



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

A15 of 2022

BETWEEN:

ALFRED CLAUDE RIGNEY
Appellant

and

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THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

1. These submissions are in a form suitable for publication on the internet.

Part II: A concise statement of the issues presented by the appeal

- 20 2. Do the principles of extended joint criminal enterprise (**EJCE**) apply to the offence of constructive murder in section 12A of the *Criminal Law Consolidation Act 1935* (SA) (**the Act**)?
3. For a secondary participant to be guilty of common law murder according to the principles of EJCE, must they contemplate not only that a co-participant in the joint criminal enterprise (**JCE**) might commit an unlawful act with an intention to kill or cause grievous bodily harm, but also that the act will (or could) cause death?
4. For a secondary participant to be guilty of constructive murder in section 12A of the Act according to the principles of EJCE, must they contemplate not only that a co-participant in the JCE might commit an intentional act of violence while acting in the course or furtherance of the JCE, but also that the act will (or could) cause death?

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Part III: Notice under section 78B of the *Judiciary Act 1903*

5. The appellant does not consider that notice should be given under s 78B of the *Judiciary Act 1903*.

Part IV: Citation of the judgment of the court below

6. The citation of the judgment of the Court of Appeal of the Supreme Court of South Australia (CA) is (2021) 290 A Crim R 384; [2021] SASCA 74.¹

Part V: A narrative statement of the relevant facts

Overview and evidence

7. The appellant Rigney and three co-accused, Mitchell, Carver and Tenhoopen were tried on an Information charging a single joint offence of murder (CAB 6). The Information alleged that on 9 October 2018 at Para Vista they murdered Urim Gjabri (Gjabri).
8. The prosecution case was that the four co-accused and a fifth man, Howell (who was tried separately), were parties to a JCE to break into a house in the northern suburbs of Adelaide (**the grow house**) and steal cannabis plants they believed were being grown inside (CA [23] CAB 347). The deceased, Gjabri, was living in the house at the time and had been growing the cannabis plants.
9. The prosecution case was that in the late evening of 8 October 2018, the four co-accused and Howell (collectively, **the five men**) drove to Para Vista in two cars, Rigney in one car and the other four men in a second car. The prosecution case was that they met a couple of streets away from where the grow house was located.
10. Recordings of footage taken by residents' CCTV cameras situated at the front of their houses on streets near the grow house (Janet Street, Lorraine Avenue and Carousel Street) showed five men walking along the streets up to close to the grow house at 17 Carousel Street, where they went out of view.² The CCTV footage was in black and white, was taken at night, and was of poor quality.
11. The CCTV footage tendered included that from two cameras situated at the front of a house at 33 Lorraine Avenue. This footage showed five men walking past the front of that house between 12:05 am and 12:06 am on 9 October 2018, heading in the direction of Carousel Street. None of the men could be identified from the footage because of its poor quality. One of the men could be seen to be holding a long object in his right

¹ References to paragraph numbers in brackets after "CA" are references to paragraphs in the Court of Appeal's judgment.

² An electronic compilation of the recordings from the CCTV cameras was tendered as Exhibit P11.

hand, which could have been a branch, stick or bat, using it a bit like a walking stick. That was the only object visible in the hands of the five men.

12. The prosecutor suggested to the jury in his closing address that the men might also have armed themselves with bricks when they walked past a building site at 17B Lorraine Avenue, prior to walking past the house at 33 Lorraine Avenue.³ But this possibility was inconsistent with the CCTV footage taken by the cameras at 33 Lorraine Avenue, which did not show any of the men holding or carrying a brick, or partial brick, as they walked past. The prosecutor's suggestion was speculative and a "red herring".⁴
- 10 13. Circumstantial evidence established that one or more of the five men who were seen to walk up to near the grow house broke into it.
14. Gjabri was inside the grow house at the time. He was assaulted by one or more of the five men, causing him injuries which included the injury that caused his death.
15. The evidence of the pathologist, Dr Charlwood, was that the cause of Gjabri's death were blunt force head injuries. The top left side of the skull was fractured and there was a large extradural haemorrhage inside the skull. The injuries that caused Gjabri's death were caused by either a single blow, or possibly two blows, to the head. Dr Charlwood's evidence was that Gjabri survived for at least 35 minutes after the infliction of the head injuries, but she could not say for how much longer.⁵
- 20 16. Some or all of the men who went inside the grow house removed growing cannabis plants from it and loaded them into Gjabri's car in the driveway of the house.
17. The five men then either left on foot or in Gjabri's car with the cannabis plants.

