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 QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

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

Part II: Concise statement of the issue or issues presented by the appeal

2. This appeal raises two interrelated issues concerning the principles of extended joint criminal enterprise (**EJCE**) and their application to cases of common law murder and constructive murder pursuant to s12A of the *Criminal Law Consolidation Act 1935* (SA) (***CLCA***).

3. In *Miller v The Queen* (2016) 259 CLR 380 (***Miller***), this Court held that EJCE remains a part of the common law of Australia, such that an accused who embarks on a joint criminal venture with others is liable for a different, incidental crime, committed by one or more of his or her co-venturers in furtherance of the agreed upon crime, provided the accused foresaw the possible commission of the incidental offence. The plurality confirmed the organising elements of EJCE liability in the following terms:

> … a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the **incidental crime** in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability).[1]

4. This passage is representative of most formulations of EJCE. It emphasises that the heartland of EJCE liability is foresight of the possible commission of an incidental *offence*, and a conscious choice to pursue the underlying criminal venture nonetheless. The decisions of this Court do not speak in terms of foresight of one element or aspect of the incidental offence as sufficient. The decisions speak with a generally unified voice that what is required is foresight of the *incidental crime*. It is the secondary participant's contemplation that the incidental crime might be committed if the confederates persist with their plan that provides the justification for holding the secondary participant liable for an incidental crime they do not agree to or intend be committed.[2]

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[1] *Miller v The Queen* (2016) 259 CLR 380, [4]; see also at [100], [108] (Gageler J), [132], [138] (Keane J).
[2] *Gillard v The Queen* (2003) 219 CLR 1, [25], [31], [112]; *Clayton v The Queen* (2006) 81 ALJR 439, [17]; *Miller v The Queen* (2016) 259 CLR 380, [4], [30], [135], [137]-[138].

It follows, in the appellant's submission, that in a case of common law murder relying on EJCE principles, what must be foreseen by a secondary participant is the *possible commission of murder*. Equally, in a case of constructive murder, *if EJCE principles can apply at all*, what must be foreseen by the secondary participant is the complete concatenation of facts that comprise the elements of that species of constructive murder.

5. There are therefore two questions arising on this appeal. The first, and threshold question, is whether the principles of EJCE apply at all to cases of constructive murder where an unlawful killing that would not otherwise amount to murder is deemed to be murder by a legislative fiction (**Ground 1**). The disposition of this ground turns on an understanding of the nature of the liabilities created by s12A of the *Criminal Law Consolidation Act 1935* (SA) (***CLCA***) and EJCE principles respectively and the operation and legal context of s 12A. In short, s12A does not authorise layering two forms of constructive liability upon each other to create a path to murder.

6. If EJCE principles *can be* relied upon in conjunction with s12A, a further question arises: was the Court of Appeal (**CA**) correct to uphold that the trial judge's directions that foresight of "*any* act of violence", including something as trivial as a threat, menace or strike to the back of the deceased's leg, was sufficient for constructive murder, notwithstanding that such an act of violence was inherently unlikely to cause death or serious injury? This question should be answered "no". An "act of violence" for the purpose of s12A is an act that, by virtue of its character, qualities or the circumstances in which it is committed, is realistically capable of causing death or serious injury. A secondary participant is not guilty of murder by virtue of s12A and EJCE principles unless he or she contemplates the possible commission of an act of that kind.

7. The second question to be determined is whether proof of liability for common law or constructive murder on EJCE principles requires proof of foresight of *all of the elements* of the incidental crime charged (**Grounds 2 and 3**). Whilst the application of EJCE principles to common law murder and statutory murder require contemplation of different states of affairs, the question common to the application of EJCE principles and both pathways to murder is whether it is necessary to prove that a secondary participant foresaw the possible commission by one of his confederates of an act causing, or capable of causing, death or really serious harm? Must the secondary participant contemplate not just the mens rea for common law or statutory murder, but the *whole of the actus reus*, which unquestionably extends to the consequences of the impugned act or violence?

8. Drawing on the approach reaffirmed in *Miller*, the appellant, who was alleged to be party to a joint criminal enterprise to commit Aggravated Serious Criminal Trespass and Theft (**the foundational offence**), could not be found guilty of common law or constructive murder on EJCE principles unless proved to have foreseen the possibility that a co-venturer might commit murder

contrary to s11 of the *Criminal Law Consolidation Act 1935* (SA) (***CLCA***), or constructive murder contrary to s12A of the *CLCA*. This entailed proof of foresight of an act causing death or really serious injury (for common law murder) or an act causing death (for s12A murder), or at least an act capable of causing either consequence.

Part III: Certification that the appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*

9. The appellant does not consider that notice is required to be given.

Part IV: A citation of the authorised report of the reasons for judgment of the intermediate court in the case

10. *Rigney v R; Tenhoopen v R; Carver v R; Mitchell v R* [2021] SASCA 74.[3]

Part V: A narrative statement of the relevant facts

11. After a trial before Lovell J (**the trial judge**) and a jury, the appellant was convicted of murder, contrary to s 11 of the CLCA.[4] The prosecution case was that the appellant and four others (Rigney, Tenhoopen, Mitchell and Howell (tried separately)) (collectively **the accused**) were party to a joint criminal enterprise (**JCE**) to break into a residence and steal cannabis plants. On 9 October 2018, and in furtherance of that agreement, the appellant and his co-venturers converged on the residence. Closed Circuit Television footage obtained from a nearby house showed one of the men carrying a "long object…apparently a bat"[5] or possibly a stick.

