IN THE HIGH COURT OF AUSTRALIA No. A32 of 2012

ADELAIDE REGISTRY

BETWEEN:

ROTHA SEM
Appellant

and

THE QUEEN
Respondent

APPLICANT'S REPLY

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: SUBMISSIONS

2. The Applicant Sem adopts as his Reply the submissions of the Appellant Huynh contained in paragraphs [2] to [3] as his own and makes the following amendments to paragraphs [4] to [5] of the Appellant Hyunh's Reply.

3. Basic or traditional joint enterprise[1] is a species of primary liability. Proof of this against the Applicant Sem required that the jury be satisfied beyond reasonable doubt that:[2]

10 3.1. Sem was a party to an agreement to kill or cause grievous bodily harm to the deceased (here, an agreement to assault the deceased with a bladed weapon);

3.2. Sem participated in the implementation of that agreement in the sense that he acted in furtherance of that agreement with the requisite intention (ie, to cause death or grievous bodily harm, or knowing that some other party to the plan would act with an intent to cause death or grievous bodily harm);[3]

3.3. The deceased was killed by a party to the agreement (the stabber) pursuant to that agreement.

4. A finding of guilt on the basis of an extended joint enterprise, required that the jury be satisfied beyond reasonable doubt that:[4]

20 4.1. Sem was party to an agreement to assault (the primary offence) the deceased;

4.2. Sem participated in the implementation of that agreement with the requisite intention or foresight (ie, with knowledge or foresight of the possibility of an additional offence occurring, namely an assault with an intention to kill or cause grievous bodily harm);

4.3. the deceased was killed by a party to the agreement (the stabber).

5. The Applicant Sem further adopts as his Reply the submissions of the Appellant Huynh contained in paragraphs [6] to [15] the *First Issue – Participation in Joint Enterprise Liability* and paragraphs [16] – [18.2] the *Second Issue – Failure to Apply the Legal Directions to the Case Against the Applicant* as his own.

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[1] In the UK it has been referred to as the "paradigm" or "plain vanilla" version of joint enterprise: *R v Rahman* [2009] 1 AC 129 at [9]; *Brown v The State* [2003] UKPC 10 at [9], [13]; *R v Gnango* [2010] EWCA Crim1691 at [28], citing Sir Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233 at 237.

[2] *Johns v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-114; *Osland v The Queen* (1998) 197 CLR 316 at [24], [72]-[75]; *Gillard v The Queen* (2003) 219 CLR 1 at [109]-[110]; *Likiardopoulos v The Queen* (2012) 291 ALR 1; [2012] HCA 13 at [19]; *Handlen v The Queen* (2011) 86 ALJR 145 at [4]. As the High Court observed in *Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17], citing *Chan Wing-Siu v The Queen* [1985] AC 168; *Hui Chi-Ming v The Queen* [1992] 1 AC 34 and *R v Powell* [1999] 1 AC 1, other common law countries apply similar principles.

[3] As to the requirement of participation with the necessary intention / foresight, see *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Gillard v The Queen* (2003) 219 CLR 1 at [110]-[112]; *R v Taufahema* (2007) 228 CLR 232 at 238 [7]; *Arafan v The Queen* (2010) 206 A Crim R 216; VSCA 356 at [24]; *Likiardopoulos v The Queen* (2010) 208 A Crim R 84; [2010] VSCA 344 at [59]; *Likiardopoulos v The Queen* (2012) 291 ALR 1; [2012] HCA 13 at [19]; *Osland v The Queen* (1998) 197 CLR 316 at [73] (applying *R v Tangye* (1997) 92 A Crim R 545 at 556-557), and at [217], [225] where Callinan J described "participation" in terms of a causal responsibility or contribution to the death.

[4] *Johns v The Queen* (1980) 143 CLR 108 at 130-131; *McAuliffe v The Queen* (1995) 183 CLR 108 at 115, 118; *Gillard v The Queen* (2003) 219 CLR 1 at [112];*Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17].

6. As to the *First Issue* the applicant Sem also refers to the following passages of the summing up:

6.1. SU65 Lines 38-50 where it is submitted the jury were directed that a *participant* in a joint enterprise could be one who merely agrees to join in the joint enterprise without taking any further step.