The prosecution case for murder

18. In his opening address, the prosecutor identified two ways by which the prosecution alleged the appellant and co-accused were guilty of murder, namely common law

³ Prosecution address at T1593.25. Police located five broken partial bricks either inside the grow house or in its front and rear yard. Whilst police located house bricks at the building site on 13 October 2018, they were all complete bricks and there was no evidence they had been at the building site prior to 9 October 2018. There was nothing especially distinctive about the bricks or partial bricks, nor was there any suggestion that Gjabri's injuries had been inflicted, or damage had been done to the grow house, using a brick or partial brick. Furthermore, a partial brick is not the type of object one might expect to be taken for use as a weapon.

⁴ The statement in the judgment of Peek AJA that the building site on Lorraine Avenue had "a number of unsecured half-bricks which were indistinguishable from a number of half bricks that were left in the grow house" (CA [24] CAB 347) was not supported by the evidence.

⁵ T382-384, T393-395, T397-398.

murder (s 11 of the Act) and causing death by an intentional act of violence (s 12A of the Act). The prosecutor said the appellant and co-accused could be found guilty of common law murder according to the principles of JCE and EJCE⁶ and could be found guilty of s 12A murder according to the principles of JCE.⁷ The prosecutor said two foundational offences were relied upon for murder pursuant to s 12A, namely Robbery⁸ and Aggravated Serious Criminal Trespass in a Place of Residence (ASCT)⁹.

19. Towards the end of the trial, the appellant's counsel complained about the prosecution's purported reliance upon not one, but two, foundational offences for murder pursuant to s 12A and about the ambiguity of the nature of the ASCT offence that the prosecutor had relied upon in his opening. This led the trial Judge to question the prosecutor about the prosecution case on these matters.¹⁰
20. The prosecutor then resiled from the prosecution case as opened. He asked the learned trial Judge to only leave ASCT as the foundational offence for s 12A murder, not Robbery. The prosecutor said the prosecution alleged the ASCT was committed by the accused entering the grow house with the following intention: "*Intent to steal – well, intent to rob.*" Shortly after this the prosecutor clarified that for the foundational offence of ASCT, the prosecution case was that the accused trespassed with the intention of committing the offence of Robbery.¹¹
21. However, after an adjournment, the prosecutor changed the prosecution's s 12A murder case again.¹² From this point in the trial, the prosecution case was that the foundational offence for s 12A murder was the offence of ASCT with the intention of committing the offence of Theft.¹³ That is, the appellant and co-accused had entered or remained in the grow house in company as trespassers, with the intention of stealing cannabis plants. This foundational offence did not include any act of violence as an element.
22. There was no evidence capable of proving which of the five men struck the blow or blows to Gjabri's head which caused his death.

⁶ ABFM 4-6.

⁷ ABFM 6-8.

⁸ Section 137 of the Act.

⁹ Section 170(1)(b) of the Act. A "serious criminal trespass" is defined in s 168 of the Act.

¹⁰ ABFM 9-11.

¹¹ ABFM 11-17.

¹² ABFM 24-27.

¹³ ABFM 27. The offence of Theft is s 134 of the Act.

23. A consequence of this was that the prosecution's case that the appellant and co-accused were guilty of common law murder and/or s 12A murder required the application of the principles of EJCE.

The trial Judge's directions

24. The trial Judge directed the jury there were two ways by which the appellant and co-accused could be found guilty of murder. He described these as common law murder (or intentional murder) and constructive murder (s 12A).¹⁴
25. The trial Judge directed the jury as to the elements of common law murder¹⁵ and constructive murder according to s 12A.¹⁶
- 10 26. The trial Judge said it was common ground that none of the five men had planned to murder Gjabri and it was not alleged there had been a joint enterprise to kill him. Therefore, no question of guilt according to the principles of JCE arose. As a result, the trial Judge only directed the jury how the appellant and co-accused could be guilty of murder according to the principles of EJCE.¹⁷
27. The trial Judge directed the jury that for common law murder, the JCE relied upon for the application of the principles of EJCE was an agreement between the five men to break into the grow house and steal the cannabis plants inside. He said that the appellant and co-accused would be guilty of common law murder according to EJCE
- 20 if they had contemplated, that in carrying out the JCE, one or more of them, if they came across someone in the house, might inflict violence on that person accompanied with the intention of killing the person or causing them really serious bodily harm.¹⁸
28. The trial Judge directed the jury that the appellant and co-accused would be guilty of constructive murder pursuant to s 12A of the Act, according to the principles of EJCE, if they had contemplated, that in carrying out the JCE to commit the foundational offence of ASCT with intent to steal the cannabis, one or more of them, if they came across someone in the house, might inflict an intentional act of violence on that person.¹⁹

¹⁴ CAB 42-43, 60.