12. An unknown number of the men obtained access to the residence and came across the occupant, Urim Gjabri (**the deceased**). It was the prosecution case that in response to the presence of the occupant, one or more of the co-venturers assaulted the deceased and thereby caused his death. Expert evidence established that the deceased's death resulted from a fractured skull inflicted with a blunt object.[6]

13. Although in opening the prosecution put its case on multiple bases,[7] by the conclusion of the trial the case of murder had been confined to two pathways,[8] both depending on EJCE principles. The prosecution could not say who was responsible for the infliction of the fatal injuries and did not allege a joint enterprise to murder the deceased.[9]

14. As the deceased was killed by an act of violence in the course of the commission of the

[3] References in this document in brackets [X] relate to paragraphs in the CA's judgment. References to the Core Appeal Book are in the form "CAB[page number]".
[4] The appellant was subsequently sentenced on the basis that the jury found him guilty of constructive murder and sentenced to life imprisonment with a non parole period of 20 years: CAB298, 308.
[5] CA[24] (CAB347-349).
[6] Summing Up, pg 47 (CAB55). Dr Charlwood was unable to say whether one or more than one blow was involved.
[7] Prosecution opening, T17-21.
[8] CA[25]-[29] (CAB349-350).
[9] Summing Up, pg 39, 49 (CAB47, 57).

foundational offence to break into the house and steal cannabis, the appellant was said to be guilty of murder by virtue of s12A of the CLCA, which provides an alternative pathway to murder loosely based on the common law felony murder rule. It was the prosecution case that as one or more of the accused committed an intentional act of violence that caused death in the course or furtherance of a joint enterprise to commit a major indictable offence punishable by imprisonment for 10 years or more, the appellant was guilty of murder if he contemplated the possibility that in committing the foundational offence a co-participant might perpetrate "any act of violence".

15. The prosecution also alleged that the appellant was guilty of common law murder on the basis that he foresaw the possibility that, in carrying out the agreement to break and enter and steal cannabis, one of his confederates might attack the deceased with an intention to kill or cause grievous bodily harm.

16. The trial judge directed the jury that liability for constructive murder on EJCE principles would be made out if the appellant contemplated that a co-participant *might* commit *any* act of violence in the course or furtherance of the foundational offence (CA[101]-[102], [157]) *if they came across someone in the house*.[10] The jury were told that the appellant need not have foreseen the act that in fact caused the deceased's death nor an act of a similar kind.[11] Foresight of any act of violence would, the jury were told, be sufficient to find the appellant guilty of constructive murder. The jury were not directed that the appellant had to contemplate an act of violence that might or was capable of causing death or really serious injury. To the contrary, the trial judge told the jury:

> …if they contemplated that one of their participants in the joint enterprise might strike [the deceased] 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 [the deceased] on the skull.[12]

17. The jury were told that, in some cases, even a "threat or menace" could constitute an "act of violence" within the meaning of s12A.[13]

18. As to common law murder, the jury were directed that the appellant would be guilty if he were party to a JCE to "break and enter and steal the cannabis"[14] and contemplated that "in carrying out the joint enterprise…one or more of the accused, if they came across someone in the house, might inflict *violence* on that person…with the intention of either killing that person or causing really serious bodily harm" (emphasis added). The trial judge repeated directions in these terms

[10] Summing Up, pg 42-43, 53-61, 266-270 (CAB50-51, 61-69, 274-278).
[11] Summing Up, pg 54-55, 61, 270 (CAB62-63, 69, 278).
[12] Summing Up, pg 54-55 (CAB62-63). A similar example was given again at Summing Up, pg 61, 270 (CAB69, 278).
[13] Summing Up, pg 53 (CAB61).
[14] Summing Up, pg 39 (CAB47). It was not suggested that there was a plan to commit murder: Summing Up, pg 261-262 (CAB268-269).

on numerous occasions.[15] The directions emphasised that foresight that a co-venturer might engage in "violence" *if* confronted by the occupant of the house, would be sufficient for a verdict of murder if the "violence" was and was foreseen to be accompanied by murderous intent.[16] This form of instruction, focussing on the possible occurrence of "violence", tended to elide the distinction between common law murder on EJCE principles (which required at the least foresight of the intentional infliction of grievous bodily harm not *violence* of an unspecified kind) and statutory murder, which the trial judge said required no more than foresight of any, even trivial, "act of *violence*."[17]

The approach of the Court of Appeal

19. The appellant and his co-accused appealed their convictions. In the CA, it was contended[18] that liability for constructive murder on EJCE principles required proof that the accused contemplated that one of their number might commit an act of violence *causing death* in the course of committing the foundational offence.

20. The CA unanimously dismissed the appeals. Peek AJA (with whom Kelly P and Doyle JA agreed (in short separate reasons) upheld the correctness of the trial judge's directions on constructive murder[19] and found that constructive murder on the basis of EJCE did not require foresight of the possibility that death might or would result from an act of violence.[20] This conclusion was, in part, predicated on Peek AJA's view that comments made by this Court in *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 260-261 were against the need to prove contemplation of an act of violence causing death.[21] Peek AJA held further that the trial judge's directions concerning a "smack on the leg" caused no miscarriage of justice, as it was "common knowledge in Australian society that such a grow-house would likely be guarded and that violence might well be necessary to overcome the guard".[22]

21. Doyle JA, in separate reasons, commenced his examination of the interplay between EJCE and constructive murder by observing that common law murder on EJCE principles does not require foresight that death might result from the act of a co-venturer.[23] His Honour reasoned that if death

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[15] Summing Up, pg 42 (CAB50). See also Summing Up, pg 50, 262, 265-266 (CAB58, 270, 273-274).
[16] Summing Up, pg 42-43 (CAB50-51).
[17] Summing Up, pg 261-267 (CAB269-275).
[18] CA[104]-[173] (CAB373-393).
[19] CA[157]-[172] (CAB390-393).
[20]CA[124], [172] (CAB379, 393).
[21] CA[123] (CAB379) - *Arulthilakan* was not, however, an EJCE case. The liability of the secondary participants for the infliction of the fatal stab wound arose by virtue of their participation in a "basic" JCE to commit a foundational offence involving an intentional act of violence. No question arose as to what was necessary to establish constructive murder by way of EJCE.
[22] CA[167] (CAB392). This approach seems to be incompatible with what is said in *Miller v The Qeueen* (2016) 259 CLR 380, [44]-[45] and the shift in the common law's focus since *Parker v The Queen* (1964) 111 CLR 665 to what is actually intended or contemplated by an accused.
[23] CA[12] (CAB345).

need not be a contemplated result to establish common law murder, foresight of an act of violence causing death was not required for constructive murder.[24]

Part VI: The appellant's argument

22. At common law, an accused may be convicted of murder on EJCE principles if he or she is party to an agreement to commit an offence and foresees, but does not agree to, the commission of murder in the course of carrying out the agreement and, with that awareness, continues to participate in the underlying enterprise.[25] The accused's culpability derives from his or her ongoing participation in the venture "with foresight that the incidental *crime* might be committed".[26] The accused is liable for what he foresees as the "possible *results*" of the venture.[27]

23. Liability on EJCE principles is thus a form of constructive liability. The accused is liable not because he or she has assented to or authorised the commission of the incidental crime but, rather, because he or she, with an awareness that the incidental crime might take place, determines not to withdraw from the criminal venture. The nature of the liability is best characterised as derivative, and is conditional on establishing the commission of the incidental offence by another.[28] There is not, and cannot be, any attribution of the *acts* of the co-venturers in respect of the incidental crime as the accused neither authorises, intends or assents to the commission of the incidental crime.[29] Nor can it be said that there is authorisation of the offence because, by definition, the incidental offence in an EJCE case falls outside the scope of the foundational agreement. Accordingly, the legal premise upon which one might attribute the conduct of one co-venturer to another is absent in cases of EJCE.

