IN THE HIGH COURT OF AUSTRALIA A30/2012, A31/2012 & A32/2012

ADELAIDE OFFICE OF THE REGISTRY

BETWEEN

TUAN KIET DAVID HUYNH, ROTHA SEM and CHANSYNA DUONG

10 **Appellant/Applicants**

and

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

PART I

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

PART II: CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. The respondent agrees with the statement of the issues presented by the appeal in paragraphs 2 and 3 of the written submissions of the appellants.

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PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (Cth)

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

PART IV: NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED.

4. The appellant Huynh categorises the attack upon the deceased as "the brawls". While it might be convenient to categorise the attack by reference to the two separate locations of the roadway and the gates (referred to by the appellant Huynh as "the brawls"), it is important to note that in reality this was one continuous attack upon the deceased.

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5. Contrary to the appellant Huynh's assertion in paragraph 17 of his outline and the applicant Sem at paragraph 19 of his outline, it was not the prosecution case that the stabber was Duong. It was the prosecution case that there was some evidence, if accepted, that Duong was the stabber.[1] However, there was also direct evidence that Huynh was the stabber[2] - although there was only one stab wound and therefore it was not possible for more than one person to have committed the stabbing.[3] However, it did not matter who the stabber was, provided that liability attached as a consequence of joint enterprise, extended joint enterprise, or by virtue of aiding and abetting.

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6. The appellant / applicants (from hereon referred to as the appellants) have referred in their submissions outline to the "paucity" of evidence against each.[4] Such a description fails to recognise that *all* of the evidence (with the exception of the out of court statement made by Sem[5]) was admissible with respect to all appellants.

7. In addition, in so far as the alleged unreliability of particular witnesses is referred to, it must be remembered that the jury had the benefit of seeing and hearing those witnesses.[6]

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THE PROSECUTION CASE AT TRIAL

8. The prosecution opened the case to the jury on the basis that it would be open to the jury to convict of murder if they found that any particular appellant had acted as a principal, if they were part of a joint enterprise or an extended joint enterprise, or if they aided and abetted another.[7] In particular, with respect to joint enterprise, the prosecutor addressed the jury with respect to "combined actions" and the concept of them "working together".[8]

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[1] Prosecution Opening, 25; Prosecution Closing, 1796, 1799.
[2] Rithy Kheav, 514.
[3] K Heath, 163.
[4] See for example, paragraphs 24 and 26 of the Written Submissions of the Appellant Huynh and paragraphs 25 and 27 of the Written Submissions of the Applicant Sem.
[5] Exhibit P74.
[6] *M v R* (1994) 181 CLR 487, 492-493 (Mason CJ, Deane, Dawson and Toohey JJ); *Jones v R* (1997) 191 CLR 439, 450-451 (Gaudron, McHugh and Gummow JJ).
[7] Prosecution Opening, 33-39.
[8] Prosecution Opening, 35.

9. It was made plain to the jury that for liability on the basis of joint enterprise an agreement, and participation in that agreement were required. In the opening address, that was clearly linked by the prosecutor to the evidence it was anticipated that the jury would hear as to what the appellants' actions were or what they did.[9] In the closing address, these themes were clearly reiterated. The prosecution case with respect to the involvement of each appellant was set out.[10] In addition, the prosecutor set out in some detail how it was that the events at Duong's house, the return to the party armed with weapons, and the events that took place after that, were relevant to establishing a joint enterprise.[11]

PART VI: STATEMENT OF ARGUMENT

GROUND 1 - JOINT ENTERPRISE AND EXTENDED JOINT ENTERPRISE

The Appellants' Contentions

10. The appellants' contentions can be summarised as follows:

(1) That "participation" is an essential "element" for liability on the basis of joint enterprise.

(2) That for an accused to be guilty on the basis of joint enterprise, the jury must be directed that the there is a relevant agreement to which the accused is a party *and* that the accused must "participate" in that agreement.

(3) That, on the facts of this case, the evidence proving the relevant agreement and the evidence proving "participation" was not the same.

(4) As a consequence, the Court below erred in holding that there was no need to specifically direct that there had to be "participation" for liability to be established.

A brief summary of the respondent's arguments

11. The respondent agrees that liability on the basis of joint enterprise requires an accused to be a participant in a relevant agreement and that has been held to require not just that a person be a party to the agreement but that there be "participation" in it. Further, the respondent agrees that the requirement of "participation" was not separately set out in the written directions.

12. However, it is not in every case that there will be any difference between evidence showing that a person is a party to the relevant agreement and that he/she "participated" in it. The evidence of one will commonly be the evidence of the other. Where, as in this case, the evidence that establishes that an appellant was a party to the agreement *and* the evidence establishing "participation" in that agreement is the same - there is no requirement that a jury

[9] Prosecution Opening, 36.
[10] Prosecution Address, 1799 - 1804.
[11] Prosecution Address, 1806 onwards.

be separately directed that the accused must be a party to the agreement and have "participated" in it.

13. Even if there is a failing in the directions through the absence of a direction as to the requirement of "participation" there is no substantial miscarriage of justice. Given that each appellant was present, if the jury followed the balance of the directions on joint enterprise (or extended joint enterprise) a conviction on the basis of aiding and abetting was inevitable.

Terminology

14. This Court has held that the terms common purpose, common design, concert, and joint criminal enterprise are used more or less interchangeably.[12] The respondent will use the terms joint enterprise and extended joint enterprise.

