IN THE HIGH COURT OF AUSTRALIA No. A32 of 2012

ADELAIDE REGISTRY

BETWEEN:

ROTHA SEM
Applicant

and

THE QUEEN
Respondent

APPLICANT'S WRITTEN SUBMISSIONS

Filed on behalf of: Rotha Sem
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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 holding that the trial judge did not err in failing to direct (either in the oral summing up, and/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 Applicant Sem.

3. Whether the Court below erred in law in holding that the oral summing up and written redirection were also, or alternatively not fatally flawed on account of their failure to direct the jury as to the application of legal directions to the evidence and case against the Applicant Sem.

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

4. The Applicant has considered whether 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 Applicant and his two co-accused, Chansyna Duong (Duong) and Tuan Kiet David Huynh (Huynh), were each convicted of murder.

7. The Applicant and his co-accused received mandatory sentences of life imprisonment. On 14 April 2011 the trial judge fixed a minimum non-parole period of 20 years for the Applicant, commencing on 25 November 2010. His Honour noted that at the time of sentencing the Applicant was 21 years of age, meaning he was only 18 at the time of the offence.

Overview of the Facts

8. The basic facts leading up to a number of brawls that occurred on the night of 2 December 2007 are set out in Doyle CJ's reasons (**CCA**) at [3]-[18], with which Vanstone and Peek JJ agreed.

9. The deceased, Thea Kheav, died as the result of a single stab wound inflicted during the course of one of two brawls which occurred at the conclusion of an 18th birthday party held for Richard Nguyen at his parents' house (the Nguyen house) on 2 December 2007.

10. Thea Kheav arrived at the Nguyen house with his three brothers Rithy Kheav, Tha Kheav and Johnny Kheav at approximately 7:00pm[1].

11. The Applicant arrived later in the evening as part of a large group of people, which included his co-accused Duong and Huynh. Most of the group did not stay long and accompanied Duong and Huynh back to Duong's house (the Duong house)[2].

12. The Applicant remained at the party and became involved in a verbal altercation with Rithy and Tha Kheav, during which the Applicant was heard to say words to the effect of "watch your back."[3]

13. The Applicant left the party and drove to the Duong house. Once there he informed those present of his altercation with the Kheav brothers. [4] According to the witness Ms Francis, the Applicant was angry and wanted to go back to the Nguyen house. Ms Francis said that the Applicant might have said "let's go get them". She said that as the group began to leave the Duong house, she heard someone (she did not know whom) say "get a knife".[5]

14. 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]

15. Members of the group were armed with various items.[8] Witnesses described Duong and the Applicant as arriving with pieces of wood and bottles respectively.[9]

16. There was evidence that Duong hit Thea Kheav with a bottle, causing him to fall to the ground, on the roadway outside the Nguyen house (the first location).[10]

17. After this, the attack on Thea Kheav continued with people punching and kicking him.[11]

18. Thea Kheav got up and made his way to a set of gates (the second location). He tried to climb over the gates, but was pulled down and the attack on him continued.[12] It is most likely that Thea Kheav was fatally stabbed during this second brawl near the gate.[13]

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[1] CCA [6]
[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 [16].

19. Thea Kheav, suffered 32 injuries, but there was only one stab wound and that was the fatal wound.[14] It was the prosecution case that the stabber was Duong,[15] although the trial judge summed up to the jury on the basis that there was a very real possibility that another person, Kimlong Rim (or another unidentified person) was the stabber.[16]

20. During the trial it was accepted that the three accused arrived at the Nguyen house prior to the brawls. However, the extent (if any) of their involvement thereafter was in dispute.

The Prosecution Case

21. 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]

22. The prosecution case was that Thea Kheav was stabbed either on the roadway outside the Nguyen house (the first location), or near the 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.

23. The prosecution case on joint enterprise, as left to the jury, involved an agreement (to which the Applicant 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. The Prosecution case proceeded on the basis that the agreement might have been made (a) at the Duong house; (b) on the way to the Nguyen house; (c) on arrival at the Nguyen house, or (d) during either of the brawls as they unfolded at the Nguyen house.[19]

The Case against the Applicant

24. The evidence as to what each accused did at each stage differed.[20]

25. In relation to the Applicant, despite there being a large number of witnesses present during the brawls, there was limited direct evidence as to his involvement in the relevant events. As Doyle CJ records, only five witnesses gave evidence of involvement by the Applicant;[21]

    25.1. Mr David Lam said he saw the Applicant carrying two spirit bottles as he exited a vehicle at the Nguyen house.

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[14] CCA [17].
[15] T1796.26; T1799.32; T1801.6.
[16] SU125.
[17] CCA [153].
[18] CCA [153].
[19] CCA [153].
[20] CCA [154].
[21] CCA [21]-[23]

25.2. Mr Johnny Lam said that he saw the Applicant holding a bottle as he approached the Nguyen house and that the Applicant pushed past him saying "I'm going to fuck his cunt up."