24. In South Australia, s12A of the CLCA provides an alternative pathway to a murder conviction commonly referred to as "constructive murder":

> A person who commits an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more, and thus causes the death of another, is guilty of murder.

25. In the present case, the appellant was convicted of murder by virtue of EJCE and s12A "piggybacked" upon each other. He was sentenced to life imprisonment because he lent himself to a plan to commit a foundational offence that did not involve an act of violence, but contemplated that in carrying out that offence, one of his co-venturers might commit *any act of violence if there happened to be someone inside the house*. On the trial judge's directions, if the

[24] CA[13] (CAB345).
[25] See, e.g., *Miller v The Queen* (2016) 259 CLR 380, [4].
[26] See eg *Clayton v The Queen* (2006) 81 ALJR 439, [17], [20].
[27] *Clayton v The Queen* (2006) 81 ALJR 439, [20].
[28] *IL v The Queen* (2017) 262 CLR 268, [34].
[29] Cf *IL v The Queen* (2017) 262 CLR 268, [26]-[40].

appellant foresaw the possibility of physical contact as trivial as a smack to the back of the leg[30] during the commission of the foundational offence, he was guilty of murder if a co-venturer in fact inflicted a completely different, and far more severe, act of violence causing death.[31]

Ground 1: whether EJCE may be relied upon to establish liability for constructive murder

26. Against that background, the appellant's primary contentions in support of ground 1 may be summarised. First, the text and context of s12A of the *CLCA* do not expressly contemplate any intersection between the legislative deeming and EJCE principles, rather, those principles are impliedly excluded. Section 12A creates a direct or primary liability by virtue of the statutory deeming provision. An "unlawful killing" becomes "murder" if it results from the deliberate commission by the primary offender of an intentional act of violence, whilst engaged in a criminal pursuit. The section is concerned with the *conduct and state of mind of the person who causes death*. By contrast, liability under EJCE principles is derivative. EJCE principles do not provide a mechanism through which a secondary participant can be pushed into s12A because the act of the person who causes death within the meaning of s12A is not attributed to the secondary participant.

27. Secondly, recognised objections to the "culpability divide" created by both constructive murder provisions and EJCE principles tell against the cumulative application of what are, essentially, both "constructive liability" doctrines. A cumulative application of EJCE and s12A casts the liability net too broadly, and results in irrational outcomes that cannot be explained away by reliance on the rationales justifying the independent operation of either doctrine. The absurdity that arises is exemplified by the directions in this case that mere contemplation of the possibility of a threat, a menace or a trivial act of violence would suffice to render each accused guilty of constructive murder *if* one of their number in fact inflicted a completely different, unforeseen, intentional act of violence *if confronted by the occupant of the house*.[32]

Combining EJCE with constructive murder is inconsistent with the text and context of s12A

28. Section 12A has its conceptual provenance in the felony murder rule[33] although it does not precisely emulate that now redundant common law concept. It does not create a separate offence of murder to s11 of the *CLCA* but, rather, provides an alternative pathway to conviction of murder[34] with all of its attendant consequences, including a mandatory minimum non-parole period of 20 years.

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[30] Summing Up, pg 54, 61 (CAB62, 69).
[31] Summing Up, pg 53-55, 61.
[32] Summing Up, pg 42,53-54, 61.
[33] *R v R* (1995) 63 SASR 417, 420 (King CJ); *R v Kageregere* [2011] SASC 154, [134].
[34] *IL v The Queen* (2017) 262 CLR 268, [155] (Gordon J).

29. The ostensible object of the provision is to deem a person guilty of murder for an unlawful killing that results from a deliberate act of violence perpetrated by *that person* in the course of committing an indictable offence of a specified kind. The section contemplates that the risks attending the commission of foundational crimes to which it applies are sufficient to warrant an unintended yet unlawful killing in the course of committing such an offence being treated as murder notwithstanding the principal does not act with murderous intent.

30. The focus of the section is self evidently on the conduct and state of mind of the principal: the person who commits the relevant act. Plainly, the principal who intentionally commits an act of violence of sufficient magnitude that in fact and law causes the death of another, is, at the time of the commission of the violence, acting consciously, deliberately and with an appreciation of the potential consequences of his or her conduct.

31. The express terms of the provision set up an incurable problem in allowing EJCE principles to sit above it. As observed above, the section is, in its terms, confined to *"[a] person who commits* an intentional act of violence…". The natural and ordinary meaning of the statutory taxonomy is that the provision applies only to the person who actually carries out the act of violence that causes death.[35] The provision is conspicuously silent about any interrelationship with other forms of constructive liability. In fact, 12A manifests no intention to deem guilty of murder an accused who may be joined in a non violent enterprise and who does not agree, assent to or even foresee the possibility of the commission of the violence that in fact causes death. Moreover, the inexacting threshold set for liability for murder speaks against the proposition that s12A can and should be overlayed with EJCE principles so as to create a dual layered constructive liability.

EJCE liability is derivative not primary

32. Of course, s12A might readily extend to members of a basic JCE *where the act of violence causing death is part of the foundational agreement*.[36] The concepts of authorisation and assent that are central to JCE simpliciter provide a justification for holding co-venturers accountable for an unlawful killing in those circumstances. However, that reasoning is inapposite in the case of EJCE: the liability is derivative.[37] The conduct of the co-venturer who inflicts the act of violence that in fact causes death cannot be attributed to the secondary participant because the act is by definition outside the scope of the authority. The secondary participant does not engage the trigger for s12A: he or she is not "a person who commits an intentional act of violence" that causes death.

