



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

A15 of 2022

BETWEEN:

ALFRED CLAUDE RIGNEY

Appellant

and

THE KING

Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. The appellant certifies that this outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of propositions to be made

2. Overview of the grounds of appeal (Notice of Appeal at JCAB426):
 - 2.1. Ground 2: Section 12A implicitly excludes the application of the principles of extended joint criminal enterprise (**EJCE**).
 - 20 2.2. Grounds 1 and 3: Liability pursuant to the principles of EJCE requires foresight of the incidental crime. That means foresight of all elements of the incidental crime.
 - 2.3. EJCE liability for murder at common law (ground 1) requires, *inter alia*, that the accused foresees the possibility that a co-participant in the joint criminal enterprise might commit an act that causes the death of another person.
 - 2.4. EJCE liability for murder pursuant to s 12A (ground 3) requires, *inter alia*, that the accused foresees the possibility that a co-participant in the foundational crime might commit an intentional act of violence act that causes the death of another person.
3. An overview of the issues at trial:
 - 3.1. the prosecution case and the evidence the jury must have accepted {AS [7]-[17]};
 - 30 3.2. the way the prosecution case was advanced in relation to extended joint criminal enterprise {AS [18]-[23]};
 - 3.3. the relevant directions given by the trial judge {AS [24]-[31]}.

Ground 1

4. It is common ground that at common law, for an accused to be guilty of an incidental offence, committed by a co-participant in a joint criminal enterprise, the principles of EJCE require that the accused foresee or contemplate (these are synonymous) that the incidental crime might be committed {AS [56]-[60]}.
5. An issue in contention is what “*foresight of the incidental crime*” requires an accused to foresee. The respondent argues that in order for an accused to be guilty of an incidental crime, foresight of the possibility of all elements of the incidental crime is unnecessary.
6. Similarly, the Court of Appeal held that foresight of the incidental crime does not require
10 an accused to foresee the possibility that all elements of the incidental offence might occur {AS [48]-[52]}. The appellant submits that is incorrect.
7. Foresight that an incidental crime might be committed means foresight that all elements of the incidental crime might occur {AS [61]-[62]}.
8. An accused’s liability for an incidental offence pursuant to EJCE principles is derivative, not primary. The liability of the co-participant who commits or possesses each of the elements of the incidental offence (conduct, fault and consequence) is attributed to the accused, because the accused foresaw the possibility of the elements occurring (and therefore the incidental crime being committed) and despite this, continued to participate in the agreed joint criminal enterprise {AS [63]-[66]}.
- 20 9. This principle is of general application to all crimes for EJCE liability to apply.
10. For an accused to be guilty of common law murder on EJCE principles, the accused must foresee the possibility that all elements of murder will occur. This includes that a person’s death might result from a co-participant’s violent conduct {AS [67]-[76]}.
11. The trial judge’s directions were that all that was required by way of foresight by an accused was the possibility of **violence** with murderous intent. What was required, in addition to this, was a direction that the accused foresaw the possibility that the violent act of a co-participant in the break-in might cause the death of another {AS [77]-[80]}.
12. The appellant’s submission is consistent with the authorities {AS [67]-[70], [72]}.
13. On the facts of this case, the requirement that an accused foresee the possibility of a co-
30 participant in the break-in causing another person’s death, as distinct from just foreseeing the possibility of violence with murderous intent, involved a distinction of substance.
14. The directions were an error of law and resulted in a substantial miscarriage of justice.

Ground 3

15. It was accepted the evidence could not prove an agreement between the five men to commit an act of violence and the foundational offence relied upon for s 12A murder did not include an element of violence. Consequently, the prosecution relied upon EJCE principles instead of joint criminal enterprise principles {AS [84]-[88], [91]}.
16. For an accused to be guilty of s 12A murder pursuant to EJCE principles, they must foresee the possibility that all elements of a s 12A murder offence will occur, including that a co-participant in the agreed foundational offence might commit an intentional act of violence and thus cause the death of another {AS [82]-[83], [89]-[90], [92]-[93]}.
- 10 17. The trial judge's directions were that all that was required by way of an accused's foresight was foresight of the possibility of an intentional act of violence of any kind, including a verbal threat or a slap on the back of the leg. This was erroneous.
18. It was necessary for the prosecution to prove that the appellant foresaw the possibility a co-participant might commit an intentional act of violence that caused the death of another. That is, they might do a violent act that could cause the death of another.
19. The directions were an error of law and resulted in a substantial miscarriage of justice.

Ground 2

Counsel for Rigney anticipates relying upon his written submissions and adopting the written and oral submissions of other counsel.

- 20 20. By necessary implication, the doctrine of EJCE has no application to s 12A {AS [35]}.
21. EJCE is a doctrine born of public policy. The doctrinal basis for the imposition of EJCE liability is the combination of foresight of the incidental offence and continued participation in the agreed foundational offence {AS [36]-[37]}.
22. If the only foresight required is foresight of any intentional act of violence, then continued participation in the enterprise does not justify liability for murder on a public policy level {AS [39]-[42]}. The trial judge erred by leaving EJCE as a pathway to guilt.

Dated: 5 December 2022



30 Scott Henchcliffe KC



Andrew Culshaw