Joint Enterprise and "participation"

15. In *McAuliffe v The Queen*, this Court set out the doctrine of joint enterprise. This Court held that it:

> ...arises where a person reaches an understanding or arrangement amounting to an agreement between that person or another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all of the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the crime played by each in its commission. (footnotes omitted)

As Hayne J observed in *Gillard v The Queen*:

> It 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 and abets in the commission of the crime. Joint criminal enterprise, or acting in concert, depends upon the secondary party... showing a common purpose with the principal offender... or with that offender and others.[13]

16. In neither *McAuliffe v The Queen* nor in the judgment Hayne J in *Gillard v The Queen* is there explicit reference to the need for "participation" in the agreement once the person is a party to it. Further, there is no reference in that context to the need to participate with the necessary foresight. Such a reference is unnecessary as the agreement is to do something with a particular intent.

17. In *Likiardopoulos v The Queen* it was said of joint enterprise with respect to an offence of murder (where the intent relied upon at trial was an intent to inflict really serious injury):

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[12] *McAuliffe v The Queen* (1995) 183 CLR 108, 113 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Gillard v The Queen* (2003) 219 CLR 1, 35 [109].

[13] *Gillard v R* (2003) 219 CLR 1, 35 [109] (Hayne J) citing with approval *McAuliffe v The Queen* (1995) 183 CLR 108, 113-114.

> It was necessary to prove that the appellant was a party to an understanding or arrangement, whether formed expressly or tacitly, ... to inflict really serious injury on the deceased and that, while that arrangement was on foot, one or more of the parties to it did the acts which caused death intending thereby to do really serious injury to him. The appellant's participation in the enterprise while possessed of the requisite intention... operates to fix him with liability for the acts of the other parties carried out in pursuance of it.[14]

Here there is reference to "participation" but the Court does not set out that "participation" is anything more than being a party to the relevant agreement.

10 **Extended Joint Enterprise and "participation"**

18. Extended joint enterprise deals with the situation where the crime committed is beyond the scope of what has been agreed. Hayne J summarised the approach in *Gillard v The Queen* by reference to this Court's judgment in *McAuliffe*. It was held that:

> As *McAuliffe* reveals, the contemplation of a party to a joint enterprise includes what that party foresees as a possible incident of the venture. If the party foresees that another crime might be committed and continues to participate in the venture, that party is a party to the commission of that other, incidental, crime even if the party did not agree to it its being committed. ... *The criminal*
20 *culpability lies in the participation in the joint criminal enterprise with the necessary foresight.*[15] (emphasis added)

Here there is explicit reference to "participation" and that it must be with the necessary foresight as the agreement is not to act with the intent necessary for the crime charged. Liability attaches because a person is a party to (or "participates in") the agreed venture, while foreseeing another crime might be committed. This does not mean that an accused must *do* anything more once the incidental crime is foreseen other than remain a participant in the agreed venture. In the absence of anything to suggest that an accused might have withdrawn from the agreed venture, he/she is already participating.

30 **What the above has been seen as requiring in directions**

19. The above has been interpreted as requiring a jury to be directed that not only must there be a relevant agreement to which the accused is a party but that a jury must also be directed that it is necessary that the accused "participated" in that agreement.[16] The respondent will deal with the issues in this appeal on the assumption that there will be some cases that require such a direction. However, it is not clear that the judgments of this Court referred to above require such an approach as the "participation" referred to appears to simply be

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[14] [2012] HCA 37, [19] (citations omitted) (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Handlen v The Queen* [2011] HCA 51, [4].

[15] *Gillard v The Queen* (2003) 219 CLR 1, 36 [111]-[112] (Hayne J) (citations omitted).

[16] See for example *Likiardopoulos v R* (2010) 30 VR 654 at the direction given at trial, 662 [41]; *Arafan v The Queen* (2010) 206 A Crim R 216, [24]-[36]; *Tangye* (1997) 92 A Crim R 545, 556-7; *R v Kostic* (2004) A Crim R 10, 21 [53]. See also Judicial College of Victoria, *Victorian Criminal Charge Book* (First published 2006, 23 October 2012 ed) at 5.3.1 [2] and the Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (First published 2007, October 2012 ed) at [2-750].

a reflection of the requirement that a person be a party to the agreement. At the very least, such a direction is not necessary in every case.[17]

What does "participation" mean?

20. The appellants appear to contend that "participation" is always (or at least was in this case) something more than being a party to the relevant agreement.[18] Further, that "participation" is restricted to an act/s in the course of the assault of the deceased.[19] The appellants then contend that these things guide the directions to be given and, in turn, expose the approach of the court below as erroneous.

21. It is necessary to consider what is meant by "participation". It is helpful to look at the approach of the intermediate Courts. At the very least the approaches show that evidence that proves the existence of a relevant agreement and evidence that shows "participation" in that agreement can be the same. If this is so, the sort of direction for which the appellant contends (one that identifies "participation" as a separate element) will not be needed in every case.

22. In *Tangye*[20] the New South Wales Court of Appeal described participation as:

> committing the agreed crime itself or simply... being present at the time when the crime was committed and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit the crime. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime.[21]

However, the reference to "presence" in *Tangye* must be read in light of this Court's judgments in *Johns (TS) v The Queen* and *McAuliffe v The Queen.* Both make plain that presence is not required.[22]

23. In *R v Likiardopoulos* the Victorian Court of Appeal referred to participation as "the taking of a step or steps to further (the) enterprise".[23] Such an approach will include acts that amount to assistance or encouragement.

24. In South Australia, Kourakis CJ has stated, with respect to joint enterprise, that participation is an act that "satisfies one or more of the elements of procuring,

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[17] It can be noted that recommendations have been made in Victoria to draft legislation that will have the consequence, as the respondent understands it, of not requiring any direction as to participation. See Simplification of Jury Directions Project, *A Report to the Jury Directions Advisory Group August 2012* (August 2012) [2.270]-[2.280].

[18] Appellant Huynh's Written Submissions, [39.2], [39.3] and [56], adopted by Sem [38] and Duong, [30].

[19] Appellant Huynh's Written Submissions, [39.2], [39.3] and [58], adopted by Sem, [38] and Duong, [30].