25.3. Ms Pavic said in relation to the brawl at the first location that she saw the Applicant, Huynh and Kimlong Rim hit Thea Kheav and throw bottles at him after the Applicant hit Thea Kheav on the head with a bottle.

25.4. Mr Rithy Kheav said he saw the Applicant holding up Thea Kheav so that other members of the group could continue to hit him after he had fallen from the gate.

25.5. Mr Loc Nguyen said he heard Mr Rithy Kheav say "Syna with Rotha (Sem), they are stabbing my brother."

26. 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]).

As the Court explained, it was the case for the Applicant Sem that:

26.1. *"... although he had returned to the party, following his argument at the party earlier in the evening, and while some of those with him were armed and were ready to fight, Sem's only involvement in any fighting was on the roadway, and the fatal injury had been inflicted at the gates where Sem was not involved. It was also submitted that the stabbing had been done by another man, not charged with the accused, and that his conduct was completely unexpected.*[22]"

26.2. It was a reasonable possibility that he was not involved in any of the attacks on Thea Kheav; that the witnesses who had identified him were unreliable or dishonest.[23]

26.3. The Applicant gave his account and his explanation of his very limited involvement in the events of that evening in a statement to the police which became exhibit P74 at trial. The Applicant Sem was the only accused to have given a statement to the police about the events of that evening.

26.4. Thus in relation to the Applicant, while there was evidence that he arrived back at the Nguyen house with people armed and ready to fight, his case was that his only involvement was at the roadway, that he had withdrawn from any joint enterprise before the brawl moved to the gates, that he was not involved in the brawl at the gates

[22] CCA [160]
[23] CCA [161]; T2031-2039.

where the fatal injury was inflicted, and that what happened at the gates was completely unexpected.[24]

26.5. In relation to Duong, different issues again arose, not least because the prosecution case included the possibility that he was the stabber i.e. the principal offender.

27. In essence, the Applicant, at trial, and in the Court below, relied on both the paucity of the evidence against him, on the account that he gave to the police, and the likelihood that he had withdrawn from an alleged joint enterprise of any sort.

The Trial and Directions

28. The trial was a lengthy one. The jury was empanelled on 14 October 2010 and returned their verdict on 25 November 2010 being the 21st day of trial.[25]

29. The trial judge's summing up began at 4:00pm on the afternoon of Monday 22 November 2010 and concluded at 4:25pm on that same day[26].

30. His Honour then resumed on the morning of Tuesday 23 November 2010 10:03am with the jury retiring to consider their verdict at about 3.15pm.[27] After approximately 40 minutes of deliberation, the jury returned with a question.[28] The trial judge recounted the question to counsel in the following terms:[29]

> "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."

31. Some discussion about this request ensued with counsel before the Court was adjourned for the day.[30]

32. The following morning being Wednesday 24 November 2010 one of the jurors was unwell and the written redirection was the subject of further 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 next day.[31]

33. At 10:26am on Thursday, 25 November 2010 the trial judge provided the jury with copies of the written redirection (the *aide memoire*) and read it out to them.[32] The document was 17 pages

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[24] CCA [160].
[25] CCA [25].
[26] SU1, 17
[27] CCA [80].
[28] CCA [80]; SU141.
[29] SU141.
[30] SU154.
[31] CCA [80]; SU155
[32] CCA [80]; SU206.

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.

34. The *aide memoire* addressed the offences mentioned above by simply listing the elements it made no attempt to link the legal directions to the facts relevant to the case against each individual accused. Further, in reading aloud the *aide memoire* without more, the trial judge did not direct the jury as to how they should apply the elements of the offences set out in the *aide memoire* to the case and evidence against each individual accused.

10 35. The jury retired at 10.56am,[33] returning after a short while so that the trial judge could clarify some matters before retiring again at 11.05am.

36. The jury returned their unanimous verdict of guilty in respect of each accused at 3.09pm.[34]

PART VI: SUCCINCT STATEMENT OF ARGUMENT

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

37.1. The first relates to the trial judge's omission to direct as to the requirement of 'participation' in respect of joint enterprise liability.

37.2. 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 Applicant Sem.

38. The Applicant Sem adopts as his statement of argument the submissions of the Appellant
20 Huynh contained in paragraphs 34 to 85 of the Appellant Huynh's written submissions and makes the following additional submissions.

38.1. One of the grounds of complaint made before the Court below relevant to the two issues constituting the grounds of appeal brought by the Applicant Sem was the continual use by the trial judge in his summing up of the phrase *thrown their lot in* or *thrown his lot in* or *thrown in their lot* or similar forms of the same phrase as well as the continual use of the phrase *the accused or any one of them*, or similar forms of that phrase, which phrases in the Applicant's submission, tended to suggest, and were intended by the trial judge to suggest that mere intention without an act of participation was sufficient to constitute a joint enterprise and therefore support a verdict of guilt.

30 38.2. Thus, at the end of the trial judge's summing up[35] before the trial judge briefly referred to each of the defence cases, the trial judge said

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[33] SU223.
[34] SU227.