6.2. SU124 Lines 38-50 where it is submitted the jury were similarly misdirected.

6.3. SU126 Lines 10-52 where the phrase "*thrown their lot in*" it is submitted conflates the elements of agreeing to join an enterprise with an act of participation in such an enterprise.

6.4. Such conflation is also apparent, it is submitted, from the phrase "*their intention or participation*" appearing at SU133 Line 19, and the use of the word "*participant*" by the Trial Judge when reading out to the jury the written directions at SU213-219.

7. As to the *Second Issue* the applicant makes the following amendments to paragraphs [18.3] to [19] of the Appellant Huynh's Reply.

8. The Respondent's Submissions (RS) do not address the failure to distill for the jury the evidence and issues relevant to a finding of the existence of a basic and extended joint enterprise. If a separate distillation of the matters against each accused had occurred, then (in addition to those issues identified in the submissions of the Appellant Huynh at [18.1] and [18.2]) it would have exposed, for the jury's consideration:

8.1. The possibility that an agreement to use a bladed weapon, forming the basis for a basic joint enterprise might have been formed at various points in time, including (i) at the Duong house; (ii) on the way to Nguyen house; (iii) upon arrival at the Nguyen house; or (iv) upon the commencement of, or during, the brawls; and the differing evidence relevant to each point in time.

8.1.1. As to (i), (ii) and (iii) the jury should have been reminded that there was no evidence that Sem heard the reference to a knife about which Ms Francis gave evidence, and that the accused did not all travel together to the Nguyen house.

8.1.2. As to (iv), the prosecution in its closing address[5] identified the case against Sem as dependent upon the evidence of relatively few witnesses. Firstly, prosecution relied upon the evidence of Ms. Pavic, who claimed to have seen Sem moving towards the deceased and then striking him with a bottle on the roadway, and that of Mr. Johnny Lam who saw the Applicant holding a bottle whilst using language such as 'I am going to fuck this cunt up' as he arrived at the Nguyen house. Prosecution also relied upon the evidence of Mr. Nguyen who stated that he heard Mr. Rithy Kheav saying 'Syna with Rotha (the Applicant) are stabbing my brother' (the aforementioned statement was allowed as a *res gestae* exception to the hearsay rule.) Prosecution also referred generally to the Applicant being identified as being present at the initial attack on the roadway and near the gates. Prosecution did not rely on the evidence of Mr. Rithy Kheav as to the presence of a bladed weapon, presumably because of the difficulties inherent in relying upon evidence which suggested that the Appellant Huynh was the 'second stabber' when there was only one stab wound.

8.1.3. Importantly, neither Ms. Pavic, Mr. Nguyen nor Mr. Lam described seeing Sem (or anyone else) in possession of a bladed weapon, and it was therefore critical that the jury be directed as to how the evidence of either or both of these witnesses could prove joint enterprise liability.

8.2. The need to be satisfied of Sem's participation in the implementation of the agreement. This required a consideration of the reliability of the evidence of Ms. Pavic and Mr. Lam.

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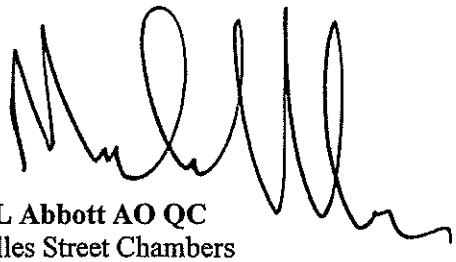
[5] T1804; T1889

If the prosecution intended to rely upon some earlier act of participation, then this, together with the relevant evidence, ought to have been squarely identified for the jury's consideration.

8.3. The need to be satisfied that Sem had the requisite intention / foresight at the time of his participation.

9. The above analysis makes plain not only that the issues as against Sem were different from those relevant to the other accused, but also that the evidence relevant to making out the various elements vis-à-vis Sem was very limited. It follows that the failure of the trial judge to separately identify the evidence relevant to the case against Sem, and to assist the jury to link that evidence to the matters in issue, undermined the jury's ability to properly evaluate the position and defence of Sem.

Dated: 28 November 2012



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