IN THE HIGH COURT OF AUSTRALIA **No. A22 of 2015**
ADELAIDE OFFICE OF THE REGISTRY

BETWEEN

WAYNE DOUGLAS SMITH
Applicant

THE QUEEN
Respondent

APPLICANT'S REPLY

Part I: Internet Publication

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

Part II: Reply

2. The respondent (RS [13]) accepts that the Full Court made no reference to the evidence concerning the applicant's intoxication in its disposition of his complaint that the verdicts were unsupported by the evidence. Accordingly, the Full Court expressed no consideration of the interaction between the applicant's state of intoxication and the directions on complicity. It ought to have been dealt with expressly. Contrary to the respondent's contention, the assumption that the Full Court must have taken the issue into account is unjustified.

3. The respondent's approach (RS [15]) to the evidence concerning the applicant's degree of intoxication is too narrow and ignores the persuasiveness of the circumstantial evidence which
20 was material to any assessment of the applicant's sobriety. Whilst there was no evidence of exactly how much the applicant had consumed or what his blood alcohol concentration was at the time of relevant events, the evidence suggested that all of the accused were drunk and that the applicant had been drinking throughout the day with Miller, whose blood alcohol concentration was between .292% and .342% at the relevant time. The evidence going to Miller could not be transplanted into an evaluation of the applicant's sobriety without any qualification; but it provided a convincing circumstantial platform from which an inference could, and should, have been drawn as to the applicant's degree of intoxication.

4. However, it was not necessary for the applicant to have been *demonstrably* affected by alcohol; it was not necessary for the evidence to establish that the applicant was incapable of
30 controlling his conduct or was unaware of what he was doing (RS [15]). The relevant question is not whether the applicant was "unable" to form the forbidden state of mind (RS [15]). To approach the significance of intoxication through the prism of an "intoxication threshold" involves a distraction from the real enquiry: in light of his consumption of alcohol, had it been proved beyond reasonable doubt that the applicant had the necessary state of mind to establish his guilt by virtue of joint enterprise or extended joint enterprise principles.

2.1 The meaning and significance of "injustice"

5. Searching for "injustice" resulting from the principles of extended joint enterprise will inevitably be illusory (RS [21]). For one, the word "injustice" is a protean phrase, the content of which will necessarily depend on normative and subjective judgments about the

Legal Services Commission
Solicitors for the applicant
Windsor Building, Elizabeth City Centre
ELIZABETH SA 5112

Telephone: (08) 8111 5415
Facsimile: (08) 8207 9333
Julia.Davey@lsc.sa.gov.au.au
27 April 2016

circumstances of a particular case. This kind of analysis is unhelpful because it yields little relevant information about the functionality and efficacy of the principles under consideration. Second, in a system dominated by trials by juries, relieved of the obligation of expressing reasons for verdicts, the detection of "injustice" (whatever that might mean in a particular context) will ordinarily be all but impossible. It is more useful to substitute a search for "injustice" with an inquiry into judicial treatment of the principles of extended joint enterprise and to examine the compatibility of extended joint enterprise with other aspects of the criminal law (AS [23.1-23.6, 45-68]). However, if a search for "injustice" is useful, one of the primary shortcomings of extended joint enterprise is the frequent use of the principle as a bridge between different species of criminal offences. It effectively enables reasoning from participation in one, less serious crime, to another more serious crime. Thus, an assault consisting of accosting or impeding, contrary to s 20(1)(e) of the *Criminal Law Consolidation Act 1935* (SA) becomes a foundation for an allegation of murder – yet it need not be proved that the secondary participant ever intended, encouraged or agreed to the commission of murder, nor made any physical contribution to that crime. The principle invites proof of an intention or agreement to commit less serious crimes, such as assault or robbery, as a platform for liability for much more serious crimes.[1] Contemporary sentencing regimes, which involve mandatory non-parole periods for murder, highlight the severity of the principle in this respect (AS [68]).