[35] See *IL v The Queen* (2017) 262 CLR 268, [60] (Bell and Nettle JJ), though finding that constructive murder may nonetheless be combined with basic JCE.
[36] *IL v The Queen* (2017) 262 CLR 268, [26] Kiefel CJ, Keane and Edelman JJ), [60] (Bell and Nettle JJ).
[37] The trial judge's directions (Summing Up, pg 48 (CAB56) illustrate that what was here in issue was derivative liability.

33. The liability of each JCE member for crimes committed in the course of that enterprise is primary rather than derivative.[38] It is conceptually possible to characterise all members of a basic JCE as falling within the scope of s12A (*a person who commits* an intentional act of violence…causing death) because all members are *deemed to have committed the relevant acts*, having expressly or implicitly authorised acts, including acts of violence, that fall with the scope of the agreement.[39]

34. In *Osland v The Queen*,[40] McHugh J stated that the liability of each party to a basic JCE for crimes committed in the course of that enterprise is direct or primary liability, not derivative or secondary:[41] "They are responsible for the acts (because they have agreed to them being done) and they have the mens rea which is necessary to complete the commission of the crime."[42]

35. In *IL v The Queen*,[43] McHugh J's reasoning was explored in the context of constructive murder based on a JCE (simpliciter) to manufacture and produce methylamphetamine. Once again, the Court emphasised the primary nature of JCE liability.[44] Contrasting the liability of accessories, Kiefel CJ, Keane and Edelman JJ wrote:

> But where two or more persons act in concert then any liability is primary. The acts of one are attributed to the others because they reached an understanding or arrangement that together they would commit a crime and the acts were performed in furtherance of that understanding or arrangement.[45]

36. Thus, the justification for JCE and the attribution of acts to each participant (thereby bringing them within s12A), is the link in purpose between the participants and the authorisation that each confers on the others to act on his or her behalf. This link in purpose is established through the existence of an agreement, participation in that agreement, and the commission of the charged crime in furtherance of that agreement.[46] The bilateral agreement and authorisation justify the imputation of the acts of one participant to all other participants in the enterprise,[47] and hence each member of the JCE is, for the purposes of s12A for example, taken to be the "person" who has committed the relevant act of violence.

37. In the case of EJCE, however, the concepts of mutual agreement and authorisation are essentially discarded. The incidental crime, by definition, has not been agreed upon or authorised. The

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[38] *Osland v The Queen* (1998) 197 CLR 316, 356 [81], 383 [174], 413 [257]; *IL v The Queen* (2017) 262 CLR 268, [30] (Kiefel CJ, Keane and Edelman JJ), [60] (Bell and Nettle JJ).
[39] See *Markby v The Queen* (1978) 140 CLR 108, 112 (Gibbs ACJ); *Osland v The Queen* (1998) 197 CLR 316, 329 [27] (Gaudron and Gummow JJ), 342 [72], 346 [81] (McHugh J), 383 [174] (Kirby J), 402 [217] (Callinan J); *Miller v The Queen* (2016) 259 CLR 380, [139] (Keane J); *IL v The Queen* (2017) 262 CLR 268, [30], [66], [103], [146].
[40] (1998) 197 CLR 316.
[41] *Osland v The Queen* (1998) 197 CLR 316, 356 [81] (McHugh J), 383 [174] (Kirby J), 413 [257] (Callinan J).
[42] *Osland* (1998) 197 CLR 316, 350 [93] (McHugh J).
[43] (2017) 262 CLR 268.
[44] *IL v The Queen* (2017) 262 CLR 268, [30] (Kiefel CJ, Keane and Edelman JJ), [60] (Bell and Nettle JJ).
[45] *IL v The Queen* (2017) 262 CLR 268, [30] (Kiefel CJ, Keane and Edelman JJ).
[46] *Huynh v The Queen* (2013) 87 ALJR 434.
[47] *Miller v The Queen* (2016) 259 CLR 380, [37]; *R v Britten and Eger* (1988) 49 SASR 47, 53 (King CJ).

rationale for attribution of the incidental acts to other EJCE members is therefore lacking. The other EJCE members are deemed liable for the incidental crime because they *foresaw the commission of the offence and continued to participate*.

38. This is a crucial distinction between basic JCE and EJCE and has important implications for the interaction of those doctrines with s12A. A secondary participant does not, by virtue of EJCE principles, become "*a person who commits* an intentional act of violence…" within the meaning of s12A of the CLCA; nor is he or she a person who assents to or authorises the commission of an intentional act of violence. As a matter of statutory construction, the reference in s12A to "*[a] person who* commits an intentional act of violence…" can only be understood as a reference to a person who, with the required subjective *intention* (not merely foresight of a possibility), either (i) personally commits the relevant act of violence or (ii) has the relevant *act* of violence attributed to them by JCE principles as an act within the scope of the foundational agreement.

39. EJCE principles essentially create a species of constructive liability,[48] insofar as the accused is deemed to have committed the incidental offence notwithstanding that he or she does not commit the *actus reus* nor possess the *mens rea* for that crime. This Court has emphasised that constructive crimes "should be confined to what is truly unavoidable", in view of the development of the law "towards a closer correlation between moral culpability and legal responsibility".[49] This correlation is particularly important in cases of homicide.[50] Allowing EJCE principles to operate concurrently with provisions like s12A effectively piles one form of constructive liability on top of another, pushing the gap between criminal liability and moral culpability to breaking point. It is significant in this respect that commentators have noted the resemblance between the EJCE doctrine and the constructive murder rule, as well as the similar reasoning that is often used to justify the two independent conviction pathways.[51] Both EJCE and constructive murder have been criticised for separating legal liability from moral culpability[52] and for undermining the general requirement of the criminal law for proof of the co-existence of the *actus reus* and *mens rea*.[53]

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[48] *Miller v The Queen* (2016) 259 CLR 380, [100].
[49] *Wilson v The Queen* (1992) 174 CLR 313, 327 (Mason CJ, Toohey, Gaudron and McHugh JJ).
[50] *La Fontaine v The Queen* (1976) 136 CLR 62, 76 (Gibbs J); *R v Crabbe* (1985) 156 CLR 464, 469; *Wilson v The Queen* (1992) 174 CLR 313.
[51] See eg Andrew Dyer, "The 'Australian Position' Concerning Criminal Complicity: Principle, Policy or Politics?" (2018) 40(2) *Sydney Law Review* 289; Sanford H Kadish, 'Reckless Complicity' (1997) 87(2) *Journal of Criminal Law and Criminology* 369, 376. See also *IL v The Queen* (2017) 262 CLR 268, [175] (Gordon J).
[52] See, e.g., the observations in *IL v the Queen* (2017) 262 CLR 268, [143], [155] (Gordon J); *DPP v Hansen* [2020] VSCA 307; *Rigney v R* [2021] SASCA 74, [9] (Doyle JA); New South Wales Law Reform Commission, *Complicity*, [2010] NSWLRC 129, 150-153.
[53] Regarding EJCE, see generally *Miller v The Queen* (2016) 259 CLR 380, [2] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), [111]-[112] (Gageler J).