¹⁵ CAB 42, 45, 53-60.

¹⁶ CAB 46, 61, 63-68.

¹⁷ CAB 47.

¹⁸ CAB 47-50, 57-60.

¹⁹ CAB 50-51, 62-69.

29. The trial Judge directed the jury that, “*the intentional act of violence under their contemplation can be any act of intentional violence*” and that, “... if they contemplated that one of their participants in the joint enterprise might strike Mr Gjabri for example in the back of the leg, that would be a contemplation of an intentional act of violence.”²⁰

30. The learned trial Judge also directed the jury that:²¹

“The intentional act that was inflicted is the blow to the head and that blow must lead to the death but the prosecution do not have to prove that the particular blow was contemplated or that the injury, however serious, was within their contemplation. The prosecution only have to prove that the accused contemplated that an intentional act of violence, as I have described to you, might be used.”

31. On their second day of deliberations, the jury asked for further assistance with respect to the pathways for murder, clarification of the difference between JCE and EJCE and the definition of each and further explanation of “contemplation” and “intention”.²² The trial Judge redirected them consistently with his previous directions.²³ The trial Judge’s final directions included:²⁴

“For constructive murder, it does not have to be that intentional act of violence that was inflicted, it can be any intentional act of violence. ... I think I gave you the example that it could be, an intentional act of violence could be they contemplated that one of the accused in the joint enterprise contemplated that they might inflict a blow on Mr Gjabri’s back leg or left leg - he does not have a back leg, a quadriped would have a back leg - on one of his legs, that would be contemplation of an intentional act of violence. When you get to the actual elements of the offence, the intentional act of violence, the one that was actually performed has to lead to his death but that does not have to be within the contemplation.”

Part VI: The appellant’s argument

Overview

32. The appellant appeals to this Honourable Court on three grounds against the decision of the Court of Appeal dismissing his appeal (Notice of Appeal at CAB 426).

²⁰ CAB 62. The trial Judge repeated similar directions at CAB 68-69.

²¹ CAB 69.

²² CAB 263-264.

²³ CAB 269-280.

²⁴ CAB 278.

33. The first and third grounds of appeal are that the Court of Appeal erred in its conclusions about what a secondary participant must contemplate, according to the principles of EJCE, to be guilty of common law murder and s 12A murder and erred in upholding the directions of the trial Judge in relation to these issues.
34. The second ground of appeal concerns whether the principles of EJCE apply to s 12A murder at all. This issue was not the subject of a ground of appeal, or argument, before the Court of Appeal. The appellant will deal with this ground of appeal first, before turning to the Court of Appeal judgments and grounds of appeal 1 and 3.

10 Ground 2 – Do the principles of EJCE apply to s 12A murder?

35. Unless expressly or impliedly excluded, the common law principles of criminal complicity, including JCE and EJCE, apply to statutory offences, such as the constructive murder offence created by s 12A of the Act.
36. The existence and application of the principles of EJCE liability for crimes was confirmed in Australia by the unanimous decision of the High Court in *McAuliffe v The Queen* (1995) 183 CLR 108 (*McAuliffe*). *McAuliffe* post-dated the insertion of s 12A into the Act. Parliament cannot be assumed to have foreseen the articulation of the EJCE principles in *McAuliffe* at the time s 12A was enacted. The principles articulated in that case were explained in a context where the incidental crime that was not the object of the JCE was common law murder. The Court held that the criminal culpability of a co-participant in a JCE who did not personally commit the incidental crime, which justified their criminal liability according to EJCE principles, lay in their participation in the JCE with actual foresight that the incidental crime might be committed.²⁵
- 20 37. There is substantial overlap between policy and principle with respect to EJCE. In *Chang Wing-Siu* [1985] AC 168, which the High Court relied upon in propounding the EJCE principles in *McAuliffe*, Sir Robin Cooke expressly acknowledged that the formation of the principle was based on what was required by public policy.
38. At the time Gjabri was killed, s 12A of the Act provided:

²⁵ (1995) 183 CLR 108 at 117-118.

