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

APPELLANT'S REPLY

Part I: Certification

1. The appellant certifies this Reply is in a form suitable for publication on the internet.

Part II: Reply

Reopening and overruling *McAuliffe*, *Gillard* and *Miller*?

2. The respondent contends at Respondent Submissions (**RS**) [26] that the appellants' contentions about the precise nature of the foresight required for the purpose of the doctrine of extended joint criminal enterprise (**EJCE**) would require the Court to re-open *McAuliffe*, *Gillard* and *Miller* and alter the content of that doctrine.
3. Rigney accepts that contention, but only to a limited degree, in relation to the appellants' submissions about the nature of the foresight required for EJCE liability for common law murder.
4. Rigney rejects that contention in relation to the appellants' contentions about the nature of the foresight required for ECJE liability for s 12A murder.

McAuliffe

5. In *McAuliffe*, the relevant direction given by the trial Judge for EJCE liability was that the jury must be satisfied the accused contemplated the intentional infliction of grievous bodily harm by one or other of the co-participants upon the victim.[1]

6. This direction required the jury to be satisfied the accused contemplated that one or other of the co-participants would:

   6.1 Cause grievous bodily harm to the victim [act and consequence]; and

   6.2 Intend to cause grievous bodily harm to the victim [intention].

7. The contemplation that was required by the direction was of all the elements of the crime of murder. It was left unsaid that contemplation of the intentional infliction of death by one or other of the co-participants upon the victim would also prove the accused's guilt, presumably because this was a higher bar than the test expressed as involving grievous bodily harm.

8. The plurality of the High Court explained in *McAuliffe* that these directions conveyed to the jury:[2]

> "… [T]here was a sufficient intent on the part of either appellant for the purpose of murder if he contemplated the intentional infliction of grievous bodily harm by one of the other participants as a possible incident in the carrying out of their joint enterprise and continued to participate in that enterprise."

9. The reference to "*a sufficient intent*" above was shorthand for what was required to be in contemplation – it was not a true "intent" as the word is ordinarily used.

10. The passage quoted above makes it clear that the contemplation that was required included that a consequence, the actual infliction of grievous bodily harm, might result.

11. The only difference between the appellants' contentions and what was said in *McAuliffe* is that the appellants contend that the contemplation required for EJCE liability for common law murder includes that death might result, rather than just grievous bodily harm.

12. To that narrow extent only, Rigney applies if necessary for leave to reopen and overrule *McAuliffe*. In this regard, Rigney relies upon Tenhoopen's Applicant's Submissions at [32] and [33]. In the circumstances of *McAuliffe*, the issue the appellants now raise was not important and appears not to have been the subject of submissions or consideration in the judgment.

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[1] (1995) 183 CLR 108 at 112-113.
[2] Ibid at 113.

Gillard

13. Rigney submits that the appellants' contentions do not require the Court to re-open or overrule *Gillard*.

Miller

14. The plurality judgment in *Miller* arguably describes the contemplation required for EJCE liability in two different ways. One of those ways fully supports the appellants' contentions; the other way partly supports their contentions.

15. In *Miller* the plurality said at [45]:[3]

> "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."

16. Rigney agrees with the submission of Tenhoopen in his Applicant's Submissions at [29] that foresight that a "*party ... may commit murder*" inescapably means foresight that a party may do an act that in fact results in the death of another. Murder can only be committed if a death results. So, these statements in *Miller* support the appellants' contentions concerning what must be contemplated for EJCE liability for common law murder.

17. However, the plurality also stated at [1] that the foresight required was, "… *that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention …*".

18. This formulation confirms, like *McAuliffe*, that both the act and the result (or consequence) of the act must be contemplated, as well as the intention accompanying the act. However, at [1], as in *McAuliffe*, it is said that a contemplation that really serious bodily harm might be caused is sufficient.

19. Given the tension between what was said by the plurality at [45], compared to [1], Rigney also applies for leave to reopen and overrule *Miller* at [1] to the limited extent indicated if that is necessary.

Markby

20. At RS [103] - [104] the respondent seeks to support its arguments, by statements made in the case of *Markby* in 1978. Rigney submits that given the fact that the complicity

[3] *Miller v The Queen* [2016] HCA 30; (2016) 259 CLR 380 at [45].

principle there discussed was joint criminal enterprise, not EJCE, and the subsequent developments in the common law concerning EJCE liability (which was not recognised as existing in Australia in 1978), what was said in *Markby* is of no assistance in the present appeal.

Dated: 7 October 2022

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