2.2 McAuliffe, Accessorial Liability and the Early Cases

6. It is correct that the reasons of the Court in *McAuliffe* endeavoured to link the development of extended joint enterprise to the principles of accessorial liability generally[2] (RS [28-29], [61]). The point made by the applicant (AS [23.5, 59-61]) is that extended joint enterprise departs from the fundamental precepts of accessorial liability and joint criminal enterprise itself. The rules of extended joint enterprise cannot be described as consistent with accessorial liability and, beyond the suggestion in *McAuliffe* that extended joint enterprise "accords with the principle" of accessorial liability, there was no attempt to reconcile the concepts.[3] If there had been, the incompatibility of the two concepts, which the applicant contends exemplifies the shortcomings of the principle, would have been apparent (AS [23.5, 33-37, 59-61]).

7. The respondent (RS [61-66]) may misunderstand the contentions made by the applicant. Extended joint enterprise is not a species of accessorial liability. It is inaccurate to characterise extended joint enterprise as consistent with, and therefore a modest evolution of, the principles of accessorial liability. Both joint enterprise simpliciter and traditional accessoryship are built upon the requirement of intentional contribution to the agreed upon or committed offence. Both principles focus on the causal link between the secondary party's conduct and the commission of the offence charged. Extended joint enterprise does not. The concept abandons the requirement of a nexus between conduct and crime; and state of mind and crime. For this reason, extended joint enterprise does not sit at all comfortably with the law of accessorial liability. It dilutes the importance of the co-existence of actus reus and mens rea. This creates anomalies across the bases of liability for "secondary participants" and with more generally applicable principles of the criminal law.

8. These anomalies make the identification of the jurisprudential foundations of extended joint enterprise important (AS [45-47]). Although the respondent points to historical references to a concept that shares some parallels with the modern doctrine of extended joint enterprise, early statements of the limits of liability are not consistent with its current formulation (RS [34-36]).

---

[1] See, eg, *Sio v The Queen* [2015] NSWCCA 42; *R v Phan* [2016] NSWSC 483; *R v Taufahema* (2007) 228 CLR 232, [31] (Gleeson CJ and Callinan J) referring to the three (and ultimately four) bases on which the accused were said to be liable; [115]-[116] (Kirby J).

[2] *McAuliffe v The Queen* (1995) 183 CLR 108, 118.

[3] *McAuliffe v The Queen* (1995) 183 CLR 108, 113-114.

9. Equally, cases such as *R v Smith* [1963] 1 WLR 1200, *R v Anderson and Morris* [1966] 2 QB 110 and *R v Vandine* [1970] 1 NSWR 252 should not be read as supporting the development of a principle based on foresight of a possibility (RS [38]). In *R v Smith* [1963] 1 WLR 1200, the emphasis was clearly on the scope of the common design to which the appellant was a party. As Slade J said at 1205:

> The term 'agreement', 'confederacy', 'acting in concert' and 'conspiracy', all presuppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing, *is guilty of manslaughter*. That does not mean that one cannot hypothesise a case in which there is an act which is wholly outside the scope of the agreement, in which case no doubt different considerations might apply; but the judge was not dealing with that case at all.

10. Later at 1206-1207, Slade J held:

> By no stretch of the imagination, in the opinion of this court, can that be said to be outside the scope of the concerted action in this case. In a case of this kind it is difficult to imagine what would have been outside the scope of the concerted action, possibly the use of a loaded revolver, the presence of which was unknown to the other parties; but that is not this case, and I am expressing no opinion about that. The court is satisfied that anything which is within the ambit of the concerted arrangement is the responsibility of each party who chooses to enter into the criminal purpose.

11. In *R v Anderson and Morris* [1966] 2 QB 110 (RS [44]) M was convicted of manslaughter for his role in a fight between A and the deceased in which A acted outside of the common design between M and A. That M could not be guilty based on a frolic by A was made clear by Lord Parker CJ's concluding remarks at 120:

> It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.[4]

12. The critical passage in *R v Vandine* [1970] 1 NSWR 252 which was a case of felony murder (RS [39]) appears at 254 of Herron CJ's reasons:

> ...it must be kept clearly in mind that aiders and abettors are only liable for such crimes committed by principals in the first degree as are done in execution of their common purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories, unless they actually instigate its commission.