[20] (1997) 92 A Crim R 545.

[21] *R v Tangye* (1997) 92 A Crim R 545, 557 (Hunt CJ at CL).

[22] *McAuliffe v The Queen* (1995) 183 CLR 108, 114; *Johns (TS) v The Queen* (1980) 143 CLR 108; See also *Likiardopoulos v The Queen* [2012] HCA 37, [21].

[23] *R v Likiardopoulos* (2010) 30 VR 654, [59].

counselling, aiding or abetting that offence."[24] The same approach was taken by Sir Robin Cooke in *Chan Wing-Siu v The Queen.*[25] As this Court has observed each term is used to convey the concept of conduct that brings about or makes more likely the commission of an offence.[26]

25. While it is neither possible, nor helpful, to fix upon a single description of what amounts to "participation" it is plain that whatever description is used - they are all things that are equally capable of showing both that an accused is part of an agreement and that he/she "participated" in it.[27]

26. In light of the above, at the very least, and contrary to what the appellants appear to contend, there is no requirement that the conduct of an accused that establishes he/ she is a part of the agreement, must be different conduct to that showing "participation". If there was such a requirement, there would also be a requirement for the jury to determine when the agreement was formed. Such a requirement has never existed. Indeed, it is contrary to the fact that it has long been accepted that an agreement can be unstated, inferred from conduct and simply mutually understood between the parties to it.[28]

27. Further, the requirement of participation with the necessary foresight (state of mind) must be properly understood. In joint enterprise, the state of mind ("foresight") already exists as part of the agreed plan. In extended joint enterprise, the requirement is that a crime is foreseen that is not the one agreed. Liability attaches because the accused continues to "participate" in what was previously agreed. Accordingly, unless it is a reasonable possibility that, having foreseen the commission of a crime that is beyond the one agreed, the accused withdraws - the accused will continue to participate.

28. To suggest, as the appellants appear to do, that the relevant participation must be in, or at least proximate to, the act the subject of the crime charged ignores that an accused's contribution to a plan (and the evidence showing that he/she is a participant or a party) can be at any time and at any location.[29]

A separate direction with respect to "participation", is it always required?

29. As set out above, it is accepted that there are authorities that set out that a jury should be directed that "participation" in the agreement should be identified as a

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[24] *R v B, FG; R v S, BD* [2012] SASC 157, [24].
[25] *Chan Wing-Siu v The Queen* [1985] 1 AC 168, 175.
[26] *Handlen v The Queen* [2011] HCA 51, [6] citing with approval *Giorgianni v The Queen* (1985) 156 CLR 473, 493 (Mason J).
[27] For this reason it is perhaps inappropriate to draw a firm distinction (as at least the appellant Sem appears to do at [38.3]) between what is required to prove involvement in a conspiracy and involvement in a joint enterprise. If a person can be part of a joint enterprise by procuring, counselling, aiding or abetting (things that might be established by a mere entry into an agreement and no more) then there will commonly be considerable overlap between evidence capable of proving a conspiracy and evidence proving involvement in a joint enterprise. When the completed offence is committed, the substantive offence should be charged (*The Queen v Hoar* (1981) 148 CLR 32, 38).
[28] See for example *R v Tangye* (1997) 92 A Crim R 545, 556-557 (Hunt CJ at CL). See also *McAuliffe v The Queen* (1995) 183 CLR 108, 114; *Likiardopoulos v The Queen* [2012] HCA 37, [19].
[29] The facts of *Johns (TS) v The Queen* (1980) 143 CLR 108 provide just one example.

separate "element" of liability on the basis of joint enterprise.[30] The appellants then argue that such a direction was essential in this particular case.

30. It is one thing to say that a person cannot be guilty on the basis of joint enterprise unless he or she has participated in that joint enterprise, it is another to say that a jury must be directed that participation is a separate "element" to be established in every case. The direction required must be determined by the particular facts of the case and not some rigid formula. If the evidence of what an accused does is relied upon to show both that he/she is a party to the agreement and also shows that he/she "participated" in that agreement, it is difficult to see that the direction for which the appellant contends achieves any purpose. The appellants' reliance on this Court's judgment in *Handlen v The Queen* in this context is misplaced. In that case, a basis of liability that did not exist was left to the jury.

31. The starting point for the directions that must be given is this Court's judgment in *Alford v Magee*. The only law on which a jury need be directed is that:

> necessary for them to know... as must guide them to a decision on the real issue or issues in the case...[31]

32. Further, it is for the trial judge to determine what the real issues are and to instruct the jury about only so much of the law as most guide them to a decision.[32] What the real issues are is a judgment to be made in the context of the trial. It may be that an appeal court should attribute a great deal of importance to what was done at trial with regard to the advantage of the trial judge and the responsibility of counsel to draw the judge's attention to any omission.[33]

33. In this case, the evidence that the appellants were a party to the agreement (what they did which cannot be divorced from the context in which they did it) and the evidence that the appellants participated in the agreement (again, what they did and the context in which he did it) was the same. That being so, there cannot have been a requirement to direct the jury in a way that identified the fact that the appellants were a party to a relevant agreement, and that they participated in that agreement, as separate "elements".

What would be required in every case if the appellants' approach was correct

34. It is helpful to examine what would be required if the appellants' approach were mandatory regardless of the facts of the case. Using the example of an agreement to act with murderous intent, it would mean that even in a case where the evidence proving the agreement and the evidence proving "participation"

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[30] See for example *Likiardopoulos v R* (2010) 30 VR 654 and the direction given at trial, 662 [41]; *Arafan v The Queen* (2010) 206 A Crim R 216, [24]-[36]; *Tangye* (1997) 92 A Crim R 545, 556-7; *R v Kostic* (2004) 151 A Crim R 10, 21 [53]. See also Judicial College of Victoria, *Victorian Criminal Charge Book* (First published 2006, 23 October 2012 ed) at 5.3.1 [2] and Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (First published 2007, October 2012 ed) at [2-750].