Implications for the law of manslaughter

40. One further point should be noted. The combined operation of constructive murder provisions with EJCE principles leaves virtually no practical room for verdicts of manslaughter. This case illustrates the problem. Proof of constructive murder on EJCE principles was here less demanding than proof of manslaughter on EJCE principles, given the need to prove foresight of the possible commission of an unlawful and dangerous act in the case of the latter, yet only foresight of the commission of *any* intentional act of violence to prove the former.[54] This undermines the entrenched moral and legal distinction between murder and manslaughter.[55]

Culpability

41. In fact, to accept that EJCE principles can operate in tandem with the s12A deeming provision so as to render a secondary participant liable for murder because he or she foresees the commission of *any* act of violence by another, gives rise to a complete legal and "moral disconnect".[56] Proving the EJCE participant's liability for murder is less onerous than proving the liability of the primary offender, who of course carries out the willed act of violence, appreciating the nature of the act and hence having the opportunity to assess potential outcomes. Contrastingly, on the approach to s12A upheld by the CA, the EJCE participant need only contemplate *any* act of violence, extending, on the directions here given, to trivial physical contact. The incompatibility of these outcomes with orthodox views concerning relative legal and moral culpability suggests there is no room in the liability matrix in s12A for the principles of EJCE to work rationally.

42. One further example of the culpability disconnect can be given. In *R v Kageregere* [2011] SASC 154 at [142]-[143], it was held that s12A does not apply to foundational offences that have as their sole object the infliction of personal harm. So, if A, B and C agree to cause harm to X using a baseball bat[57] and, in the course of that venture, X is *unintentionally* killed, A, then B and C would be liable only for manslaughter and not murder by virtue of s12A. Contrast the position of the appellant here: he was found guilty of murder on the basis that he agreed to commit a non violent foundational offence but contemplated that, in the course of committing that offence, one of his confederates might strike the deceased to the back of the leg. There is no rational way to reconcile these two scenarios.

43. When applied cumulatively, these doctrines enlarge the reach of criminal liability too far and lead to capricious outcomes that have no reasonable policy justification. The end result is a degree of

[54] Summing up, pg 65-71.
[55] See eg *La Fontaine v The Queen* (1976) 136 CLR 62, 76 (Gibbs J).
[56] To borrow from *Miller v The Queen* (2016) 259 CLR 380, [119] (Gageler J).
[57] An offence contrary to s 24 of the *CLCA* and punishable by 13 years imprisonment.

over-criminalisation that extends well beyond the justification for EJCE or constructive murder alone. Individuals who play a relatively minor role in a non violent foundational offence may find themselves convicted of a murder that they neither committed *nor even contemplated* but because they foresaw the *possible* commission of *some act of violence*, even if of a completely different quality and gravity to that which is in fact perpetrated, without authorisation or assent, by one of their confederates.

44. Acknowledging that s12A cannot work concurrently with EJCE principles achieves an appropriate reconciliation of the threads of the criminal law that emphasise the importance of the co-existence of *mens rea* and *actus reus*[58] and the need for a close correlation between moral culpability and legal responsibility,[59] particularly in homicide cases.

The trial judge's directions on what constitutes an "act of violence"

45. The further question arising under ground 1 is one of statutory construction.[60] As discussed earlier, the trial judge told the jury that contemplation by the accused of *any act of intentional violence*, including a strike to the back of the deceased's leg, was an "act of violence" for the purpose of s12A as there was no need for correspondence between the act of violence that in fact caused the deceased's death and the act of violence contemplated by the appellant. Essentially, the trial judge and the CA proceeded on the basis that the meaning of "act of violence" in s12A was at large, and embraced acts as trivial as a threat, menace or strike to a leg.

46. This was an error. The phrase "act of violence" in s12A is not at large and is not to be understood as extending to such trivial acts. For an act to qualify as an "act of violence" it must be an act that, on account of its nature, qualities or the relevant circumstances, is realistically capable of causing death or at least really serious injury. The liability of a secondary participant for constructive murder on EJCE principles therefore turns not on contemplation of *any conceivable act of violence*; but on contemplation of an act capable of causing death. The nature of the provision and its place within the broader legal context justify a construction of "act of violence" that excludes foresight of contact as minor as "a smack to the back of the leg", a threat or a menace,[61] as amounting to an "act of violence".

Common law progenitor to s12A

47. Although not free from debate, when s12A was introduced it was the "generally accepted rule of the common law"…"that an unintended killing in the course of or in connexion with a felony

[58] *Myers v The Queen* (1997) 147 ALR 440, 442.
[59] *Wilson v The Queen* (1992) 174 CLR 313, 327 (Mason CJ, Toohey, Gaudron and McHugh JJ).
[60] It should be noted again that, if the appellant is right as to ground 2, this complaint falls away.
[61] This would appear to pick up the construction given to of "act of violence" in s 3A of the *Crimes Act 1958* (Vic): *R v Galas* (2007) 18 VR 205, [31]-[32].

[was] murder if, but only if, the felonious conduct involved violence or danger to some person".[62] There was no settled meaning of "violence or danger".[63] Plainly enough, questions of fact and degree were involved.

48. Section 12A borrowed from the common law but was not intended to precisely replicate it. The requirement for a foundational felony involving violence or danger was replaced with the need to prove that the accused had embarked on the commission of a major indictable offence punishable by imprisonment for more than 10 years. Whilst this redefinition of the required character of the foundational offence introduced *a* threshold of a different kind into s12A, the threshold says little about the nature and extent of violence that was, and is, required to engage the statutory deeming provision.