13. These cases did not turn on the application of a principle of foresight in a way that links them with the decisions in *Chan Wing-Siu* [1985] AC 168 and *McAuliffe*. They do not, in the applicant's submission, identify a jurisprudential basis for the decision in *McAuliffe* independent of what has been held to be the flawed approach in *Chan Wing-Siu* (RS [27-50]). It is clear, in the

---

[4] M's conviction for manslaughter was quashed. The flaw in the trial judge's summing up was that it invited the jury to find M guilty of manslaughter in relation to a crime which fell outside the scope of the common purpose between A and M. This was the inevitable result of the correct application of the principles which had developed in the United Kingdom. The decision in *Anderson* drew on the statement of principle in Article 17 of Stephen's *Digest of the Criminal Law* which provided that the commission of a crime foreign to the common purpose agreed upon by participants in an unlawful enterprise, could not be attributed to the participants in the common purpose (see Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 578, 579. Article 17 appears to have been Article 38 in Stephens' earlier works: Simester, "The Mental Element in Complicity", (2006) 122 *Law Quarterly Review* 578, 596-597). The Respondent (RS [44], footnote 78) might misunderstand the submission made at (AS [28]).

applicant's submission, that the decision in *McAuliffe* rested on the statement of principle in *Chan Wing-Siu* and cannot therefore be quarantined from criticisms of the Privy Council's reasons (RS [28-31]).[5] The chronology of Australian cases prior to *McAuliffe* supports that contention (AS [29-31]).[6] The comments of Stephen J in *Johns v The Queen* (1980) 143 CLR 108 at 118 cannot be fragmented in the way suggested by the respondent (RS [41]).[7] A fair analysis of Stephen J's judgment[8] shows that he drew on conventional accessorial liability and otherwise acknowledged that bilateral assent determined the scope of a common purpose which in turn defined the extent of liability. The reasons of the plurality in *Johns* also plainly emphasised the importance of authorisation to secondary liability.[9]

2.3 Policy Justifications and Jogee

14. The importance of policy considerations to the expression and refinement of legal principle cannot be denied. However, it is unwise to place too much emphasis on such considerations (RS [51-60]), particularly in the context of the criminal law where value judgments about moral responsibility can vary significantly.[10] The Court in *Jogee* rightly approached its analysis of the correctness of the principle by paying primary attention to its jurisprudential provenance and its interrelationship with other features of the criminal law (cf RS [75]). The respondent's submissions tend to invert the correct approach to the issue raised by the amended application for special leave by attempting to justify the rules of extended joint enterprise by positing an answer to the question "who *should* be guilty of murder?" In the applicant's submission, the better approach is to ask "who is guilty of murder", having regard to central principles of the criminal law.

15. Moreover, underlying the policy arguments routinely cited in favour of extended joint enterprise is an assumption that in all cases in which an accused is a party to an agreement to commit a crime, it is just and reasonable to hold the accused equally accountable for incidental crimes which he or she neither intended nor contributed to. This largely unreasoned assumption has created the paradigm anomaly between the rules of extended joint enterprise and the criminal law more generally (AS [23.3, 48-54]). Equally importantly, assumptions of this kind necessarily involve innately subjective and idiosyncratic value judgments about moral responsibility. It may be thought to be unclear why the criminal law should necessarily favour the prospect of penalising a person with a verdict of murder when he or she does not perform the actus reus of murder; does not make any causal contribution to its commission; lacks the intention necessary for murder; and otherwise provides no intentional encouragement or assistance to murder. The soundness of policy rationalisations become even more dubious when the person who inflicts the fatal wound him or herself would not be guilty of murder if it were proved only that he or she contemplated the possibility of acting with murderous intent (AS [23.3, 55-56, 65]). It may be questioned why manslaughter is thought to be an unsatisfactory verdict for those who are involved in a criminal activity which results in the unintended (by the secondary participant) death of another (AS [64]).