12A—Causing death by an intentional act of violence

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 (other than abortion¹), and thus causes the death of another, is guilty of murder.

Note—

¹ ie an offence against section 81(2).

- 10 39. The primary offender in respect of an offence against s 12A must commit an intentional act of violence and he or she must do so in the course or furtherance of a sufficiently serious foundational offence. The *mens rea* of the primary offender is comprised of the intention to commit the foundational offence and the intention to commit the act of violence. No *mens rea* as to the consequences of the act of violence is necessary for the offence to be committed. The offence is complete if the act of violence causes the death of another.
- 20 40. The appellant's submission is that the terms of s 12A impliedly exclude EJCE liability because its application to s 12A would be incongruous with the justification that underpins EJCE principles. The justification of the ongoing operation of EJCE in the case of common law murder is that the secondary party continues to participate in the JCE with foresight that another party to it may commit common law murder: *Miller v The Queen* (2016) 259 CLR 380 (**Miller**) at [45].
41. Applied to the constructive murder offence in s 12A, the justification for the application of EJCE liability is, according to the Court of Appeal below, that a secondary party continues to participate in the JCE with foresight that another party to it may commit an intentional act of violence *simpliciter*. The appellant submits that if the Court of Appeal is correct about this (which the appellant disputes), a secondary party is deemed to be guilty of murder, to be punished as if they committed murder, despite them not committing the act which causes death, and despite them not even foreseeing the possibility that a person might die or even be injured.
- 30 42. The appellant submits that the nature of the offence created by s 12A impliedly excludes EJCE liability, because the application of that form of complicity to s 12A is not justified by the rationale for the existence of EJCE liability. The principled basis relied upon by the High Court plurality in *Miller* for the continued application of EJCE liability does not support its application to the offence created by s 12A,.

43. The question of the application (or not) of EJCE principles to the offence of constructive murder in s 12A was determined for the first occasion by the Court of Appeal in this case. For this Court to determine that EJCE liability is impliedly excluded from application to s 12A would not involve the alteration of any existing general principle, nor would there be any wider effect.
44. Accordingly, this Court should determine that the trial Judge's directions were erroneous at law by leaving a pathway open for the conviction of the appellant and co-accused of constructive murder pursuant to s 12A according to the principles of EJCE and that the Court of Appeal erred in ruling otherwise.

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Grounds 1 and 3 – The judgments of the Court of Appeal

45. The Court of Appeal's reasons relating to these grounds of appeal were given by Peek AJA (CAB 373-393 CA [104]-[173]), with whom Kelly P agreed (CAB 343 CA [1]) and by Doyle JA (CAB 344-346 CA [11]-[18]).
46. Peek AJA's reasons, at CAB 374-379 CA [109]-[122], in so far as they address the old common law felony murder rule, and the application of JCE principles as they were understood prior to *McAuliffe*, are not particularly apposite.
47. Peek AJA then referred at CAB 379 CA [123] to the application of the principles of common purpose to s 12A of the Act in *Arulthilakan v The Queen (Arulthilakan)* (2003) 78 ALJR 257. However, *Arulthilakan* was a JCE case, not an EJCE case and the JCE (and foundational offence for s 12A) was to rob others whilst armed with knives and a billiard ball and to use those weapons if necessary. When one of the participants stabbed a person with a knife and caused their death during the attempted robbery, all the participants were guilty of s 12A murder, without the need for them contemplate anything more, because the use of the knife was part of the agreed JCE.
48. Peek AJA concluded at CAB 379-380, 393 CA [124], [172] that for the appellant and co-accused to be guilty of s 12A murder, all that was required to be proven (apart from being a participant in the JCE to commit the foundational offence) was that they contemplated an intentional act of violence *simpliciter*. Peek AJA said it was not necessary to prove the appellant and co-accused contemplated an intentional act of violence that causes the death of another person, or an intentional act of violence of the same sort as the act that caused death.