[31] *Alford v Magee* (1952) 85 CLR 437, 466 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

[32] *Clayton v The Queen* (2006) 168 A Crim R 174, 180 [24].

[33] *Tully v The Queen* (2006) 230 CLR 234, 258 [80] (Hayne J)

was the same (as it will be in every case where the agreement is one, like many, to be inferred by the actions of the accused) - the jury would nonetheless need to be directed to the following effect:

(1) The accused must be part of an agreement to kill or to cause grievous bodily harm. A matter the prosecution seeks to prove by the evidence of what the accused did.

(2) That if (1) is proved, then the accused must have participated in that agreement. A matter that the prosecution seeks to prove by the evidence of what the accused did.

Such directions are obviously unnecessary.

The approach in the Court below is not erroneous

35. Before turning to the directions given at trial it is helpful to consider the approach of the Court below. It was held in the Court below that:

(1) Liability on the basis of joint enterprise depends upon the jury being satisfied that there was more than an agreement or arrangement to commit the crime in question.

(2) There must be some participation in the joint venture by the accused, so that it can be said that the accused participated in the joint venture with the necessary foresight.

(3) That the trial judge did not identify this as a separate element to be proved.[34]

36. However, the Court did not hold that it was essential in the particular circumstances of this case that the jury be directed that "participation" was a separate element to be proved. This was so because the real issue was whether the jury was satisfied that the appellants were, first, a party to an agreement to kill or to cause grievous bodily harm. If the jury found that the appellants were a party to such an agreement, they could only do so because the appellants had "participated" in the agreement. There was no other way that the fact of the appellants being a party to the relevant agreement could have been established.[35]

37. The Court below took the same approach to extended joint enterprise[36].

38. The appellants contend that the approach of the court below was erroneous. It is necessary to examine why the appellants say that is so. First, the appellants argue that:

> [i]t cannot be said that the jury must have inferred agreement from participation in circumstances where the case put by the Crown, and left to the jury by the trial judge, encompassed scenarios in which agreement might

[34] *R v Duong* [2011] SASCFC 100, [97].
[35] *R v Duong* [2011] SASCFC 100, [98]-[100].
[36] *R v Duong* [2011] SASCFC 100, [104].

be inferred from evidence separate from, and earlier in time than, any participation of the accused in the brawls.[37]

39. What is telling about the appellants' approach is that it suggests that the only conduct that can amount to "participation" is personal involvement in the assault of the deceased (what the appellant describes as *"participation...in the brawls"*)[38]. It happens that in this case there was evidence that each appellant was personally involved in the assault of the deceased, but that does not mean that such evidence was necessary to prove guilt or that such evidence was the only evidence of "participation".

40. Second, the appellants argue that the jury had been invited to find the existence of an agreement "based upon evidence other than participation"[39]. Again, the appellants appear to be restricting "participation" to evidence of personal involvement in the assault of the deceased. The appellants ignore everything that took place before this point in time even though it is relevant to whether an accused was part of the agreement and participating.[40] Further, in so arguing, the appellants assert that the jury had been permitted to infer an agreement from things that were not "participation". For example, from things that he may have heard rather than what he himself did.[41] What a person does, cannot be divorced from the circumstances in which it is done. What a person hears or discusses will influence a person's state of mind about the scope of the agreement.

The Directions - no complaint and the context of the evidence

41. There was no complaint about the directions given at trial. This is not a matter that can be ignored. It is of importance in considering whether there is a risk of a miscarriage.[42]

42. The directions must be evaluated in the context of the evidence at trial. First, there were key issues not in dispute. There was no dispute that all three appellants, having been at Duong's house, left the house at the same time, travelled back to Vartue St, approached the house and were present when the violence took place. These actions alone were capable of showing they were part of a relevant agreement and participants in it given the context in which these actions took place. Part of that context was that the appellants attended as part of a large group, at least some of the members of the group were armed and obviously so and that the deceased was set upon by more than one person. Again, these were not matters in dispute. Second, while it was disputed, there was evidence that all three appellants were personally involved in the attack on the deceased.

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[37] Appellant Huynh's Written Submissions, [39.2].
[38] Appellant Huynh's Written Submissions, [39.2], adopted by Sem, [38] and Duong, [30].
[39] Appellant Huynh's Written Submissions, [58] and [59], adopted by Sem, [38] and Duong, [30].
[40] For example - the mere fact that the appellants returned to the house in the company of people armed which could show a great deal about whether they were part of a plan and participating.
[41] Appellant Huynh's Written Submissions, [58], adopted by Sem, [38] and Duong [30].
[42] *La Fontaine v The Queen* (1976) 136 CLR 62, 70; *Chamberlain v R* (1982-1983) 46 ALR 493, 501-2; *R v Aziz* [1992] 2 NSWLR 322, 331; *R v Carbone (No 2)* (1976) 14 SASR 280, 287-8 .

Analysis of the oral directions on joint enterprise

43. There is nothing in the oral directions with respect to joint enterprise to suggest that merely being a party to an agreement to assault with intent to kill or to cause grievous bodily harm (but an accused not *doing* anything - ie not "participating") could result in liability for the actions of another. Further, a finding of the relevant agreement was something that could only be inferred from what an appellant did (ie - that he "participated").

