority in *Clayton* when refusing an application to re-open *McAuliffe*

[35] *Huynh v The Queen* (supra) at [38][39]

do not apply. Moreover, to suggest that the law has not been acted upon (PS [85]) is incorrect. It is now well established as part of the common law in Australia.

23. The Applicant's submission (PS [86]) that this Court should adopt the law in *Jogee* as correctly stating the position in Australia, and that to do so would bring the common law in line with the Code States, is flawed.

The "restatement of principles" in *Jogee* should be applied by this Court

24. It is not appropriate to simply restate the law of EJCE in accordance with the approach in *Jogee*, as the Applicant asserts in one sentence (AP [86]). There are several problems with this.

25. As submitted by the Respondent in his written submission in Smith, the purported restatement of the law is confusing and problematic for various reasons. It demonstrates that any change to this area must come from a systematic review of the law of complicity and accessorial liability.

26. The Applicant's submission begs the question, what are the restated principles in *Jogee* and are they applicable in Australia? The Applicant appears to contend that the relevant restated principles in *Jogee* are those found at [96] (AP [83]). It is unclear why that is said to be the principle; that paragraph must be considered with the proceeding[36] and following paragraphs. Rather paragraph [96] appears to simply reflect the conclusion that without the approach in *Chan Wing-Sui*, the liability of the persons on the factual scenarios posited is one of manslaughter (and not murder).

27. However, [96] uses language foreign to that of JCE: it talks of a party assisting or encouraging another in an unlawful act (language of aiding and abetting). It does not address the situation of a JCE. If it is intended to cover JCE, then at the very least it is using language that is inconsistent with that concept; it uses terminology inapt to describe the basis of liability.

28. In Australia JCE is a doctrine "*which is separate from the liability of an accessory before the fact, who counsels or procures the commission of the crime; it is separate from the liability of a principal in the second degree, who aids or abets in the commission of the crime. Joint criminal enterprise, or acting in concert, depends upon the secondary party (here, the appellant) sharing a common purpose with the principal offender (here, Preston) or with that offender and others.*"[37] Accessorial liability involves an offender, with the requisite knowledge, intentionally assisting or encouraging the commission of the offence. The liability for JCE lies in the *participation* in a joint criminal enterprise with the necessary state of mind. "*A person participates in a joint criminal enterprise by being present when the crime is committed pursuant to the agreement*"[38] Proof that an

[36] For example: R v Jogee [2016] 2 WLR 681 at [93][94][95]
[37] *Gillard v The Queen* (2003) 219 CLR 1 at [109] cf: *R v Jogee* (supra) at [77][78]
[38] *Huynh v The Queen* (supra) at [37]

offender is party to an agreement having the requisite foresight does not depend upon proof that he had engaged in any particular conduct at the scene. The language in [96] at the very least conflates the two concepts.

29. Moreover the approach in [96] (as well as possibly [94] and [95]) is then qualified by the Court[39] by reference to the principle of "*fundamental departure*". That principle, while part of the common law in relation to complicity in the UK,[40] has not been applied in Australia. Were the Court to consider restating the law in accordance with [96], consideration would need to be given, to whether and how this doctrine should be introduced into Australian law, and then of course, provide some guidance as to what the phrase means and how and when it applies in practice.[41] For example, if you have participated by encouraging or assisting in the unlawful act (as in [96]), why then, is it relevant that this unlawful act is a "*fundamental departure*"?

30. The reasoning in the paragraphs preceding this purported test in [96] also give rise to problems. For example, in [94], despite the court's criticisms as to the use of "*foresight*" that language is used. But it is qualified: if the jury are satisfied that D2 "*must have foreseen that ...D1 might well commit crime B*", then in certain cases, the jury might be justified in "*drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose*". So foresight *might* in some cases be used as inferential evidence of conditional intention. This would involve juries being instructed on the meaning of conditional intention. Again, this concept currently has no application in Australian law. This Court will need to provide guidance as to what this concept means and how the jury can be satisfied that an accused had the relevant mental state. Interestingly, this inference of intention referred to in [94] is one to be drawn in relation *to an individual person*, there is no reference to it being the intention of the parties.

31. As to [95], the Court appears to effectively be applying the principles of aiding and abetting to those circumstances where it would be artificial to say that the accused had a conditional intent in circumstances where there is a "*more or less spontaneous outbreak of multi-handed violence*" (which, one might say, would capture many instances of EJCE). This point is reiterated in [98], where the Court says the focus in the law needs to be on whether "*D2 intended to assist in the crime charged.*" But, again, the doctrine of JCE does not turn on the participants assisting or encouraging each other in their various acts in executing the JCE. What the Court is effectively doing is replacing the law of EJCE with that of accessorial liability. That is inappropriate.