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49. Doyle JA stated at CAB 345 CA [12] that he agreed with Peek AJA’s reasons. He said that the application of the principles of EJCE to common law murder, as confirmed in *Miller*, do not require the contemplation of death. Doyle JA said that for common law murder, all the EJCE principles required was the contemplation of the possibility that one participant in the JCE would commit an act intending to cause grievous bodily harm or death; contemplation of the possibility that the consequence of this would be death was not required.
50. Doyle JA recognised that contemplation that an act might be done with intent to cause death or grievous bodily harm is only a short step from contemplation that an act that causes death might be done. But in his view, there was an important distinction between contemplating an act with the relevant murderous intent and contemplating the consequence of death.
51. Doyle JA reasoned from this at CAB 345 CA [13] that when applying the same EJCE principles to s 12A murder, a consistent approach required only that the accused contemplate the possibility of an intentional act of violence. They did not require contemplation of the possibilities that: death would be the consequence of that act, or the act of violence would be of the same type as what occurred, or the act of violence be one that might reasonably be expected to result in death. Doyle JA supported this conclusion by saying there was no basis in the authorities on EJCE for requiring the contemplation of something that does not form an element of the primary offence.
52. By “primary offence” Doyle JA must have meant the incidental offence, not the foundational offence for the JCE, as otherwise EJCE principles could not apply at all. But an intentional act of violence that causes the death of another are both elements of the primary offence, where the primary offence is s 12A murder. So, this aspect of Doyle JA’s reasoning does not support his conclusion at all; indeed, it supports the appellant’s contrary position, that a secondary participant must contemplate that all the elements of the incidental offence might occur.

Joint Criminal Enterprise

53. The relevant common law principles of JCE²⁶ liability are:²⁷

²⁶ Or “common purpose” or “concert” as it is also called: *IL v The Queen* (2017) 262 CLR 268 at [61].

²⁷ *Miller v The Queen* (2016) 259 CLR 380 at [4]; *IL v The Queen* (2017) 262 CLR 268 at [61]-[62]; *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Johns v The Queen* (1980) 143 CLR 108.

- a. A JCE comes into being when two or more persons agree to commit a crime.
- b. If the crime that is the object of the JCE is committed while the agreement remains on foot, all the parties to the agreement who participate in the JCE are equally guilty, regardless of the part that each plays in the conduct that constitutes the *actus reus*.
- c. Each party to the agreement is also guilty of any other crime (the incidental crime) committed by a co-participant that is within the scope of the agreement. An incidental crime is within the scope of the agreement if the parties all contemplate its commission as a possible incident of the execution of their agreement.

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54. In *IL v The Queen* (2017) 262 CLR 268 (*IL*), a majority (5:2) of the High Court held that the effect of the principles of JCE liability is that the acts of one person (the actor) which are done in the course of effecting the JCE, and which are incidental to that purpose, are attributed to all the co-participants in the JCE. The criminal liability of the actor is not attributed; the acts of the actor are attributed. This makes the act of each participant an act for which each other participant is personally responsible.²⁸

55. Liability for a crime according to the principles of JCE is primary, not derivative. Each participant in the JCE is guilty as a principal in the first degree. As a party to the agreement to commit a crime, they already possess the *mens rea* to commit it and any other incidental crime within the parties' joint contemplation as a possible incident of the execution of their agreement. Once the acts necessary for the agreed or incidental crime are done by another participant in the JCE and are attributed to the other parties, they are all guilty of the crime.²⁹

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Extended Joint Criminal Enterprise

56. The High Court first explicitly recognised the common law principles of EJCE in Australia in 1995 in *McAuliffe*. The Court considered the situation where one party foresees, but does not agree to, the commission of a crime other than that which has been agreed, but continues to participate in the JCE.

²⁸ (2017) 262 CLR 268 at [2], [26]-[29], [34] and [40] per Kiefel CJ, Keane and Edelman JJ, at [100]-[106] per Gaegler J, at [146] per Gordon J, Bell and Nettle JJ contra at [63], [65]; See also *Osland v The Queen* (1998) 197 CLR 316 at [75], [78] per McHugh J, with whom Kirby J ([174]) and Callinan J ([257]) agreed.

²⁹ *Osland v The Queen* (1998) 197 CLR 316 at [75], [93], with whom Kirby J (at [174]) and Callinan J (at [257]) agreed.

