IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

BETWEEN: **No. M 30 of 2013**

DANG KHOA NGUYEN

Appellant

and

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

PART I – Certification that the submission is in a form suitable for publication on the Internet.

1.1 The appellant certifies that this submission is in a form suitable for publication on the Internet.

PART II – A concise statement of the issue the Appellant contends that the appeal presents.

2.1 Has a substantial miscarriage of justice been caused by virtue of the trial judge's failure properly to direct the jury on the alternative verdict of manslaughter?

PART III – Certification that the Appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth.).

3.1 The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth.) and is of the view that no such notice is required.

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PART IV – Citation of report of the reasons for judgment of the intermediate court.

4.1 The decision of the Court of Appeal of Victoria that is appealed from may be cited as *R v Nguyen & Nguyen* [2010] VSCA 23.

PART V – A narrative statement of the relevant facts found or admitted in the Court from which the proceedings are brought.

5.1 The appellant and his co-accused Dang Quang Nguyen ("Nguyen") and Bill Ho ("Ho") were each charged with having murdered Hie Trung Luu ("Luu") and having attempted to murder Chau Minh Nguyen ("Minh"). The evidence led at trial is summarised sufficiently to dispose of this appeal in the judgment of this Court in *The Queen v Nguyen* (2010) 242 CLR 491 at 495[13] to 497[24] and in the judgment of the Court of Appeal at 7[17] to 23[90].

5.2 In brief terms, the evidence led at trial revealed that the three accused had gone to a flat in order to collect a drug debt either owed to the appellant or Ho by a man named Mau Duong ("Mau"). Seven young people were in the flat – some asleep and some watching television. Mau was not present. The three accused entered the lounge area of the flat and repeatedly asked where Mau was. Nguyen wielded a sword that he used to cut two or three of the flat's occupants. Ho produced a firearm that he had brought with him. He fired two shots. The first hit Minh, the other Luu. Minh survived. Luu died later as a result of his wound.

5.3 Minh gave evidence that he was asleep and then woke to find the three men in the flat. He saw a man (Nguyen) waving a sword, a man kneeling down asking another where Mau was (Ho) and another man (the appellant) sitting on the stereo (T at 122, AB at). Minh said that he saw the man on the stereo (the appellant) say to the man kneeling down (Ho): "Get him off" or "Fuck him off". Ho then pulled out a gun and pointed the gun directly at Minh, asking "That guy?". Minh said that the man on the stereo (the appellant) "nodded his head", and Ho then shot him (T at 123 & ff, AB at).

5.4 Kathleen Quach, one of the flat's occupants, initially estimated that the time between the shots fired by Ho was "a couple of minutes", but later agreed that she had previously estimated the interval to be 10 to 15 seconds. She said also that the short-haired guy (the appellant) appeared to be drunk (T at 273, AB at), and that at the time of the second shot the appellant was at the door of the flat as distinct from the door of the lounge (T at 274-276, AB at). Ho confirmed in his

evidence that the appellant was drunk and stumbling when he walked (T at 532-535, AB at).

PART VI – A succinct statement of the Appellant's argument.

The trial judge's directions

6.1 Having directed the jury initially that, in circumstances where Ho had committed manslaughter, manslaughter by concert or manslaughter by extended common purpose were open as alternative verdicts on the count of murder, the judge expressly withdrew those directions (T at 1145-1146, AB at). The judge directed the jury to disregard her earlier directions.

6.2 The judge then handed the jury written directions, instructed them that this was the document to use in their deliberations and sought to explain how the jury were to apply the principles stated therein (T at 1146-1149, AB at).

6.3 The judge's directions on manslaughter were erroneous for two reasons.

6.4 First, the effect of the written directions was that if Ho was *guilty of manslaughter*, the offences of manslaughter by concert and manslaughter by extended common purpose were withdrawn from, and effectively not left to, the jury. Only manslaughter by aiding and abetting was left for the jury's consideration.

6.5 As a result of the judge's withdrawal of her earlier directions on manslaughter by concert and extended common purpose to "any crime committed by Bill Ho", "the crime in question was committed by Bill Ho" and the requirement that there be an agreement "that they would kill intentionally" or that the appellant "foresaw the possibility that an intentional killing might occur", the following consequences ensued: the bases for inculpation of the appellant for murder and manslaughter were, from the appellant's perspective, precisely the same. Each turned on the appellant's agreeing "that they would kill intentionally" or his "fore[seeing] the possibility that an intentional killing might occur". The possibility of manslaughter by an unlawful and dangerous act by concert or extended common purpose was therefore, in effect, not left at all.

