HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A16 of 2022

BETWEEN: CARVER
Appellant

and

THE KING
Respondent

APPELLANT'S OUTLINE OF ORAL PROPOSITIONS

Part I: Certification for publication

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

Part II: Outline of the propositions to be advanced in oral argument

Foundation premises

1. In *Miller v The Queen* (2016) 259 CLR 380 at [33]-[34] this Court confirmed that secondary liability on extended joint criminal enterprise (**EJCE**) principles is a *sui generis* form of liability. The adoption in *Miller* of the doctrinal concepts articulated by Professor Simester was significant, particularly in the context of the contrasting approach taken in *Jogee* [2017] AC 387.

2. EJCE stands outside accessorial liability: it imposes criminal liability without requirement for agreement, knowledge of essential facts or intention.

3. A participant in an agreement to commit Crime A is guilty of Crime B if they foresaw Crime B as a possible incident of carrying out the plan to commit Crime A yet continued to participate in the agreement to commit Crime A with that foresight. The decisions in *Miller* at [44]-[45] and *Clayton v The Queen* (2006) 81 ALJR 439 at [20], building on the principles expressed in *Chan Wing-Siu* [1985] AC 168, emphasise that it is foresight of the *incidental crime* that justifies the extension of liability to a person who neither commits nor agrees to the commission of Crime B.

4. This emphasis is not accidental. It reflects the lineage of EJCE and the derivative nature of the liability they give rise to. The further one moves from foresight of the inherent elements of the incidental crime (intention, conduct and, where applicable, consequence) the greater the risk of severing the relationship between notions of liability and legal responsibility (AS[39], [43]).

5. This understanding of EJCE principles, and the *way* they render a secondary participant liable, is critical to whether EJCE principles *can* engage with a provision like s12A of the *Criminal Law Consolidation Act 1935* (SA) (***CLCA***) and, if so, *how* they engage with s12A. If EJCE can apply to s12A, it can only be by necessary implication.

6. Section 12A requires proof of the following:

    a. "A person" commits an intentional act of violence;
    b. In the course or furtherance of committing a prescribed indictable offence;
    c. The intentional act of violence causes the death of another.

Erroneous Directions

7. The principal problem with the directions on common law murder by EJCE was that the contemplated consequence was consistently described in terms of the *use* of, (CAB51, 58, 78) or infliction of, *violence* (CAB50, 270, 274), or a "blow" (CAB273, 277). The jury should have been directed that what was required was foresight of the possibility of death, or at the least, grievous bodily harm (see, eg, RS[31]-[34]; Reply, [5]). The directions identified an incidental offence that was not murder but another, lesser, offence (see, eg, s24, *CLCA*).

8. As to s12A, the directions identified participation in an agreement to commit aggravated trespass (s170, *CLCA*) but failed to address the first element of s12A adequately and the third element at all. The directions on the first element essentially repudiated the need to prove the third element.

9. Relevant directions as follows:

    a. EJCE liability for common law murder – foresight of *violence* or that someone might "use" violence (CAB51, 78); that another *might commit violence* in the event there was someone inside the house (CAB49-50, 51, 57-60, 76, 269-270, 273-274).

    b. EJCE liability for constructive murder (CAB50, 76, 269-270, 274-278) – foresight of "*any* act of intentional violence"; strike on the back of the leg (CAB62-63, 68-69, 278). These directions made clear that this was in contradistinction to *what actually happened*.

    c. Manslaughter (CAB73, 76-79, 279-281) - contrast the matters to be proved to establish manslaughter by EJCE and directions as to constructive murder by EJCE (AS[40]).

    d. Jury questions – seeking explanation of the two pathways to murder and manslaughter (CAB262) and further explanation of "contemplation and intention" (CAB263).

EJCE and common law and constructive murder (Grounds 2 and 3)

10. The shortfall of the directions on EJCE and common law murder was that foresight of the use or infliction of violence or a "blow" was sufficient foresight for murder. It was not. The directions fell well short of the requirement that the secondary participant foresee the possibility of death or, at the least, grievous bodily harm.

11. The application of EJCE principles to s12A would require participation in an agreement to commit Crime A (as in para [3] above), with *foresight* of the possibility of all three elements of constructive murder as an incident of carrying out the plan to commit Crime A.

Can EJCE apply to s 12A? (Ground 1, first limb)

12. The "constructive" murder provision created by s 12A cannot operate satisfactorily in conjunction with principles of EJCE (Ground 1) (AS[26]-[44]):

    a. Section 12A pays close attention to the "person" who commits an intentional act of violence. That "person" necessarily has the opportunity to evaluate and hence appreciate the likely consequences of committing an act *of such character and degree as to cause the death of another as a matter of fact and law.* Whilst this understanding of s12A might accommodate joint criminal enterprise participants,[1] the connection between the terms of

[1] Cf *Arulthilakan v The Queen* (2003) 78 ALJR 257.

the section and the conduct and intent of a secondary participant is broken when s12A is made to operate in conjunction with EJCE principles.

b. If EJCE applies to s12A, the provision catches someone who foresaw the possibility of *violence* but did not lend themselves to it. If foresight of the possibility of violence apt to cause death (referable to the third element of s12A) is not required, the cumulative operation of the provision and EJCE principles moves yet a further step away from established notions of criminal responsibility.

c. The EJCE offender would effectively need to sit outside the terms of s 12A. He or she does not commit the proscribed act; does not have the necessary state of mind; and does not cause the required consequence. Nor does he or she *agree* to the offence or the actions which comprise it. Participation in some lesser crime together with foresight only of *any* act of violence, and the derivative liability that EJCE gives rise to, cannot supply a principled pathway to a secondary participant becoming "*a person* who commits an intentional act of violence…and thus causes the death of another".

d. Statutory context (creating a liability for murder; the circumstances in which s 12A was enacted, pre-dating *McAuliffe v The Queen* (1995) 196 CLR 108 (Reply, [11])-[12]) and a consequence based approach to interpretation (the direct collision with unlawful and dangerous act manslaughter (AS[40])) confirm the difficulties in combining s12A with EJCE.

e. The case put against the appellant was that he personally committed a relevant indictable offence, or was at the very least party to an agreement to commit such an offence. In the language of s12A, the appellant was, in this respect "*a person*" – a primary offender. However, the appellant was *not* "*a person*" who committed an intentional act of violence that caused death and therefore was not "*a person*" in respect of this aspect of s12A. The respondent's argument necessarily requires a differential meaning to be accorded to "person" with respect to different elements of s12A.

"Act of violence" (Ground 1, second limb)

13. The term "act of violence" is not at large, its content is derived from the statutory context, (particularly that the act has caused death) (AS[45]-[57]; Reply, [13]). An "act of violence" is an act capable of causing death or that carries a realistic or appreciable risk of death. The jury were told on multiple occasions that the contemplated act of violence did not have to be anything like the *actual act of violence* that caused death (CAB62-63, 68-69, 278).

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