



HIGH COURT OF AUSTRALIA

8 March 2023

MITCHELL v THE KING; RIGNEY v THE KING; CARVER v THE KING;
TENHOOPEN v THE KING
[2023] HCA 5

Today, the High Court allowed four related appeals from a judgment of the Court of Appeal of the Supreme Court of South Australia and ordered that each appellant's conviction for murder be quashed and a new trial take place. The dispositive question in the appeals was whether liability for murder under s 11 of the *Criminal Law Consolidation Act 1935* (SA) ("the Act") could be established by combining the common law doctrine of extended joint criminal enterprise ("EJCE") with constructive murder as provided for by s 12A of the Act. Section 12A extends liability for murder to a person who commits or agrees to an intentional act of violence causing death while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more. EJCE applies where a party to a joint criminal enterprise foresees, but does not agree to, the possible commission of an incidental crime in the course of carrying out an agreement to commit an offence and continues to participate in the enterprise.

The appellants were each convicted of murder following a trial in the Supreme Court of South Australia in which they were alleged to have made and executed an agreement to break and enter a residence for the purpose of stealing cannabis. The prosecution alleged that in the course of committing the indictable offence of criminal trespass, one or more of the participants violently assaulted the deceased causing his death. It was not the prosecution case that the murder of the deceased was within the scope of the appellants' joint criminal enterprise. Rather, the prosecution alleged that the doctrine of EJCE operated together with s 12A of the Act to make each of the appellants guilty of murder under s 11 of the Act because each had foreseen that, in the course of carrying out their agreement, one of them might have perpetrated an intentional act of violence.

The trial judge directed the jury that the prosecution could establish a pathway to murder based on a combination of s 12A and EJCE by proving that the appellants contemplated the possibility of any intentional act of violence, including a strike to the back of the leg. The trial judge further directed that the prosecution need not prove that the appellants contemplated that one of them might commit the act of violence with intention to kill or cause really serious bodily harm. The Court of Appeal dismissed the appellants' appeals against conviction.

The High Court held that EJCE and s 12A of the Act could not be relied upon in combination to create a new pathway to murder under s 11. Section 12A requires that a person commit or agree to an intentional act of violence, which cannot be proved by establishing derivative liability of a secondary participant under EJCE principles where the secondary participant foresaw the possibility of an intentional act of violence by another participant but did not agree to the act. To allow murder to be established by that pathway would dispense with the requirement of s 12A that the accused commit or be attributed an act causing the death of another or agree in the commission of the intentional act of violence, broadening the reach of s 12A beyond that supported by its text, context and purpose.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*