6.6 Secondly, the effect of the judge's manslaughter directions was that if Ho was *guilty of murder*, the offence of manslaughter was not left for the jury's consideration on any basis at all. Ho was found guilty of murder, so manslaughter was not left to the jury.

The Court of Appeal

6.7 In the Court of Appeal, the appellant relied on grounds alleging that the trial judge had erred in her directions to the jury and, as a consequence, had failed fully to leave the alternative verdict of manslaughter. See the judgment of the Court of Appeal at [14] (AB at).

6.8 The Court of Appeal rejected the first basis of complaint concerning the directions on manslaughter, namely, the complaint where it was contended that the judge erred in her directions to the jury and, as a consequence, had failed to leave manslaughter by concert and extended common purpose where Ho was guilty of manslaughter. See paragraphs 6.4 to 6.5 above.

6.9 Neave JA set out the oral and written directions, the discussion at trial and the submissions of the parties on appeal as to the leaving of manslaughter. See the judgment of the Court of Appeal at [119] to [140], (AB at). Her Honour then set out her reasons for rejecting the grounds of appeal directed at this complaint. See the judgment of the Court of Appeal at [141]-[161] (AB at). For the reasons that follow, it is submitted that Neave JA's reasons for concluding that no miscarriage of justice arose out of these errors are flawed.

6.10 First, Neave JA concluded that the erroneous direction was unduly favourable because it required the appellant to be acquitted of any offence arising out of the death of Luu if the jury were not satisfied that "the men had a murder intention" (the judgment of the Court of Appeal at [146], AB at). This reasoning is not to the point. Rather, the error is that the appellant has been deprived of having the jury consider *the choice* of acquitting the appellant of murder and convicting of manslaughter by unlawful and dangerous act based on concert or extended common purpose.

6.11 Secondly, Neave JA said that, although "the elements of the offence were misstated in the written directions dealing with the... [the appellant's]... criminal liability for 'any crime committed by Ho', they were correctly stated elsewhere in the charge" (the judgment of the Court of Appeal at [147], AB at). But the jury was unequivocally instructed to apply the written directions.

6.12 Thirdly, Neave JA reasoned that the directions still left open manslaughter by aiding and abetting Ho to commit unlawful and dangerous act manslaughter (the judgment of the Court of Appeal at [148], AB at). That is true. But that was only on the basis that Ho committed manslaughter, which was always unlikely, and the more

realistic and viable bases for manslaughter by the appellant – concert and extended common purpose – were not left for the jury's consideration.

6.13 Fourthly, Neave JA said that she doubted whether there was a viable case for manslaughter against the appellant based on concert or extended common purpose (the judgment of the Court of Appeal at [156], AB at). But that conclusion was based on a view of the evidence that was *ex hypothesi* in error. Put another way, had Neave JA concluded that it was open to convict of murder based on concert or extended common purpose, she necessarily would have – or should have – concluded that manslaughter by concert and by extended common purpose were not only viable, but were far more apt paths to manslaughter to have been left to the jury.

The judgment of this Court

6.14 In this Court, Nguyen contended for error in the trial judge's manslaughter directions on the first and second bases that are outlined above at paragraphs 6.4 to 6.6. This Court, in allowing Nguyen's cross-appeal, did not in its reasons consider the first basis of alleged error. Nevertheless, this Court did uphold the second error contended for, namely, the error that precluded the jury from finding that Nguyen was guilty of manslaughter if Ho was guilty of murder. See paragraph 6.6 above.

6.15 This Court accepted the submissions made on behalf of Nguyen that the judge's directions on manslaughter precluded the jury properly considering a viable verdict of manslaughter premised on three different findings of fact, referable to each of extended common purpose, concert and aiding and abetting. It was accepted in the judgment of this Court that (at 503[45] & [46]):

> **As to extended common purpose... if the jury were satisfied that... [Nguyen]... knew of the presence of the gun before the shootings occurred, and was party to a plan that violence would be threatened to recover a drug debt, it was possible that the purpose was to do no more than cause serious harm to another short of really serious injury. As to concert... it may have been that the arrangement was for Bill Ho to do no more than threaten others in a dangerous fashion. As to aiding and abetting... the respondent's words and actions may have encouraged or assisted Bill Ho to assault or threaten others but not to kill or do really serious injury.**

6.16 The error identified by this Court constituted, in the words of the Court, a "wrong decision on a question of law". See the judgment of this Court generally at 501[41] to 505[50], and, in particular, at 505[50]