The text – "act of violence"

49. Section 12A does not define what constitutes an "act of violence". The phrase must be construed in accordance with orthodox principles of construction. Those principles, of course, require the focal point to be the text of the section,[64] understood in its legal context and bearing in mind the consequences of competing interpretations that are available.

50. The phrase "act of violence" has been construed in cognate provisions to extend to intimidatory, threatening or menacing behaviour.[65] In *R v Kageregere* [2011] SASC 154 at [141] however, Kourakis J (as he then was) explained that "an intentional act of violence" was an act involving "uncontrolled force which carries a real, in the sense of not remote, risk of personal harm". The point there made was that there is *a threshold* an act must surpass before it can be characterised as an "act of violence". With respect, that must be so and is consistent with the way the law differentiates trifling or minor acts of physical violence and those which carry real and appreciable risks of serious harm or death.[66]

51. Importantly, s12A is not concerned with acts of violence simpliciter; it is concerned with acts of violence that, as a matter of fact and law, cause the death of another. It is the consequence based physical element of s12A that gives the surest guide as to the correct construction of "act of violence". The section is not concerned with minor or trifling acts of violence, such as a strike to the leg, but, rather, with acts of violence that, by virtue of their intrinsic character or the prevailing

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[62] *Ryan v The Queen* (1967) 121 CLR 205, 241 (Windeyer J).
[63] *R v Galas* (2007) 18 VR 205, [31]-[32].
[64] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, [4]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [34]; *Baini v The Queen* (2012) 246 CLR 469, [14]; *R v A2* (2019) 93 ALJR 1106, [32], [124], [152].
[65] *R v Butcher* [1985] VR 43, 53-54 and *Rich v The Queen* (2014) 43 VR 558, [258], dealing with s 3A(1) of the *Crimes Act 1958* (Cth).
[66] As can be seen for example in the gradation of offences of violence across criminal law catalogues in the States and Territories.

circumstances, are acts realistically capable of causing death or serious injury. It is untenable to interpret s12A as attaching the enormous consequences of a conviction for murder to an accused who contemplates no more than a trivial act of violence that has no realistic potential to cause death or serious injury, or an act of violence that bears no resemblance to the act of violence that, as a matter of fact and law, causes the death of another.

52. Put simply: there is a fact sensitive threshold that acts of "violence" must surpass before meeting the statutory criteria. Contemplation of any act of violence is not sufficient to ground liability of a secondary participant for constructive murder on EJCE principles. The secondary participant must contemplate the commission of an act of violence of a kind capable of causing death.

53. Here, that threshold was ignored by the trial judge's directions that mere contemplation by the appellant of something as trivial as a strike to the deceased's leg would be sufficient to find him guilty of murder provided the other elements of s12A were made out.

54. In the Court below, Doyle JA appeared to endorse the observations of Kourakis J in *Kageregere* as informing the meaning of the words "act of violence", but held that the trial judge's directions concerning the "smack to the leg" were not erroneous "as this was not a case that tested those limits".[67] That was understandable insofar as the question was whether the attack on the deceased involved, objectively, an act of violence. However, the real issue with respect to the appellant was the nature of the act of violence *that he had to contemplate*. In this respect, the directions directly tested the limits of the phrase "act of violence".

55. Whilst Peek AJA considered that the trial Judge's directions as to a "smack on the back of the leg" created a risk of "roiling the water concerning the matter of causation", His Honour held that the directions were not wrong at law and did not occasion a miscarriage[68] in part, it seems, because "[it] is common knowledge in Australian society that such a grow-house would likely be guarded and that violence might well be necessary to over the guard".[69]

56. On the approach taken by Kourakis J in *Kageregere*, it may be seriously doubted that a "strike to the back of the leg", a "threat or a menace"[70] possess the character of "uncontrolled force which carries a real, in the sense of not remote, risk of personal harm".

57. Remarkably, on the directions given by the trial judge, the primary offender could not be found guilty of murder unless he intentionally struck the deceased to the head with a blunt object (the relevant "act of violence" for the primary offender) and that strike in fact caused the deceased's death. Contrastingly, the appellant was liable for constructive murder if he contemplated no more

[67] CA[17]-[18] (CAB346).
[68] CA[163]-[167] (CAB392).
[69] CA[167] (CAB392)
[70] Summing Up, pg 53-55, 61 (CAB61-63, 69).

than the possibility that one of his co-venturers might in some way threaten, menace or strike the occupant of the house (the relevant "act of violence" for the secondary participant) if a person were to be present and confronted. This anomaly supports the appellant's approach.

Grounds 2 and 3: constructive and common law murder on EJCE principles

58. If, contrary to the appellant's argument in support of ground 1, EJCE principles may be relied upon to establish liability for constructive murder, the second question to be determined is what must be contemplated by a secondary participant before he or she can be found guilty of constructive murder? The same question also arises in the context of the case of common law murder put against the appellant.

59. Although the requirements to establish common law murder on EJCE principles differ from those necessary to prove constructive murder on EJCE principles as s12A does not require the primary offender to have acted with murderous intent, it is nonetheless convenient to deal with grounds 2 and 3 together. Fundamentally, the issue to be determined is the same: whether foresight of all elements of the incidental crime of common law or statutory murder must be established.

60. Accordingly, the propositions for which the appellant contends can be expressed in a similar way for both grounds. As for ground 2 (constructive murder), where an accused is alleged to be guilty of murder by virtue of s12A and EJCE principles, the prosecution must prove that the accused contemplated the possibility that, in carrying out the joint venture, one of his confederates might perform an act of intentional violence causing or capable of causing death. If the appellant's argument in support of ground 2 is accepted, the result is the same as that which would be arrived at if the appellant's arguments on the second aspect of ground 1 are accepted. The point of difference between the two arguments is how that conclusion is arrived at.

61. As to ground 3 (common law murder), where an accused is charged with common law murder on EJCE principles, the prosecution must prove that the accused contemplated the possibility that, in carrying out the joint venture, one of his confederates might, with the intention of killing or causing really serious injury, perform an act causing or capable of causing death or serious injury.

62. Common to both contentions is the underlying proposition that EJCE requires proof of *all of the elements* of the incidental offence. As an act causing death is an element of both common law and statutory murder, an accused does not foresee the commission of the incidental crime of murder unless he or she foresees the commission of an act causing, or capable of causing death or at least really serious injury.