44. For guilt of murder on the basis of joint enterprise, the jury were directed that the following elements had to be established beyond a reasonable doubt:

(1) That someone with whom an accused was acting in concert caused the death of the deceased.[43]

(2) That that act had to be voluntary and deliberate by someone with whom an accused was acting in concert.[44]

(3) That the act that caused death had to be unlawful.[45]

(4) That the act that caused death had to be by a person with whom the accused was acting in concert and done with intent to kill or to cause grievous bodily harm.[46]

45. The jury were then directed as to joint enterprise (or acting in concert) and were directed:

(1) That the act that caused death had to fall within the scope of the joint enterprise in which the accused was a participant.[47]

(2) That the prosecution case was that each accused *engaged* upon a deliberate course of criminal conduct which included within its scope the infliction of grievous bodily harm to the deceased.[48]

(3) That if the accused *joined in* such an enterprise he would be guilty of murder even if he did not inflict the fatal wound.[49]

46. Against the background of the above the Trial judge then directed the jury:

> If two or more persons join together in a joint criminal enterprise every act done and word spoken in furtherance of that enterprise is in law done and spoken by them all. In other words, the combined *actions* of two or more persons with a criminal intent *in implementing* an arrangement *previously agreed* upon by them make them all guilty of the resulting crime (emphasis added)[50]

47. This direction required more than just an agreement. It required that those part of the agreement *act* together to *implement* the agreement that had been

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[43] Summing Up, 59-60.
[44] Summing Up, 60.
[45] Summing Up, 60.
[46] Summing Up, 61.
[47] Summing Up, 63.
[48] Summing Up, 63.
[49] Summing Up, 64.
[50] Summing Up, 64.

previously agreed. In other words, that there must be something done by an accused after the agreement. This is simply another way of directing that there must be "participation" in the agreement.

48. The trial judge then gave an example of the principle of joint enterprise. It was an example that involved an agreement being formed and then being *"implemented"* by both parties to that agreement.[51] Further, and bearing in mind that the appellants did not dispute that they were present at the time of the crime and that presence can be an act of participation, the jury were directed that:

> [t]he mere presence of the person at or near the scene of a crime being committed by another whatever may be that person's knowledge of or attitude towards the commission of the crime does not without more make him guilty under this principle. To implicate that person his presence must be by agreement with the other for the purpose of furthering and achieving the commission of the crime.[52]

49. The jury were then directed that whether a person is part of an agreement is something to be determined by looking at what they *did*. The examples given of how a person might join in an agreement involved *actions* and the jury were told that they had to be satisfied that the accused "engaged in *conduct*" that showed he was part of the joint enterprise and that the existence of an agreement was to be inferred from "proven *conduct*" and "proven *acts*".[53]

50. Later the jury were directed that if it was a reasonable possibility that an appellant had not "thrown in his lot" with the plan, then the verdict for that appellant had to be one of not guilty.[54] Given the earlier direction as to how an appellant might have "thrown in his lot"[55] - the jury would not have reasoned that merely agreeing to something but not "participating" could be enough for an appellant to be guilty. Similarly, the complaint of the appellants Sem and Duong[56] about the use of the phrase "thrown in his lot" by the trial judge must be viewed in the same context. That is, as shorthand for joining the agreement and, as the trial judge directed, something to be inferred from what an accused had done and the conduct in which he had engaged.[57]

51. In so far as the appellant Duong appears to complain[58] about the use of the phrase "the accused or any one of them", the respondent repeats the submission in paragraph 49 above.

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[51] Summing Up, 64-65.
[52] Summing Up, 64.
[53] Summing Up, 66.
[54] Summing Up, 126. The reference here to "the accused or anyone of them" is a reminder of the need to give the case against each appellant separate consideration. See the explanation of the use of this term at Summing Up, 59 and the subsequent use of the expression at 68, 69 and 71. See also the approach of the Court below - *R v Duong & Ors* [2011] SASCFC 100, [111]-[112].
[55] Summing Up, 66.
[56] Appellant Sem's Written Submissions at [38.1]-[38.2] and adopted by the appellant Duong, [30] .
[57] Summing Up, 66. See also the consideration in the court below of the use of this phrase *R v Duong & Ors* [2011] SASCFC 100, [114]-[116].
[58] Appellant Sem's Written Submissions at [38.3] and adopted by the appellant Duong, [30].

52. In so far as the appellants criticise the direction at Summing Up 125-6[59], that direction requires that the person who stabbed the deceased to be a person part of the same plan as an appellant. If the only way that being a part of a relevant plan could be shown was from an appellant's conduct (and it was) - then the appellant was both a participant and had the necessary state of mind.

Analysis of the written directions on joint enterprise

53. The jury were told that the written directions were just a summary[60] and so they must be read against the background of the oral directions. Further, they must also be read against the background of the questions posed immediately before they were read.[61] As set out in paragraph 49 above, a key part of the oral directions were the directions on how an agreement was to be proved - by an accused's *conduct.*

54. The written directions set out the principle of joint enterprise as set out by this Court -

> If two persons come to an agreement or make an arrangement that together they will commit a crime and then, while that agreement or arrangement is still on foot and has not been called off, in accordance with that agreement or arrangement one of them does, or they do between them, or the things that are necessary to commit the crime are both guilty of that crime regardless of what each played in its commission.[62]

55. The written directions then required four things to be established. It is conceded that those things did not include a specific requirement that an accused had to have "participated" in the relevant agreement. However, the first of the things to be established was:

> [t]hat the accused came to an agreement or made an arrangement with others (the participants) to use a knife or similar bladed weapon to kill or cause really serious bodily harm to a person or persons at 8 Vartue Street.

56. In this particular case, the only way that the jury could have found the above was from what an appellant had done (ie that he had "participated"). Again, the directions summarised in paragraph 49 above cannot be ignored. Further, and contrary to the appellant Huynh's submissions at [49.2] (relied upon by all), there is no need to refer to foresight. The agreement is already one that involves acting with a particular intent.

Analysis of the oral directions on extended joint enterprise

57. There is nothing in the directions on extended joint enterprise to suggest that merely agreeing to an assault (but not doing anything) could result in liability for the actions of another.

