HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

A16/2022

BETWEEN: **AARON DONALD CARVER**
Appellant

and

THE KING
Respondent

APPELLANT'S REPLY

Part I: Certification for publication

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

Part II: Reply

Strike to the back of the leg

2. The respondent[1] misapprehends the context and significance of the trial judge's directions that contemplation of *any* act of violence, even one as relatively trivial and qualitatively removed from *the* act causing death as a strike to the back of the leg, would be sufficient for constructive murder on extended joint enterprise principles. At various points in his summing up, the trial judge told the jury:

> …the intentional act of violence under their contemplation can be **any act of intentional violence**…So if they contemplated that one of their co-joint enterprise participants…might strike Mr Gjabri for example on the back of the leg, **that would be a contemplation of an intentional act of violence. They do not have to have within their contemplation that someone would necessarily strike Mr Gjabri on the skull**.[2]

3. This direction, and others like it, were intended to contrast *the act* causing death[3] and what the appellant needed to contemplate. Only the appellant's contemplation was of forensic significance in this context. The direction conveyed that contemplation by the appellant of *any* act of violence would suffice and differentiated the need to contemplate the possibility of *the act* causing death. The appellant would be guilty of murder if he foresaw no more than the possibility of a strike to the back of someone's leg.[4]

***Re-opening McAuliffe v The Queen* (1995) 183 CLR 108 – RS[3], [26], [36]-[37]**

4. The Court's reasons in *McAuliffe v The Queen* (1995) 183 CLR 108 did not deal with the

[1] Respondent's submissions (**RS**), [14]-[16].
[2] CAB62-63, 68-69, 278.
[3] CAB61-63, 68-69, 278.
[4] CAB62-63, 68-69, 278.

argument now advanced by the appellants.[5] The authorities have yet to *directly* address the contention that, in a case of murder, extended joint enterprise principles require contemplation of the possibility of death.[6] Perhaps it has been assumed as implicit in the justification for the doctrine (continued participation in a crime with foresight that another may *commit murder* for example[7]) and the requirement to prove "foresight of the *incidental crime*" that what must be foreseen in a case of murder is not an inchoate offence or a lesser offence involving violence, but *murder*; including e*x hypothesi* an act causing death.

5. It may also be that there has been no real need in the authorities to date to deal expressly with this aspect of the doctrine because many of the factual scenarios considered in past decisions have not engaged with this aspect of the principles at a practical level.[8] In *McAuliffe*, where the foundational agreement was to engage in violence using a hammer and a baton or stick, the Court's focus was on an anterior question posed at the outset of the judgment: whether a secondary party could be liable for an action outside the scope of the common purpose but within the contemplation of the secondary party.[9] Notably, the approved direction given by the trial judge in *McAuliffe* included reference to more than just foresight of an *intention* to act with grievous bodily harm; it included reference to the *outcome* or *result* of so acting, namely, the *infliction* of grievous bodily harm.[10] In that setting, this Court's statement that foresight of the *incidental crime* was required is not inconsistent with the argument advanced by the appellant.[11]

Incoherence between common law murder and extended joint enterprise

6. The respondent's contention that requiring foresight of an act causing death would generate incoherence between extended joint enterprise and other forms of primary or accessorial liability,[12] is predicated on the assumption that different forms of liability must and do operate in an almost identical way, such that extended joint enterprise principles must be conceptualised in a way that "maintains the link with the liability of the principal".[13] Extended joint enterprise, the respondent argues, cannot require foresight of a physical element of murder to which no fault element attaches in the case of a principal in the first degree. This might be thought at odds with