Foresight of the incidental "crime" or "offence"

63. Central to the appellant's submissions in support of grounds 2 and 3 is the meaning of the phrase "foresees, but does not agree to, the commission of the *incidental crime*"[71], which appears in many expressions of EJCE, and the extent to which it is to be understood as requiring foresight of *all essential elements* that constitute the incidental crime.

64. Whilst it may be accepted that the emphasis in some formulations of EJCE principles falls on foresight of an act committed with murderous intention and not foresight of the consequence of that act, that is to be expected in cases where the evidence indicates that the secondary party was aware of the possession by the principal of an inherently dangerous weapon, such as a firearm or a knife. In such cases, foresight of death will ordinarily accompany foresight of an act intending to kill or cause grievous bodily harm. However, that does not mean that references to a need to prove foresight of the "incidental crime" are necessarily accidental.

65. The lineage of the "foresight of the incidental crime" concept can be traced to the contemporary genesis of EJCE principle in *Chan Wing-Siu* [1985] AC 168 at 175, where Sir Robin Cooke spoke of "the case of a *crime* foreseen as a possible incident of the common unlawful enterprise". The jurisprudential justification[72] for liability in such cases, notwithstanding the accused is not personally responsible for the death, was explained: "The criminal culpability lies in participating in the venture with *that* foresight" (emphasis added) – that is to say, with foresight that the incidental crime might be committed. In the subsequent decision of the Privy Council in *Hui Chi-Ming v The Queen* [1992] 1 AC 34 at 51, the principle was said to require that the "accessory, in order to be guilty, must have foreseen the relevant *offence* which the principal may commit as a possible incident of the common unlawful enterprise…"

66. In *McAuliffe v The Queen* (1995) 183 CLR 108 at 117-118, after surveying the authorities and explaining the limits of the decision in *Johns* and the scenario where a secondary party foresees but does not agree to an incidental crime, the Court observed:

> …the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the **incidental crime might be committed** and cannot rely upon the existence of the common purpose as establishing that state of mind.[73]

67. It is the realisation by the secondary participant that there is a possibility that another might be murdered in the course of carrying out an agreement to commit another crime, and the conscious

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[71] See, eg, *Miller v The Queen* (2016) 259 CLR 380, [4].
[72] See eg *Clayton v The Queen* (2006) 81 ALJR 439, [17], [20].
[73] Interestingly, the directions given by the trial judge in *McAuliffe* (see at 112-113) suggested contemplation of the intentional *infliction* of grievous bodily harm was necessary for EJCE murder.

choice made by the secondary participant to nonetheless continue to participate in the agreement, that provides the rationalisation for EJCE. If the secondary participant need not foresee the commission the incidental offence in its totality, the justification for EJCE necessarily falls away.

68. In *Gillard v The Queen* (2003) 219 CLR 1 at [25], Gleeson CJ and Callinan J appeared to treat contemplation of an act causing death as essential to EJCE manslaughter. It would be anomalous to dispense with the need to prove foresight of an act causing death, committed with intent to kill or cause grievous bodily harm, for EJCE murder.[74] Similarly, in *Clayton v The Queen* (2006) 81 ALJR 439 at [26], the plurality spoke of EJCE in in these terms:

> If the prosecution demonstrated beyond reasonable doubt that the applicant under consideration was party to an agreement with one or other of the applicants to assault the deceased to some lesser degree, and **foresaw the possibility that death or really serious injury might intentionally be inflicted on the deceased in the course of that assault**…again, a verdict of murder had to be returned.

69. It is significant that, in the above passage, the Court apparently adverted to both contemplation of outcome[75] and contemplation of intention. So too did the Court of Appeal of Victoria in *Rich v The Queen* (2014) 43 VR 558, a case considering the constructive murder provision in s 3A of the *Crimes Act 1958* (Vic), the Court of Appeal of Victoria remarked (at [260]):

> In short, a person who enters into an agreement to commit a violent offence may be liable for a s 3A murder committed by the principal offender if the killing or the infliction of really serious injury was a possible incident of the planned endeavour. But, where the accomplice contemplated that an unlawful or dangerous act might occur within the scope of the enterprise **but did not and ought not have contemplated that death or really serious harm would be caused** to the victim, the accomplice may be convicted of manslaughter only.

70. In the appellant's submission, these observations are consistent with what was said more recently in *Miller v The Queen* (2016) 259 CLR 380 at [4], [33]-[34], [37]-[38], [43] and [45]. There, the principles of EJCE were explained in terms which emphasise that it is foresight of commission of the incidental *crime,* and a decision to continue to participate in the foundational agreement, that provides the anchor for liability:

> [45]…It is to be appreciated that in the paradigm case of murder, the secondary party's foresight is not that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm – it is that in executing the agreed criminal enterprise a party to it **may commit murder**. And with that knowledge, the secondary party must continue to participate in the agreed criminal enterprise.

71. In the above passage, the plurality was apparently drawing the distinction between contemplation of a state of affairs that constitutes an incidental crime and contemplation of a state of affairs that

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[74] Richards and McNamara, 'Just Attribution of Criminal Liability: Considerations of Extended Joint Criminal Enterprise Post-*Miller*', (2018) 42 Crim LJ 372, 375. See also *R v Jones* (2006) 161 A Crim R 511, [188].

[75] Although it may be said that the composite reference to foresight of the possibility of death *or* really serious injury being intentionally inflicted, tends to elide the distinction between murder and non-fatal assaults: Richards and McNamara, 'Just Attribution of Criminal Liability: Considerations of Extended Joint Criminal Enterprise Post-*Miller*', (2018) 42 Crim LJ 372, 381.

constitutes part only of an incidental crime. It is that distinction that explains the remark that mere foresight that another might suffer grievous bodily harm or death was not sufficient for murder on EJCE principles. That is because what must be contemplated is the commission of the *crime of murder*. In a case of common law murder, foresight of more than just act, consequence or intention in isolation is required.[76] Rather, the accused must be proved to have contemplated the possibility of an act *causing death*, committed with the intention to kill or cause grievous bodily harm. In the context of constructive murder, the accused must contemplate an intentional act of violence causing or capable of causing death.