6.17 Further, this Court determined in respect of Nguyen, that (at 505[50]):

> **The decisions in *Gilbert* and *Gillard* also require the further conclusion that it cannot be said that there was no substantial miscarriage of justice in the case of Dang Quang Nguyen in not leaving manslaughter as an available verdict.**

6.18 As to how the error identified might have affected the verdicts sustained against the appellant, this Court said (at 505[51]):

> **[w]hether some different conclusion could or should be reached about substantial miscarriage of justice in the case of Dang Khoa Nguyen is a question that was not addressed in argument and about which we express no opinion.**

Substantial miscarriage in the case of the appellant

6.19 The appellant identifies two errors in the judge's directions to the jury on manslaughter. The first of these errors was not accepted by the Court of Appeal and was not considered in the reasons of this Court. The argument pertaining to the second error was upheld by this Court. Assuming, therefore, that the trial judge erred on at least the second basis, such error caused a substantial miscarriage of justice in the instance of the appellant.

6.20 First, it was open to the jury not to accept Minh's evidence that the appellant had uttered the words "Get him off" or "Fuck him off" – the "him" meaning Minh – prior to Ho shooting Minh. After all, no-one else in the flat gave evidence of these words being uttered and, indeed, Ho expressly denied that the words were said (T at 532-535, AB at). Ho said that the appellant was not seated on the stereo (T at 524-528, AB at). Minh had, after all, only just woken from sleep.

6.21 If the jury doubted that the appellant had uttered the words "Get him off" or "Fuck him off", then the appellant's case for manslaughter was equally as good as, if not better than, Nguyen's. The appellant was, after all, simply present. He was not, like Nguyen, wielding a sword and cutting people while demanding to know Mau's whereabouts.

6.22 Secondly, and alternatively, even if it was not open to the jury to doubt that the appellant said "Get him off" or "Fuck him off" in the manner described by Minh, it was open to conclude that these words were uttered other than with murderous intent on the appellant's part. That is to say, it was open to conclude that the appellant uttered these words without (a) intending that Minh be killed or caused really serious injury (concert), (b) contemplating the possibility that Ho would kill Minh, Ho intending to kill or cause really serious injury (extended

common purpose) or (c) knowing that Ho intended to commit murder and encouraging Ho in doing so (aiding and abetting).

6.23 Thirdly, and perhaps most importantly, even if it was not open to the jury to doubt (a) that the appellant uttered the words "Get him off" or "Fuck him off" thereby directing Ho to shoot Minh and (b) that the appellant said these words other than with murderous intent (on any of the three bases of complicity alleged), this did not preclude a finding of manslaughter in the instance of the appellant in respect of Ho's shooting, and killing, of Luu. In essence, it was open to the jury to conclude that, for the appellant, the shooting of Luu was quite unexpected, even accepting that the appellant directed Ho to shoot Minh. It was open to the jury to conclude, after all, that there were only seconds separating the first and second shots: see the judgment of the Court of Appeal at paragraphs [45] (AB), [69] (AB) & [97] (AB).

6.24 In this particular circumstance the versions of facts supporting manslaughter that were relied upon in favour of Nguyen and that are set out at paragraph 6.15 above would still hold true for the appellant so long as they were amended to read:

> **As to extended common purpose... if the jury were satisfied that... [the appellant]... knew of the presence of the gun before the shootings occurred, and was party to a plan... [ultimately]... that violence would be threatened to recover a drug debt... [and that Minh – the first person shot by Ho - would be murdered]... , it was possible that the purpose was to do no more than cause serious harm to... [any other occupant of the flat apart from Minh]... short of really serious injury. As to concert... it may have been that the... [ultimate]... arrangement... [between Ho and the appellant]... was for Bill Ho to... [murder Minh]... but to do no more than threaten... [any other occupant of the flat apart from Minh]... in a dangerous fashion. As to aiding and abetting... the respondent's words and actions may have encouraged or assisted Bill Ho... [to murder Minh but otherwise only]... to assault or threaten... [any other occupant of the flat apart from Minh]... but not to kill or do really serious injury... [to those others].**

6.25 The dicta of Acting Chief Justice Gibbs (delivered with the agreement of Stephen, Jacobs, Murphy and Aickin JJ and approved in *Gillard v The Queen* (2003) 219 CLR 1 at [16]-[17]) in *Markby v R* (1978) 140 CLR 108 at 112-113 is particularly apposite, given that the High Court in that case identified an error on the part of the trial judge by limiting a finding of manslaughter for an inactive participant to the situation where the principle offender was guilty only of manslaughter:

> **It was erroneous to tell the jury that the applicant could be found guilty of manslaughter only if Holden also was guilty of manslaughter and not of murder. When two persons embark on a common unlawful design, the liability of one for acts done by the other depends on whether what was done was within the scope of the common design. Thus if two men go out to**