[5] RS[3], [26].
[6] Cf RS[36]-[43]. See, however, discussion in *IL v The Queen* (2017) 262 CLR 268, [65]-[76] (Bell and Nettle JJ) to the effect that at least joint enterprise only attributes to co-participants the acts that comprise the *actus reus* of the charged offence; *Miller v The Queen* (2016) 259 CLR 380, [91]-[92] (Gageler J).
[7] *Miller v The Queen* (2016) 259 CLR 380, [45], [135], [137].
[8] *Clayton v The Queen* (2006) 81 ALJR 439 for example involved group violence and a plan to exact revenge using knowingly possessed and dangerous weapons.
[9] *McAuliffe v The Queen* (1995) 183 CLR 108, 115.
[10] *McAuliffe v The Queen* (1995) 183 CLR 108, 113.
[11] *McAuliffe v The Queen* (1995) 183 CLR 108, 117-118.
[12] RS[21]-[44].
[13] RS[108].

the description of secondary liability as *sui generis*.[14]

7. This attempt to elide distinctions between different species of liability should be resisted. The elision fails to give effect to the different "normative justifications" for forms of primary and derivative liability and the legal mechanics by which they affix liability. As the passage cited by the respondent from Professor Williams makes clear,[15] the person who inflicts violence intending to cause grievous bodily harm takes such a risk that death will follow because of known 'fragility of the human body', that there is no meaningful moral distinction between that offender and the offender who intends to kill. That says little about what must be contemplated by a co-participant to establish liability on extended joint enterprise principles which, by definition, can involve offenders who do not inflict, intend or agree to violence as a possible incident of the enterprise.[16]

8. The moral justification for exposing to liability for murder a person who neither does the relevant act nor agrees to or authorises an act done with murderous intent, can be found only in the cognitive acknowledgment that *the crime of murder* might be committed by a confederate and, with that appreciation, pursuing the underlying enterprise. Whilst there are commonalities across the forms of liability under consideration here,[17] that does not pre-ordain the conclusion that extended joint enterprise *cannot* require proof of something more than is required to prove the guilt of a principal, an accessory[18] or a participant in a joint enterprise. Indeed, as the threshold for liability slides further away from traditional common law concepts emphasising the importance of concurrency of the *actus reus* and *mens rea*, there is every reason to approach extended joint enterprise in a nuanced way.

9. The anomaly that arises if the respondent's submissions are to be accepted is that a primary definitional characteristic separating murder from other offences of violence (death) is simply ignored for the purpose of extended joint enterprise principles. An accused who merely contemplates the possibility of an act done with intention to inflict grievous bodily harm, which might constitute one of a number of descending crimes,[19] is punished for murder because he or she need not foresee death as a possibility. Equally, a secondary participant might be guilty of

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[14] *Miller v The Queen* (2016) 259 CLR 380, [34].
[15] RS[24].
[16] Similarly, the secondary offender who subscribes to a common purpose which expressly or tacitly embraces the commission of an act with murderous intent and who thereby authorise their co-venturers to commit murder, are held liable because the acts of their confederates are attributable to the secondary offender who has a sufficient state of mind for murder. The emphasis that joint enterprise places on assent or authorisation (even if only conditional) of murder – factors which, by definition, have no application in extended joint enterprise cases – does nothing to undermine the appellant's argument.
[17] Namely, liability as a principal in the first degree; liability pursuant to joint criminal enterprise; accessorial liability; extended joint enterprise liability.
[18] RS[38]. The remarks in *Giorgianni v The Queen* (1985) 156 CLR 473, 495, 503 that *knowledge* of death is not required in the case of an accessory charged with culpable driving causing death, cannot be seen as a statement of general principle. The remarks were confined to the offence being considered. Requiring proof of *knowledge* of outcome or result would create unique problems for the law of accessorial liability which do not arise when considering extended joint enterprise.
[19] See, eg, s 23, *Criminal Law Consolidation Act 1935* (SA) (intentionally causing serious harm); s 33, *Crimes Act 1900* (NSW) (wounding with intent to do grievous bodily harm).

constructive murder because he or she foresees an act not rationally capable of causing death and which has no correspondence with the act that in fact causes death.