57. The Court said, “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.”³⁰

58. The Court held that the trial Judge had correctly directed the jury to the effect that if the offenders were engaged in a JCE to assault, an individual contemplation of the intentional infliction of grievous bodily harm as a possible incident of the JCE would be sufficient intention on the part of the offenders for the purpose of murder.³¹

59. “[A]n individual contemplation of the intentional infliction of grievous bodily harm” connotes the contemplation of not just an intention to inflict, but the actual infliction of, grievous bodily harm. This supports the appellant’s submission that EJCE liability requires contemplation of the result or consequence of the act contemplated, where that is an element of the offence.

60. In *McAuliffe*, the Court relied upon two Privy Council decisions regarding EJCE liability. In *Chang Wing-Siu* [1985] AC 168 at 175, Sir Robin Cooke said the necessary foresight was foresight of the incidental **crime** as a possible incident of the JCE. In *Hui Chi-Ming v The Queen* [1992] 1 AC 34 at 51, Lord Lowry described the foresight required as foresight of the relevant **offence** which the principal may commit as a possible incident of the JCE. Similarly, in *Gillard v The Queen* (2003) 219 CLR 1 (**Gillard**), Hayne J described the necessary foresight at [112] as foresight that another **crime** might be committed. The use of the words **crime** and **offence** to describe what must be contemplated or foreseen was not accidental or of no moment.

61. The references in the authorities to the requirement that a secondary participant foresee the commission of the incidental **crime** or **offence** use the ordinary meaning of those words. Each crime or offence is comprised of elements or ingredients, all of which must exist for a crime or offence to be committed. The appellant submits that for a secondary participant to foresee the commission of an incidental **crime** or **offence**, he or she must foresee all the elements of the crime or offence occurring.³²

62. The fact that foresight extends to the consequences of an act, if they are also an element of the offence, was recognised in *Gillard* by Hayne J, who said, “*The accused is held*

³⁰ (1995) 183 CLR 108 at 117-118. My emphasis.

³¹ *Ibid* at 118.

³² Richard and McNamara, ‘Just Attribution of Criminal Liability: Considerations of Extended Joint Enterprise Post-*Miller*’, (2018) 42 Crim LJ 372, 373.

*criminally responsible for his or her continued participation in a joint enterprise, despite having foreseen the possibility of events turning out as in fact they did.*³³

63. The question of whether the criminal liability of a secondary participant according to the EJCE principles is primary or derivative, or whether it is the acts, or the liability, of another participant which is attributed to a secondary participant, has not yet been settled.³⁴

10 64. The appellant's position is that for EJCE, the liability³⁵ of the actor is attributed to a secondary participant, not just the acts. This is because the secondary participant does not have the *mens rea* required to commit the incidental offence personally, unlike the actor. This differs from the situation with JCE liability, where all parties to the JCE independently possess the *mens rea* required for the agreed or jointly contemplated incidental offence.

65. The appellant submits that with EJCE, the liability of the actor for the incidental crime is attributed to the secondary participant because of their continued participation in the agreed crime, despite their contemplation of the commission of the incidental crime.

20 66. As the liability of the actor is attributed, the secondary participant's liability is derivative, not primary. This accords with the position of an accessory, who like a secondary participant in a JCE, must have actual knowledge of all the essential facts which comprise the offence committed by the principal.³⁶ The only difference is that with EJCE the secondary participant contemplates the possibility (rather than knows) of those essential facts (which make up the elements of the crime).

Ground 1 – Common law murder according to EJCE principles

67. In *Gillard*, the explanation by Gleeson CJ and Callinan J of the distinction between the requirements for EJCE murder and EJCE manslaughter included that, based on the general principles in *McAuliffe*, foresight of death was one of the required elements for establishing the liability of a secondary participant for homicide.³⁷

68. In *Truong v The Queen* (2004) 223 CLR 122 (*Truong*), Gummow and Callinan JJ approved the directions of the trial Judge, which they said were in accordance with *McAuliffe*, that the appellant was guilty of murder if it was proved he was a party to

³³ (2003) 219 CLR 1 at [118], with whom Gummow J (at [31]) and Kirby (at [59]) agreed. My emphasis.

³⁴ *IL v The Queen* (2017) 262 CLR 268 at [107].

³⁵ This was the position of Bell and Nettle JJ in *dicta* in *IL v The Queen* (2017) 262 CLR 268 at [63].

³⁶ *Giorgianni v The Queen* (1985) 156 CLR 473.