58. The jury were directed:

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[59] Appellants Huynh's Written Submissions, [48.4]-[48.5], adopted by Sem, [38] and Duong [30].
[60] Summing Up, 206.
[61] Summing Up, 206-7.
[62] Written Directions, 8; Summing Up, 235.

> The concept of joint criminal enterprise has an extended operation. Even if the accused, in terms of the agreement they actually threw their lot in with, and only agreed to the infliction of some harm and not really serious harm, they may still be guilty of murder depending upon whether they contemplated some infliction of grievous bodily harm notwithstanding their agreement did not itself go that far.[63]

59. The jury were then directed that the question for them was:

> Does the evidence show beyond reasonable doubt that the accused or any one of them agreed to *join in* the proposed assault on those persons present at 8 Vartue Street contemplating that *in carrying out* the assault one or other of his partners in the enterprise might use a knife to stab a person at 8 Vartue Street with the intention, that is use the knife with the intention of causing really serious bodily harm (emphasis added)...[64]

60. The direction required that the accused not just enter into an agreement but that he *"join in"* the proposed assault. Also required was the necessary foresight.

61. These directions must be looked at against the background of the trial judge's earlier explanation that whether an accused was a party to an agreement (or what the accused had "thrown his lot in with") was to be inferred from what the accused had done and the conduct in which he had engaged.[65] That is, the only way that an agreement could be proven was because of the accused having "participated". Again, these directions are summarised in paragraph 49 above.

62. The trial judge then stated the question for them in this way:

> If you are satisfied that at least the accused *joined in* a proposed assault on the people left at Vartue Street, did the accused contemplate in *carrying out the assault* any of the participants in the attack might use any number of different weapons or use a knife in particular with the intention of causing really serious bodily harm.[66](emphasis added)

Again, the accused had to have *"joined in"* the proposed assault and have the necessary foresight.

63. Later the jury were directed that if it was a reasonable possibility that an appellant had not "thrown in his lot" with the plan, then the verdict for that appellant had to be one of not guilty.[67] Given the earlier direction as to how an appellant might "thrown in his lot" (that it was something to be inferred from what an accused had done and the conduct in which he had engaged[68]) - the jury would not have reasoned that merely agreeing to something but not "participating" could be enough for an appellant to be guilty.

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[63] Summing Up, 68
[64] Summing Up, 69
[65] Summing Up, 66
[66] Summing Up, 70
[67] Summing Up 126. The reference here to "the accused or anyone of them" is a reminder of the need to give the case against each appellant separate consideration. See the explanation of the use of this term at Summing Up, 59 and the subsequent use of the expression at 68, 69 and 71.
[68] Summing Up, 66

Analysis of the written directions on extended joint enterprise

64. In considering the written directions it is important to remember that the participation that is required is in the agreed venture (that is, the agreement to assault). There is no requirement for any further action (or proof of participation) by the accused from that point on.

65. The written directions required:

> [t]hat the accused, came to an agreement or made an arrangement with others (the participants) to at the very least assault a person or persons at 8 Vartue Street, that is to apply force unlawfully to them.[69]

66. In light of that direction, if the jury convicted on this basis, the jury must have found that the appellants were a part of that agreement. Again, in this particular case, the only basis upon which such agreement could be established was as a consequence of what an appellant had done (ie - that he had participated) and the directions summarised in paragraph 49 above must not be ignored.

67. The requirement of foresight was also dealt with on two occasions. It required it to exist at the time the agreement was formed.[70] A favourable direction, as foresight could have arisen at anytime before the commission of the crime. In light of the fact that being a part of the agreement could only be inferred from what an appellant had done and in light the fact that the jury were directed that withdrawal had to be excluded as a reasonable possibility[71] the direction required the necessary state of mind to exist while an appellant was a participant.

The Proviso

68. Even if there is a failing in the directions with respect to the requirement of "participation", it is open to find that there is no substantial miscarriage of justice.[72] Given the directions, if the jury convicted on the basis of joint enterprise or extended joint enterprise they found that each appellant was a party to a relevant agreement to use a knife or similar bladed weapon, was possessed of the relevant state of mind and that the stabbing was not in self defence.[73] Further, on the evidence, each appellant was present[74] and, given the directions, withdrawal from any agreement was excluded as a reasonable possibility.[75]

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[69] Written Directions, 9; Summing Up, 214-5.
[70] Written Directions, 9-10; Summing Up, 214-5.
[71] A matter about which a direction was given in any event - Summing Up, 64-5 and (particularly re Sem) 125.
[72] *Criminal Law Consolidation Act 1935* (SA) s 353(1).
[73] Written Directions (joint enterprise), 8 and Summing Up, 213-4; Written Directions (extended joint enterprise), 9-10 and Summing Up, 214-5.
[74] For liability on the basis of aiding an abetting presence is widely defined. An aider and abettor must be sufficiently near to assist the principal should the need arise (see *R v B, FG; R v S, BD* [2012] SASC 157, [10] (Kourakis CJ)).
[75] The jury were directed with respect to withdrawal at Summing Up, 64-5 and (particularly re Sem), 125.

69. If the jury found the above (but not "participation"), a finding of liability on the basis of aiding an abetting was inevitable. If the jury found that an appellant was part of an agreement involving the above (as they must have done if there was a conviction on the basis of joint enterprise or extended joint enterprise), each appellant must have been "intentionally encouraging" the stabber to commit the crime charged.[76]

GROUND 2 - FAILURE TO DISTIL, AND APPLY, THE LEGAL DIRECTIONS TO THE CASE AGAINST THE APPELLANTS

The Appellants' Contentions

70. Under this ground, the contentions of the appellants are:

(1) That the legal directions in the oral summing up were not adequately linked to the evidence relevant to the appellants such that there was a miscarriage of justice.