Exclusion of complicity principles from s 12A and its proper construction

10. In support of its contentions that (1) extended joint enterprise principles are not excluded by s 12A and (2) the meaning of "act of violence" is incontestably clear,[20] the respondent draws on the historical context to the introduction of s 12A; its designation of foundational offences; the identification of a specific type of act as the putative *actus reus* for murder; the omission of reference to complicity principles; and the carve out for illegal abortion. These factors are said to demonstrate that, whilst recognising the provision "could result in harsh consequences", Parliament consciously found the appropriate balance to give effect to its legislative intention.[21]

11. Neither the characteristics of the provision, the context of its enactment nor the absence of reference to extended joint enterprise principles[22] persuasively answer the contention that, functionally, s 12A cannot be overlayed with extended joint enterprise principles. It is important to observe that the enactment of s 12A preceded *McAuliffe v The Queen* (1995) 196 CLR 108.[23] It is both unsurprising and insignificant that the provision makes no express reference to a doctrine that, unless it was remarkably prescient, Parliament could not have anticipated interacting with s 12A at the time of its enactment.[24] It is equally unlikely that the legislature would have anticipated that the constructive liability created by s 12A and textually confined to the *person* who commits an *intentional* act of violence, would become a vehicle for the attribution of liability to another by virtue of principles not then part of the common law of Australia.[25]

12. On the contrary, the nature and form of liability created by s 12A, together with the circumstances in which it was enacted, support the implied exclusion hypothesis.[26] So too does the general scope of the provision, concerned as it is with the *intentional* act of *a person* that causes death. That is the mischief the section is concerned with: holding to account the person who, in furtherance of a prescribed foundational offence, makes a conscious and voluntary decision to engage in violence of such a kind it in fact causes death. The plain meaning and objective of the provision do not suggest that a secondary party can be forced within its purview by reference to a doctrine that did not form part of the common law when s 12A was enacted.

13. Moreover, defining the legal criteria a foundational offence must possess before s 12A is

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[20] RS[71]-[97].
[21] RS[55]-[73].
[22] RS[70], [75]-[79].
[23] RS[55], footnote 66.
[24] *O'Dea v The Queen* [2022] HCA 24, [52] makes clear that the interpretation of a provision concerning matters of criminal liability is to be approached in the context of the common law principles applicable at the time of its introduction.
[25] RS[77]-[79], [94]. Very little weight can be afforded to the rule of construction on which the respondent relies.
[26] *Giorgianni v The Queen* (1985) 156 CLR 473, 477.

enlivened sheds no light on the critical question: what is an "act of violence"? Understood in its relevant legal setting, "act of violence" speaks to something more than trivial acts like a smack to the back of a leg, and precludes non-physical acts such as threats or menaces. This does not alter, modify or read words into the provision. It affords meaningful and realistic content to an inherently protean concept that synthesises with the context of a provision that creates constructive liability for murder and recognises the unjustifiable consequences of construing s 12A in the undemanding way exemplified by the directions given in this case.[27]

Contemplation of an act causing death – s 12A

14. As the appellant has previously remarked, the principal who commits *the* act of violence that causes death, makes a conscious and voluntary decision to engage in violence which, in most cases, will have carried an appreciable risk of death.[28] So much will be obvious to the principal. The respondent's argument would have that the secondary party need not contemplate the possibility of the actual act causing death; nor any act causing death; nor an act capable of causing death nor even an act of the same kind or qualities as the act committed by the principal.[29]

15. This creates an irrational liability dichotomy.[30] A secondary party might be guilty of murder even though the act contemplated bears no correspondence to the act causing death. If extended joint enterprise principles can operate in tandem with s 12A, the only rational way to integrate those principles with the form of constructive liability created by the statute is to insist upon proof of foresight of an act causing or capable of causing death. This proposition harmonises with the text of s 12A, appropriately reconciles with classic statements of extended joint enterprise as requiring proof of foresight of the *incidental crime*, and is sympathetic to the normative justification for this form of liability.

Dated: 7 October 2022

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[27] Cf RS[67]-[69], [71].
[28] AS[30].
[29] RS[98]-[111]. However, see RS[100]-[102]: if the respondent's submissions are to be understood as requiring foresight of *the act that causes death*, directions the appellant need not contemplate *the* act of violence causing death were wrong.
[30] Cf RS[108].