16. These arguments also assume that the principles of accessorial liability and joint enterprise simpliciter leave a gap (RS [78])[11] in the criminal law that needs to be bridged to ensure that secondary participants in such circumstances do not escape liability for murder. Properly

---

[5] *McAuliffe v The Queen* (1995) 183 CLR 108, 118.

[6] The decision in *Johns v The Queen* (1980) 143 CLR 108 does not, in the applicant's submission, support the proposition that prior to *McAuliffe*, the common law of Australia extended liability beyond the scope of the common purpose: cf, *Gillard v The Queen* (2003) 219 CLR 1, [115] (Hayne J).

[7] See, eg, *Johns v The Queen* (1980) 143 CLR 108, 117, 119.

[8] *Johns v The Queen* (1980) 143 CLR 108, 116-117, 119.

[9] *Johns v The Queen* (1980) 143 CLR 108, 131.

[10] An example is the discussion by Simester, "The Mental Element in Complicity", (2006) 122 *Law Quarterly Review* 578.

[11] *McAuliffe* itself provides a suitable example. There was nothing about the facts of that case which illustrated the need for the extended principle. It was a clear case of joint enterprise simpliciter or aiding and abetting.

understood, those principles provide clear and functional rules for the determination of extended liability, particularly in cases of homicide (cf RS [65]). Neither denies the potential evidentiary significance of contemplation of the possible consequences of embarking on a particular crime. However, both concepts appropriately recognise that criminal liability – particularly for serious crimes – depends on more than mere subjective ruminations.

17. Policy arguments in support of extended joint enterprise invariably distil to propositions about the unpredictability of criminal activity (RS [25]) and gang violence (RS [54-58]) yet neither provides a persuasive basis to depart from norms of the criminal law. "Unpredictability" is a hollow justification: the assumption behind extended joint enterprise is that the outcome has, to a degree at least, been predicted. In truth, this aspect of the so called policy justifications becomes about the degree to which the prediction of a crime's occurrence will be treated by the law as sufficient to establish criminal liability. It is here that the principles of extended joint enterprise depart from the key threads of the criminal law – that liability for crimes depends on more than contemplation of the mere possibility that a crime might be committed (AS [55-58, 65]).

18. "Continued participation" is a problematic premise on which to justify liability (RS [21, 59]) because, self evidently, it is continued participation referable only to the original agreement between participants that the principle then seeks to attribute to the incidental crime. The weakness in the argument is further exposed when it is acknowledged that continued participation might be nothing more than being present at the scene of the agreed crime knowing that the incidental crime might possibly be committed but not wanting it to occur. On the current formulation of the principle, "withdrawal" from an extended joint enterprise is all but impossible.

19. *Jogee* is a paradigm example of conventional common law reasoning. It is adaptive to and reflective of the emphasis which has and continues to be placed on subjective intention and causation. There is nothing uncertain or ambiguous about the Court's restatement of the principle in *Jogee* at [90]-[96] (cf RS [71, 76]). The Court was doing no more than emphasising that secondary liability depends on the conventional operation of the traditional rules of accessorial liability and joint criminal enterprise, which apply in Australia.[12] In cases involving joint criminal enterprises, the scope of the agreement will necessarily incorporate all crimes which the participants to the agreement expressly or tacitly agree will be committed if the occasion arises. This is an entirely orthodox statement of principle which resonates with the pre-*McAuliffe* authorities in Australia.

20. The concept of 'conditional intention' is well known to Australian jurisprudence (cf RS [76]). *Johns* itself was a case about conditional intention; so too was *Miller v The Queen* (1980) 55 ALJR 23. The concept of conditional intention acknowledges that although the participants to a joint enterprise may desire that the incidental crime not be committed, they have decided that, in the event necessary, the commission of the incidental crime is an authorised by-product of the criminal objective. There is nothing unworkable or curious about this proposition of law.

	T A Game	K G Handshin
Phone	(02) 9390 7777	(08) 8205 2966
Fax	(02) 8998 8547	(08) 8212 6590
Email	tgame@forbeschambers.com.au	khandshin@barchambers.com.au

Counsel for the applicant

[12] *Giorgianni v The Queen* (1985) 156 CLR 473.