(2) That the failure to refer to the evidence when the written directions were given, has resulted in a miscarriage of justice.

71. It is necessary to correct some of the assertions made by the appellants and/or to place them in context. The appellants assert that the evidence against the appellants was summarised by the court below in its judgment at paragraphs 20-23 inclusive and that the evidence against each appellant differed "markedly".[77] At paragraphs 20-23 inclusive of the judgment in the court below, the court was simply summarising the evidence of what each appellant was said to have done himself following the return to Vartue Street and once the altercation had commenced. The court below was not suggesting that this was the only evidence against each appellant. As set out above, all evidence led in the trial was admissible against all appellants other than an out of court statement by Sem with respect to which a clear direction was given[78].

Linking the Fact of the Law - Principles

72. The law should be explained to the jury in a manner which relates it to the facts of the case and the issues to be decided. So much of the law as the jury needs to know needs to be explained in order to decide the issues that arise from the charge, the evidence, the case of the prosecution and the defence case.[79] A good summing up endeavours to crystallise the legal issues in a way that simplifies the jury's task of applying the legal principles to the facts of the case. Care must be taken to explain the law in a way that is practical having regard to the context of the particular case.[80] It is not necessary to identify each piece of evidence or argument relevant to an accused.[81]

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[76] See the Written Directions on aid and abet, 3-4 (as corrected at Summing Up, 225); Summing Up, 209-211.
[77] Appellant Huynh's written submissions, [75], adopted by Sem, [38] and Duong, [30].
[78] Summing Up, 12-13.
[79] *R v Chai* (2002) 128 A Crim R 101, 106 [18]; *Alford v Magee* (1952) 85 CLR 437, 466.
[80] *R v Shinner* (1993) 173 LSJS 384, 386.
[81] *Domican v The Queen* (1992) 173 CLR 555, 561.

73. As this court set out in *RPS v The Queen*:[82]

> The fundamental task of a judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective function of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes.(footnotes omitted)

74. All evidence (other than an out of court statement by the co-accused, Sem), was admissible against all appellants. The authorities upon which the appellants place particular reliance must be viewed in that context. In *Towle*[83] there was evidence that was not admissible against the appellant and the summing up:

> was defective by reason of the omission to give the jury such directions as would enable them to consider only the evidence admissible against each of the accused as if they had been tried separately.

That is not this case. Here, there was only one piece of evidence not admissible against all appellants and that was made plain by the trial judge. In *Singh v The Queen*[84], the jury received no direction about a key issue going to the state of mind of three of the appellants and the absence of that direction was fatal.

75. Most helpful is the approach where, as here, accused are jointly charged with the same offence and all evidence is admissible against all accused. In *Nicoletti v The Queen*[85], Pidgeon J observed that the:

> cases dealing with the importance of setting out for the jury evidence admissible for each accused person in a joint trial ... do not say specifically how this is to be done and I would see the method of doing it as a matter to be determined on the facts of each case. If the evidence, generally, is admissible against each of the accused persons, but there is some particular item of evidence inadmissible against an accused person, then it would be open to refer specifically to the items inadmissible against that accused person and to instruct the jury that it must not be used against the accused. This is the way normally followed when inadmissible evidence is limited to out of court statements.[86]

Further, where evidence is inadmissible against all, to give a separate summary would *"involve needless repetition which would, if anything, prejudiced each accused person by unnecessarily repeating the evidence."*[87]

The absence of complaint at trial

76. There was no complaint at trial relevant to this ground of appeal.

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[82] (2000) 199 CLR 620, 637 [41] (Gaudron A-CJ, Gummow, Kirby and Hayne JJ).
[83] *R v Towle* (1955) 72 WN (NSW) 338, 340.
[84] [1993] SASC 4109.
[85] *Nicoletti v The Queen* [1997] WASCA 59-60 (4 November 1997).
[86] *Nicoletti v The Queen* [1997] WASCA 59-60 (4 November 1997), 3.
[87] *Nicoletti v The Queen* [1997] WASCA 59-60 (4 November 1997), 3.

The obligation was met[88]

77. The trial judge identified evidence that was relevant to each of the defence cases. This was done both during the summaries of the evidence[89] and by summarising the defence addresses.[90]

78. As the court below observed, the trial judge took the approach of dealing with events in a narrative or sequential form. The Court below concluded that the judge had spent *"a good deal of time linking the law to the facts"* and held:

> [t]hat what the judge did was a sufficient discharge of his duty to put before the jury the case in relation to each accused, and the case being made by each accused. By identifying the limitations and possible weaknesses of the evidence in relation to each of the accused, when dealing with the evidence, the judge did that.[91]

79. As was done by the court below, it is necessary to consider the structure of the summing up. The trial judge began with the general directions[92] and then gave general directions relevant to this particular case.[93] Having directed on the elements of murder and manslaughter, the trial judge gave directions with respect to the legal principles of aiding and abetting, joint enterprise and extended joint enterprise.[94] In the course of those directions, from time to time, the judge linked the directions to the facts of the case but without speaking of an individual appellant. This was done by posing for the jury a number of questions relevant to the issues that would have to be considered.[95]

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[88] There were two aspects to the approach of all appellants at trial. First, the lack of blood transference or other forensic evidence. This was dealt with in some detail (Summing Up, 84-5, 86-88). Second, criticisms of the reliability of some witnesses and the conclusions that could be drawn from the evidence. This was a regular feature of the Summing Up (8-9, 78-80, 91-92, 93-6, 99-103, 104, 108, 109-111, 118-119, 122, 123, 124, 132, 133-134). See also the summary of the addresses of the appellants at 128-137.

