

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

No. A32 of 2012

ADELAIDE REGISTRY



BETWEEN:

CHANSYNA DUONG
Appellant

10

and

THE QUEEN
Respondent

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AMMENDED APPLICANT'S SUBMISSIONS

Filed on behalf of: CHANSYNA DUONG

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PART I: PUBLICATION

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

PART II: CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. Whether the Court below erred in law in not holding that the trial judge erred in failing to direct (either in the oral summing up, or in the written redirection) that liability by way of joint criminal enterprise required proof of an act of participation in the joint enterprise by the appellant Duong?
3. Whether the Court below erred in law in not holding that the oral summing up and written redirection were also, or alternatively, fatally flawed on account of their failure to apply the legal directions to the evidence and case against the individual accused, and in particular the appellant Duong?

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

4. The appellant has considered whether a notice should be given pursuant to s78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV: CITATION

5. The reasons of the Court below on the appeal are reported as *R v Duong & Ors* (2011) 110 SASR 296.

PART V: NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

6. After a trial before a jury, the appellant and his two co-accused, Tuan Kiet David Huynh (Huynh) and Rotha Sem (Sem), were each convicted of murder.
7. The deceased, Thea Kheav, was killed when fatally stabbed in the course of one of two brawls which occurred at the end of an 18th birthday party for Richard Nguyen (held at his parents' house one night in December 2007). The brawls followed the arrival at the party of a group of people travelling in between two and five cars, and numbering between 10 and 40 people. It was accepted that the three accused had returned to the Nguyen house prior to the brawls, however, the extent (if any) of their involvement thereafter in the relevant events was in dispute.
8. The appellant and his co-accused received mandatory sentences of life imprisonment. On 14 April 2011 the trial judge fixed the minimum non-parole period of 20 years for the appellant, commencing on 25 November 2010. His Honour noted that at the time of sentencing the appellant was 23 years of age.

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Overview of the Facts

9. The basic facts leading up to the brawls are set out in Doyle CJ's reasons (CCA) at [3]-[18], with which Vanstone and Peek JJ agreed.
10. The appellant, together with Sem, Huynh, and a number of others had been at the party at the Nguyen house earlier in the evening.¹ A group, including the Huynh and the appellant, left and went to the appellant's house.²
11. Sem stayed at the party and became involved in a verbal altercation with Rithy and Tha Kheav.³ Sem then returned to the appellants house. He told some of the people there what had happened.⁴
- 10 12. According to the witness Ms Francis, Sem was angry and wanted to go back to the party at the Nguyen house. Ms Francis said that Sem might have said "Let's go get them". She said that as the group began to leave the appellants house, she heard someone (she did not know whom) say "Get a knife".⁵
13. The group, or most of them, returned to the Nguyen house in several cars.⁶ Witnesses said that they saw between two and five cars, and between 10 and 40 people, arrive at the Nguyen house.⁷
14. Members of the group were armed with various items.⁸ Witnesses described the appellant and Sem as arriving with pieces of wood and bottles respectively.⁹
- 20 15. There was evidence that the appellant hit Thea Kheav with a bottle, causing him to fall to the ground, on the roadway outside the Nguyen house.¹⁰ The attack on Thea Kheav continued, with people punching and kicking him.¹¹
16. Thea Kheav then got up and made his way to the gate. He tried to climb over the gate, but was pulled from the gate. The attack on him continued.¹²
17. The deceased, Thea Kheav, suffered a number of injuries, but there was only one stab wound, and that was the fatal wound.¹³ It is likely that Thea Kheav was fatally stabbed during the

¹ CCA [8].

² CCA [8].

³ CCA [9].

⁴ CCA [11].

⁵ CCA [11]; Francis T901-902.

⁶ CCA [11].

⁷ CCA [12].

⁸ CCA [13].

⁹ CCA [13].

¹⁰ CCA [14].

¹¹ CCA [14].

¹² CCA [16].