> "If the prosecution have failed to prove beyond reasonable doubt that the accused or *any one of them threw their lot in* with this plan to attack people at Vartue Street, if the Crown has failed to provide that the accused or any one of them contemplated in any way the use of a knife, whether to cause grievous bodily harm or even just some harm, then the proper verdict is one of not guilty."

38.3. This of course ignores the necessity for the existence of the element of an act of participation (with the relevant intent) and in effect was telling the jury that guilt could be established merely by the relevant state of mind on the part of "*any one of them*"[36]. Considering the entirety of the summing up, the trial judge's directions therefore amounted to directions in respect of a conspiracy to cause grievous bodily harm, not a murder direction as a consequence of a joint enterprise or extended joint enterprise.

38.4. As the Appellant Huynh's submissions make clear, the *aide memoire* was defective in relation to the direction on joint enterprise. The Appellant Huynh's submissions have made reference to the wording employed in the *aide memoire* by the trial judge. It is relevant that it was only after the trial judge had finished his summing up that the written direction was discussed and was eventually handed to the jury.

38.5. When the trial judge came to read the *aide memoire*, it is the submission of the Applicant that he compounded the errors already present in the *aide memoire* on *joint enterprise to commit murder*[37] by saying that the elements were[38]

> *... that the accused came to an agreement or made an arrangement with other participants ...*

38.6. As is obvious from the words used, *participation* is assumed and accordingly all that needed be proved as the elements of murder is

38.6.1. the intention to join the enterprise,

38.6.2. that the death of the deceased occurred pursuant to that enterprise, and

38.6.3. that the principal who actually committed the stabbing (whoever that person was and the Crown case was that it was either one of the three accused or another person[39]) intended to kill or cause serious harm to the deceased.

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[35] SU126.
[36] ibid
[37] written direction page 8
[38] SU213

38.7. The Court below recognized that an act of participation and therefore proof of participation in the joint venture was a separate element that must be proved beyond reasonable doubt and held, despite finding that the trial judge did not identify participation as a separate element to be proved, that the jury's verdict necessarily meant that the jury had somehow found an act of participation in that part of the events of the evening when the deceased was stabbed.

38.8. The Applicant Sem's case, as referred to above, was that whilst he had played a part in the events of the evening prior to the stabbing of the deceased (whenever and wherever that occurred), he played no part and therefore no longer participated (and committed no act of participation with the relevant intent) at the time the deceased was killed.

38.9. Further, as the Court below recognized[40], *"the evidence about what each accused did at each stage differed"*. As the Court below noted:[41]

> *The [defence] submission is that the Judge was obliged ... and ... should have separated out each of the different bases of liability, the two stages at which the stabbing might have taken place, and each different stage at which an agreement or arrangement might have been reached involving the particular accused. That summary should have identified the evidence as against each accused in relation to each bases of liability, each stage at which the stabbing might have occurred, and each stage at which an agreement or arrangement might have been made."*

38.10. The Court below did not accept this submission just as the Court below did not accept "*the criticisms of various expressions used by the trial judge.*"[42]

38.11. Subsequently the Court below described the defence submission of how the summing up should have proceeded as "*the usual approach*"[43] but the basis of the Court below rejecting the Applicant's submission that the trial judge should have proceeded in "*the usual way*"[44] appears to have proceeded on the basis, which was not the Applicant's submission, that to proceed in "*the usual way*" would have required not merely "*the*

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[39] SU125 ... *the very real possibility, and it remains a real, very real possibility that Kimlong Rim, or yet another unidentified person, murdered [the deceased] by stabbing him ...*
[40] CCA [154]
[41] CCA [156]
[42] CCA [158]
[43] CCA [170]
[44] CCA [174]

narrative approach[45]" of the trial judge to the summing up but also *the usual approach* as an addition to *the narrative approach*.

38.12. Thus, the Court below held that in doing so "*would have added substantially to the length of summing up*"[46], a proposition which would only be correct if the Applicant's submission that the usual approach instead of the narrative approach should have been adopted is ignored.

38.13. Finally, the Court below held that "*Participation in any agreement or arrangement was not the issue in this case.*"[47]. With respect, the Applicant Sem's case was always that participation in any agreement to use a bladed weapon to stab the deceased so as to cause him really serious harm was almost the only issue because, as referred to previously, the Applicant Sem's case was that whatever agreement he entered into, at whatever time and at whatever place, he had withdrawn from such agreement and was not party to any agreement which the Prosecution alleged was (at the time of the death of the deceased) to use a bladed weapon and cause the death of, or serious harm to, the deceased.

PART VII: APPLICABLE STATUTORY PROVISIONS

39. There are no statutory provisions of relevance to the appeal.

PART VIII: THE ORDERS SOUGHT

40. The Applicant seeks the following orders:

1. That permission to appeal be granted.
2. That the appeal be allowed.
3. That the Applicant's conviction be quashed and sentence be set aside, and a new trial be directed.

Dated: 1 November 2012

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[45] CCA [164]
[46] CCA [174]
[47] CCA [102]