72. Absent contemplation of these matters, a participant in a JCE has simply not contemplated the possible commission of the incidental crime of common law or statutory murder. The commission of an act *causing death* is an element of both iterations of murder that differentiates that most serious crime from non-fatal acts of violence and should not be ignored.[77]

73. Accordingly, in cases of common law and statutory murder, the appropriate translation of the above expressions of principle is that EJCE requires proof of foresight of all elements of murder, including that an act of a co-venturer might *cause death*. References to foresight of the incidental *crime* as a possible incident of executing the foundational agreement should not be swept aside as a matter of happenstance. Describing the degree of foresight required in these terms is apt to convey that the participant in a JCE to commit offence A is not liable for offence B (the incidental crime) unless he or she contemplates the possibility that all ingredients of the incidental crime will be committed.

Reconciling EJCE with accessorial liability and JCE

74. Understanding EJCE in this way achieves an appropriate reconciliation between accessorial liability and complicity principles and helps bridge the often criticised divide between legal and moral culpability that is a by-product of EJCE.[78] That is to say, the rationale that sustains a principle that attributes to an accused liability for crimes not committed, intended or authorised by the accused but which are contemplated as a possible consequence of embarking on a criminal excursion with others, supports treating foresight of "the incidental crime" as requiring proof that the accused foresaw "the possibility of events turning out as they in fact did"[79] – in the context of murder, that necessarily means foresight of an act causing death.

75. There is a further benefit to understanding EJCE in these terms. Derivative liability as an

[76] *Miller v The Queen* (2016) 259 CLR 380, [45].
[77] Richards and McNamara, 'Just Attribution of Criminal Liability: Considerations of Extended Joint Criminal Enterprise Post-*Miller*', (2018) 42 Crim LJ 372, 374.
[78] See generally *Miller v The Queen* (2016) 259 CLR 380, [2], [112].
[79] *Gillard v The Queen* (2003) 219 CLR 1, [118] (Hayne J).

accessory has always depended on proof of actual knowledge of *all of the essential facts* which comprise the offence committed by the principal and, with that knowledge, an intentional act of assistance or encouragement. Negligence, recklessness, suspicion of wrongdoing, or even knowledge of the *probability* of wrongdoing by the principal, do not sustain accessorial liability.[80] Incomplete knowledge does not suffice. The accessory must know the essential facts *which comprise the offence* committed by the principal and, with that knowledge, intentionally assist or encourage. As a species of derivative liability, it would be anomalous to hold that something less than contemplation of all of the essential facts which constitute the incidental crime of murder is sufficient to establish EJCE liability.

76. Similarly, JCE *simpliciter* requires an agreement to commit *a crime*.[81] An agreement falling short of an agreement embracing all of the elements of a crime does not suffice. To the extent that the principles of JCE apply to incidental *crimes* that the parties to the foundational agreement bilaterally contemplate and authorise as a possible incident of the foundational agreement,[82] advertence and assent to the commission of an incidental and complete offence is necessary. Understanding EJCE as requiring contemplation of all ingredients that constitute the incidental offence therefore achieves an appropriate symmetry between the doctrines of accessorial liability and complicity.

Preserving EJCE

77. Accepting that EJCE principles require foresight of all elements of common law or statutory murder as the case may be, will not render the doctrine inutile. There is, as Doyle JA observed in the context of common law murder, a "short step" between contemplating another acting with murderous intent and contemplating that death would or might thereby result from the foreseen act (CA[12]). For this reason, in many cases of common law murder, a requirement to prove contemplation of the commission of the incidental offence in all material respects is unlikely to be problematic. That is not so in this case, recalling that, here, there was no suggestion that the co-venturers embarked on the joint enterprise whilst armed with an intrinsically dangerous or life threatening weapon.

78. In the context of statutory murder, a requirement to prove foresight of an intentional act of violence causing or capable of causing death is hardly unreasonable. The breadth of "violent" conduct logically and reasonably capable of causing death is extensive.

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[80] *Giorgianni v The Queen* (1985) 156 CLR 473, 482-483, 487-488 (Gibbs CJ); 504-507 (Wilson, Deane and Dawson JJ); *R v Lowery* [1972] VR 560, 561; *R v Jones* (2006) 161 A Crim R 511, [218]-[232]; *R v Phan* (2001) 53 NSWLR 480, 490-491 (Smart JA).
[81] *Miller v The Queen* (2016) 259 CLR 380, [4]; *Gillard v The Queen* (2003) 219 CLR 1, [110] (Hayne J); *McAuliffe v The Queen* (1995) 183 CLR 108, 113-114.
[82] *Johns v The Queen* (1980) 143 CLR 108.

79. The approach here advocated appropriately synthesises the circumstances in which a primary offender will be liable for murder by virtue of s12A and the circumstances in which a secondary participant will be liable for murder by virtue of s12A. Just as the primary offender must intentionally commit the intentional act of violence that causes death, so too the secondary participant must turn his mind to the possible commission of an intentional act of violence capable of causing death. If, however, the interrelationship between s12A and EJCE is applied in the way it was by the CA, a secondary participant remains liable for murder and a mandatory minimum non parole period of 20 years, if they merely foresee the possible commission of *any* act of violence, even one carrying no realistic risk of death or serious injury or of a radically different kind and gravity to the act that in fact causes death.[83]

80. If the appellant is correct, the jury were inadequately directed. They ought to have been instructed that the appellant would not be guilty of constructive murder or common law murder on the basis of EJCE unless he contemplated the possibility that death, or at least really serious injury, might result from the act of a co-participant.[84]

Part VII: Orders sought

1. The appeal is allowed.

2. The order of the CA dismissing the appellant's appeal against conviction be set aside and in lieu thereof the appeal to that Court be allowed and the conviction for murder quashed.

3. The matter be remitted for re-trial.

Part VIII: Estimate of time to present oral argument

4. The appellant estimates that 2 hours will be required to present his oral argument.

Dated: 5 August 2022

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[83] See, in a different context, *LaFontaine v The Queen* (1976) 136 CLR 62, 76 (Gibbs J).
[84] *R v Jones* (2006) 161 A Crim R 511, [188].

ANNEXURE – LIST OF LEGISLATIVE PROVISIONS REFERRED TO

1. Section 11, *Criminal Law Consolidation Act 1935* (SA)
2. Section 12A, *Criminal Law Consolidation Act 1935* (SA)
3. Section 3A(1), *Crimes Act 1958* (Vic)