¹³ CCA [17].

second brawl, near the gate.¹⁴ It was the prosecution case that the stabber was the appellant,¹⁵ although the trial judge summed up to the jury on the basis that there was a very real possibility that Kimlong Rim (or another unidentified person) was the stabber.¹⁶

The Prosecution Case

18. The prosecution case was that each accused might be found guilty of murder on four different bases: as a principal (the stabber); as an aider and abetter of the stabber; as a participant in a joint enterprise with the stabber; or on the basis of an extended joint enterprise.¹⁷
19. The prosecution case was that Thea Kheav was stabbed either on the roadway outside the Nguyen house (the first location), or near that gates that Thea Kheav tried to climb (the second location). As the Court below accepted, the evidence pointed towards the second location.¹⁸ However, the different bases of liability had to be considered in relation to both locations.
20. The prosecution case on joint enterprise, as left to the jury, entailed an agreement (to which the appellant was a party) to use a knife or similar bladed weapon to kill or cause really serious bodily harm to a person or persons at the Nguyen house. It contemplated that the agreement might have been made (a) at the appellant's house; (b) on the way to the Nguyen house; (c) on arrival there, or (d) during either of the brawls as they unfolded at the Nguyen house.¹⁹

The Case against the Appellant

21. The evidence as to what each accused did at each stage differed.²⁰
22. The evidence said to implicate the appellant is summarised in the Court below. (CCA [20] – [21]).
23. It followed from the differing evidence against each accused, that the case against each differed. The Court below summarised the differing cases (CCA [159]-[161]).
- 23.1. The case for the appellant was that *“while the evidence showed that he had returned to the Nguyen house, there was no forensic evidence connecting him to the crime, that the evidence of the Kheav brothers implicating him should be rejected because they were determined to blame him, as were other witnesses supporting them, and that*

¹⁴ CCA [16].

¹⁵ T1796.26; T1799.32; T1801.6.

¹⁶ SU125.

¹⁷ CCA [153].

¹⁸ CCA [153].

¹⁹ CCA [153].

²⁰ CCA [154].

*while Duong had been armed with a piece of wood, that might have been picked up to defend himself against attack”.*²¹

The Trial and Directions

24. The trial was a lengthy one. The jury was empanelled on 14 October 2010. They returned their verdicts on 25 November 2010, the 21st day of the trial.²²

25. The trial judge began to sum up late on the afternoon of Monday, 22 November 2010. The summing up resumed the next morning. The jury retired to consider their verdict at about 3.15pm on the Tuesday.²³ Slightly before 4pm (ie after only 40 minutes) the jury returned with a question.²⁴ The trial judge recounted the question to counsel in the following terms.²⁵

10 The jury has asked if they could have a written description explaining the components of murder, joint enterprise and aiding abetting and manslaughter, as related to the law to refer to whilst deliberating.

26. Some discussion ensued with counsel, before the Court was adjourned for the day.²⁶ The following morning (Wednesday), one of the jurors was unwell, and the written redirection or *aide memoire* was the subject of submissions by counsel and was not ready to be provided to the jury. The trial judge again released the jury and adjourned the trial to the Thursday.²⁷

27. On the morning of Thursday, 25 November 2010 the trial judge gave the jury the document they had requested, and read it to the jury.²⁸ The document was 17 pages long, and contained sections addressing the legal elements of murder, unlawful and dangerous act manslaughter, aiding and abetting (addressing murder and manslaughter separately), joint enterprise murder, extended joint enterprise murder, joint enterprise manslaughter, extended joint enterprise manslaughter and self defence.

20 28. The jury retired at 10.56am,²⁹ but then returned so that the trial judge could clarify some matters before retiring again at 11.05am. The jury returned their verdict of guilty in respect of each accused at 3.09pm.³⁰

PART VI: SUCCINCT STATEMENT OF ARGUMENT

29. As set out above, the grounds of appeal raise two issues for consideration.

²¹ CCA [159]

²² CCA [25].

²³ CCA [80].

²⁴ CCA [80]; SU141.

²⁵ SU141.

²⁶ SU154.

²⁷ CCA [80]; SU155

²⁸ CCA [80]; SU206.

²⁹ SU223.

³⁰ SU227.

- 29.1. The first relates to the trial judge's omission to direct as to the requirement of 'participation' in respect of joint enterprise liability.
- 29.2. The second relates to the failure of the trial judge to apply the legal directions to the evidence against the individual accused, and in particular the appellant Huynh.
30. The appellant adopts as his statement of argument the submissions of the appellant Huynh contained in paragraphs 34-85 of the appellant Huynh's written submissions and the submissions of the appellant Sem in paragraphs 38.1-38.13.

PART VII: APPLICABLE STATUTORY PROVISIONS

- 10 31. There are no statutory provisions of relevance to the appeal.

PART VIII: THE ORDERS SOUGHT

32. The appellant seeks the following orders:
1. That the appeal be allowed.
 2. That the appellant's conviction be quashed and sentence be set aside, and a new trial be directed.

PART IX: TIME REQUIRED

33. Half a day.

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Dated: 6 November 2012



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