[89] Summing Up, 86-88 Absence of blood transfer and failure to see blood on any of the accused; examples of a failure to identify Duong - Summing Up, 91, 92, 93 and 115; Issues to be considered in the evidence of Tamara Pavic - Summing Up, 92, 109-110; Evidence relevant to self-defence of Sem - 78-80, 93-94, 94-95 and 96; Issues in the evidence of Rithy Khaev, 99-103 and 123; Issues in the evidence of Johnny Khaev, 101-103 and 123; The failure of David Lam to identify either Sem or Duong as involved in the assault even though he knew them - 101; The failure of Francis and Russo to give any evidence of seeing weapons - 104; The need to consider whether or not the evidence made sense - 108; The reliability of Johnny Lam - 119; The care that must be taken with the evidence of Hampton - 122; The care that must be taken with the evidence of Smith - 122; The failure of Sem to be identified by anyone in the gateway incident other than Rithy and Johnny Khaev - 123 and 124; That Rim may have stabbed the deceased - 125; Inconsistent Statements - 8-9, 99-101, 109, 110, 111, 118-119, 132, 133-4.

[90] Summing Up, 128-137.

[91] *R v Duong* [2011] SASCFC 100, [173].

[92] Summing Up, 1-8.

[93] Inconsistent statements (Summing Up 8-13); Separate consideration and separate verdicts (Summing Up, 58-59) and the inadmissibility of Sem's out of court statement in the case against the others (Summing Up, 13-16).

[94] Summing Up, 63-78.

[95] Summing Up, 63, 66, 67, 68, 69, 70, 72, 73.

80. The trial judge then began relating the directions on accessorial liability to the facts. Throughout the judge repeatedly posed questions for the jury to assist them in applying the facts to the legal issues to be addressed.[96]

81. The trial judge commenced with aid and abet. The directions included the posing of questions to assist the jury in applying the law to the facts.[97] The judge commenced on the basis that the stabbing took place on the road. This involved the trial judge addressing particular issues that the jury would have to address with respect to the appellants[98] which included references to the limitations of the evidence. The trial judge then directed with respect to aiding and abetting on the basis that the stabbing took place at the gates.[99] Again, the trial judge addressed particular issues that had to be addressed in considering the case against the appellants. This included references to the limitations of the evidence.[100]

82. The trial judge then dealt with the evidence with respect to joint enterprise. Again, the trial judge referred to the key issues to be considered. For example, state of mind[101] and the extent of any agreement[102], whether the evidence permitted the conclusion that any appellant was a participant in the attack with the necessary foresight and, relevant to Sem's case, whether he had withdrawn.[103] The trial judge also referred to potential weaknesses and limitations of the evidence and highlighted particular specific aspects of the evidence relevant to the appellants.[104] Further, the trial judge directed that if an accused was not part of a relevant plan or did not have the necessary state of mind, he could not be guilty.[105]

83. Having dealt with the issues in this way, the trial judge then reminded the jury of the key aspects of the addresses of counsel for all appellants.[106]

84. In so far as the appellants contend that the complexity of the case (and the multiple potential bases for liability) is not a matter that relieved the trial judge of an obligation to link the law to the facts[107], the respondent agrees that the obligation must be met whatever the nature of the case. For the reasons set out above, the obligation was met. Further, it should not be overlooked that the approach of the trial judge in referring to the evidence as each potential basis of liability was addressed was unduly favourable. In linking the directions to the facts, the trial judge referred to only parts of the evidence under each basis of liability. Such an approach was unduly narrow. The whole of the evidence was relevant to all bases of liability.

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[96] Summing Up, 67, 69, 70, 72-3, 89-91, 92-4, 95, 102, 105, 106, 107, 112, 123-4, 125, 126, 206-7.
[97] Summing Up, 89-90, 92-4, 95 and 102.
[98] Summing Up, 92-3.
[99] Summing Up, 98.
[100] Summing Up, 99-100, 102-3.
[101] Summing Up, 103-104, 105, 106-107, 112-3, 116, 123-4.
[102] Summing Up, 106, 107, 123-4.
[103] Summing Up, 116, 123-4 and 125-6.
[104] Summing Up, 104, 109-110, 115, 118-119 and 123.
[105] Summing Up, 126.
[106] Summing Up, 130-6.
[107] Appellant Huynh's Written Submissions, [82] and adopted by the others.

The written directions[108]

85. The written directions were provided after the oral directions had been given and only at the request of the jury. It was not a request for a reminder of the evidence but solely for a description of the components of murder, manslaughter, joint enterprise, and aiding and abetting.[109] An uncertainty as to the facts should not be read into the request. No counsel suggested that any reference to the facts was required when the written directions were provided and read to the jury. The approach of the Court below is correct.[110]

PART VIII

10 The Respondent estimates the oral argument to take 3 hours.

Dated the 15th day of November 2012

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[108] The respondent submits that it is unnecessary in this matter to consider the circumstances in which written directions might be given or, when given, the extent to which they should be linked to the facts given that the jury's request was not for the written directions to be linked to the facts (Summing Up, 141). The use of written directions is a helpful approach (*King v The Queen* (2003) 215 CLR 150, 175 [79]). Further, there is force in the suggestion in some authorities that they should be restricted to directions on the law and not to the facts (*R v Muir* [2009] SASC 94, [68]; *R v Tulisi* (2008) 258 LSJS 128, [45]; *R v Radford* (1986) 133 LSJS 110, 117).

[109] Summing Up, 141.

[110] *R v Duong* [2011] SASCFC 100, [182]-[183]. The authority upon which the appellants rely of *R v Olasiuk* (1973) 6 SASR 255 can be distinguished. In that case the jury had asked to be directed again on the difference between murder and manslaughter. In doing so, the judge failed to refer to all ways that manslaughter could arise on the facts - see *R v Olasiuk* (1973) 6 SASR 255, 259.