> **rob another, with the common design of using whatever force is necessary to achieve their object, even if that involves the killing of, or the infliction of grievous bodily harm on, the victim, both will be guilty of murder if the victim is killed: *Reg. v. Lovesey* (1970) 1 QB 352, at p 356. If, however, two men attack another without any intention to cause death or grievous bodily harm, and during the course of the attack one man forms an intention to kill the victim, and strikes the fatal blow with that intention, he may be convicted of murder while the other participant in the plan may be convicted of manslaughter: *Reg. v. Smith* (1963) 1 WLR 1200, at p 1205-1206; (1963) 3 All ER 597, at p 601; *Reg. v. Betty* (1963) 48 Cr App R 6; *Reg. v. Lovesey* (1970) 1 QB 352, at p 356 . The reason why the principal assailant is guilty of murder and the other participant only of manslaughter in such a case is that the former had an actual intention to kill whereas the latter never intended that death or grievous bodily harm be caused to the victim, and if there had not been a departure from the common purpose the death of the victim would have rendered the two participants guilty of manslaughter only. In some cases the inactive participant in the common design may escape liability either for murder or manslaughter. If the principal assailant has gone completely beyond the scope of the common design, and for example "has used a weapon and acted in a way which no party to that common design could suspect", the inactive participant is not guilty of either murder or manslaughter: *Reg. v. Anderson*; *Reg. v. Morris* (1966) 2 QB 110, at p 120. If however the use of the weapon, even if its existence was unknown to the other party, is rightly regarded as no more than an unexpected incident in carrying out the common design the inactive participant may be convicted of manslaughter: *Varley v. The Queen* (1976) 51 ALJR 243, at p 246.**
>
> **The relevant principle, in its application to a case similar to the present, was stated as follows by the Court of Criminal Appeal in *Reg. v. Reid* (1975) 62 Cr App R 109, at p 112:**
>
> > **"When two or more men go out together in joint possession of offensive weapons such as revolvers and knives and the circumstances are such as to justify an inference that the very least they intend to do with them is to use them to cause fear in another, there is, in our judgment, always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. If such injury was not intended by the others, they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter."**

6.26 Even if the jury were bound to conclude that the appellant had murderous intent in connection with being complicit in Ho's shooting of Minh, it was still open to the jury to find that while Ho was guilty of the murder of Luu, the actual shooting of Luu was an unexpected incident of the design struck between Ho and the appellant to shoot Minh and, as such, the appellant was guilty only of the manslaughter of Luu.

6.27 Thus, whether the jury rejected or accepted Minh's evidence of the appellant having said the words "Get him off" or "Fuck him off", and whether the jury were bound, or otherwise, to infer murderous intent

on the appellant's part in respect of the shooting of Minh, it was always open to the jury to bring in a verdict of manslaughter for the appellant in connection with the shooting of Luu.

Conclusion

6.28 The judge's errors precluded the jury from finding the alternative verdict of manslaughter if (a) Ho was found guilty of having murdered Luu, or (b) Ho was guilty of the manslaughter of Luu and the appellant guilty of manslaughter on the bases of extended common purpose and concert. As things eventuated, Ho was found guilty of the murder of Luu and so, as a consequence, manslaughter as an alternative verdict for the appellant was not left at all.

6.29 In these circumstances, just as in the case of the co-accused Nguyen, the two convictions sustained by the appellant must be set aside.

- *The Queen v Nguyen* (2010) 242 CLR 491;
- Also see *Gillard v The Queen* (2003) 219 CLR 1 at 14[27].

PART VII – Applicable constitutional provisions, statutes and regulations.

7.1 There are no constitutional provisions, statutes or regulations to which the appellant need make reference.

PART VIII – Orders sought.

8.1 The orders sought are as follows:

(a) The appeal to this Court be allowed;

(b) The order of the Court below dismissing the Appellant's appeal be set aside;

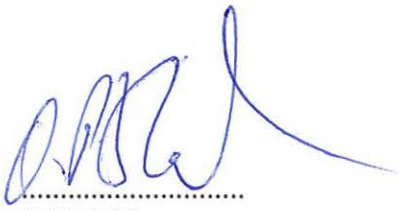
(c) The convictions sustained by the Appellant be set aside;

(d) A re-trial be ordered.

PART IX – Estimated number of hours required for the presentation of the Appellant's oral argument.

9.1 The Appellant estimates that it will take no longer than 2 hours for argument in support of the appeal to be presented on his behalf.

Dated: 15 April 2013



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