32. The approach suggested in *Jogee* which the Applicant invites this Court to adopt, reflects the difficulties with the reasoning in the judgment. It involves, amongst other things,

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[39] *R v Jogee* (supra) at [97][98]
[40] See: *R v Powell* (1999) 1 AC 1 at 28 – 31
[41] The New South Wales Law Reform Commission Report, Complicity (2010) Report 129 at [4.71] ff

potentially adopting concepts (and directing the jury accordingly) which are not currently applied in Australia, in a manner which is extremely complex. The approach conflates JCE with accessorial liability.

33. The reasoning in *Jogee* supports the conclusion in *Clayton*[42] that if the law is to change it should be a matter for Law Reform Commissions and legislatures.

Comparative legislative framework in Australia

34. The Applicant's argument (AS [86]) in favour of *Jogee* that whilst it does not "*precisely mirror the approach in the Code jurisdictions*", it however, "*reduces the extent of the divergence between the common law and the position in those jurisdictions*" is, simply incorrect.

35. *First,* adopting an approach consistent with *Jogee* would necessarily involve a substantial departure from the law of EJCE as found in the Codes (and other statutory enactments). Far from reducing any alleged divergence (which is itself incorrect – see eg, s 8 *Criminal Code Act* (NT)), it would substantially increase it.

36. *Second,* the submission seems to presuppose that the various Codes (and other statutory enactments) have considerable, if not complete, uniformity of approach, which they do not.

37. *Third,* at the most fundamental level, *Jogee* abolishes EJCE whereas the Commonwealth, and each of the States and Territories who have statutory enactments of the principles maintain the concept in some form.

38. The approach in *Jogee* can be compared with that taken in the Australian jurisdictions where legislation has been enacted. At a high level:

    (1) the *Criminal Code 1995 (Cth),* s 11A, *Criminal Code 2002* (ACT) s 45A requires recklessness as to the commission of the other offence;[43]

    (2) the *Crimes Act 1958* (Vic) s 323 requires an awareness of a probability of the other offence being committed;[44]

    (3) none of the relevant sections in the *Criminal Code Act 1899* (QLD) s 8,[45] *Criminal Code Act Compilation Act 1913* (WA) s 8[46] or the *Criminal Code Act 1924* (Tas) Schedule 1, s 4 require any specific foresight or awareness, provided the commission of the subsequent offence was of such a nature that its commission was a probable consequence of the original joint enterprise;[47] and

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[42] *Clayton v The Queen* (2006) 81 ALJR 439 at [19]
[43] See s 45A(1)(b)(ii), 45A(3)
[44] s 323(1)(b)
[45] See: *Darkan v The Queen* (2006) 227 CLR 373 for a discussion of the meaning of the provision
[46] s 8(1)
[47] See the same language in each section: "*When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed*

(4) the *Criminal Code Act* (NT) s 8 provides that a person is presumed to have committed the subsequent offence unless he proves he did not foresee that the commission of that offence was a possible consequence of prosecuting that unlawful purpose.[48]

39. It is clear, therefore, that the primary change between the common law and many of the Code/statute jurisdictions is to a test of what is (subjectively or objectively) probable. None of the provisions require proof of actual intention on behalf of the accused as to the commission of the secondary offence. None of these legislations introduce concepts of "conditional intention" or "fundamental departure". Nor do they replace parts of the statutory versions of EJCE with the law of either manslaughter or aiding and abetting. None of them have abolished EJCE.

40. Only South Australia and New South Wales apply the common law principles. Contrary to the Applicant's contention (PS [86]), even leaving aside the variations in the legislation, it is not this Court's role to bring the common law in line with legislation.

41. The common law is clear and well established. It is for the legislature to determine whether the long established law needs changing.

Injustice by reason of EJCE

42. The Applicant concedes that it is "not easy definitively" to point to "*actual examples of miscarriages of justice by the operation of the principle*" (AP [89]). This is significant. The Applicant can point to no case where an accused has been treated unjustly, despite saying that the risk of a wrong verdict of murder when only manslaughter is justified is real. The argument that *McAuliffe* has led to injustice was rejected by this Court in *Clayton*. There is no cause to come to a different conclusion here.

Part VII: NOTICE OF CONTENTION OR CROSS APPEAL

43. Not applicable.

Part VIII: TIME ESTIMATE

44. The Respondent estimates that the oral argument will take approximately 3 hours (for all Applicants).

Wendy Abraham QC
Counsel for the Respondent
Phone: (02) 80296319

Jocelyn Williams
(02) 80296322

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of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[48] s 8(1); if you have that necessary foresight then you are "presumed" to have "*aided or procured the perpetrator or perpetrators of the offence to commit the offence*"

Email: wendy.abraham@12thfloor.com.au Jocelyn.williams@12thfloor.com.au

Emily Brown

Phone: (08) 80271871
Fax : (08) 82071799
Email: emily.brown2@sa.gov.au