³⁷ (2003) 219 CLR 1 at [15], [24]-[25]; Richard and McNamara, 'Just Attribution of Criminal Liability: Considerations of Extended Joint Enterprise Post-*Miller*', (2018) 42 Crim LJ 372, 375.

the kidnapping of the victim and was aware that a realistic possible consequence of that crime was that the victim would be murdered.³⁸ They later said the conviction of the appellant on the *McAuliffe* basis involved proof of the appellant's, "... *contemplation of the possibility of intentional killing by the kidnappers.*"³⁹ Contemplation of the possibility of intentional killing is the contemplation of the *mens rea*, an act and the consequence of the act, death – in other words, all elements of the offence of murder.

69. In *Clayton*, the plurality referred to EJCE when they said, "...*in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture.*"⁴⁰

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70. In *Miller v The Queen*,⁴¹ the plurality confirmed that the foresight (or contemplation) necessary for EJCE liability was of the possible commission of the incidental **crime**. The plurality said that in the case of murder, the foresight required of the secondary party to be guilty according to EJCE principles was that in executing the agreed JCE, another party to it may commit **murder**.⁴² The inculcation of the secondary party is justified by their continued participation in the agreed crime despite having foresight that during the course of it a **murder** may be committed.

71. The appellant submits that for person A to foresee (or contemplate) the possibility that person B might commit murder, A has to foresee the possibility that all the elements of murder might occur, namely the possibility that B will unlawfully cause the death of another while intending to cause death or grievous bodily harm. The appellant submits that if a secondary participant does not foresee the possibility of death being caused, they cannot be convicted of murder, as they have not in fact foreseen the possibility of murder being committed. EJCE principles do not extend a secondary participant's liability for incidental crimes to those they neither intend, nor foresee.⁴³

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72. This was recognised by the Full Court of the Supreme Court of South Australia in *R v Jones*.⁴⁴ Duggan J said that for an accused to be guilty of common law murder according to the principles of EJCE, it had to be proved that they foresaw the

³⁸ (2004) 223 CLR 122 at [49].

³⁹ (2004) 223 CLR 122 at [89].

⁴⁰ (2006) 81 ALJR 439 at [20].

⁴¹ (2016) 259 CLR 380 at [4].

⁴² (2016) 259 CLR 380 at [45].

⁴³ Richard and McNamara, 'Just Attribution of Criminal Liability: Considerations of Extended Joint Enterprise Post-*Miller*', (2018) 42 Crim LJ 372, 378-379.

⁴⁴ (2006) 161 A Crim R 511 per Duggan J at [168] (Bleby and Anderson JJ agreed on this point).

possibility that, in the process of committing the agreed crime of assault, a party to the JCE would **murder** the deceased. Duggan J stated that this required proof that the accused foresaw the possibility that another participant in their JCE would (1) unlawfully **kill**⁴⁵ the deceased and (2) that they would do so with an intention to kill or cause really serious bodily harm.

73. The Applicant submits that contrary to the reasoning of the Court of Appeal, for an accused to be guilty of common law murder according to the principles of EJCE, it must be proved that they contemplated (or foresaw) the possibility:

- 10 a. That another participant in the JCE might do an unlawful act that causes the death of a person⁴⁶; and
- b. The act would be done by the other participant with an intention to cause death or grievous bodily harm.

74. The appellant recognises that the requirement for EJCE liability for murder, that a secondary participant in a JCE contemplate a co-participant might do an act that causes death, has not always been stated explicitly in the past. That is not altogether surprising. Another requirement for EJCE liability for murder is that a secondary participant in the JCE contemplates that a co-participant might do an act with the intention of causing death or grievous bodily harm. In most cases, it will necessarily follow from proof of the contemplation of that murderous intention, that the secondary participant must also have contemplated the possibility that an act will be done which causes death.

20

75. Firstly, contemplation of the possibility that a person might do an act with the intention of causing the death will invariably give rise to a contemplation of the possibility of death. Secondly, an intention to cause grievous bodily harm is an intent to cause such serious bodily harm to another that, in most cases, it will also necessarily give rise to the contemplation of the possibility of death being caused when that intent is acted upon. As a result, in most cases, the requirement for EJCE liability that a secondary participant contemplate the possibility that death will occur will not cause any

⁴⁵ That is, do an act which causes or results in death.

⁴⁶ The appellant submits that there is no difference between foresight that another participant might do an act that causes the death of a person and foresight that another participant might do an act that could, or is capable, of causing the death of another person. In each case the foresight is that an act might be done which results in the death of a person.

difficulty once it is proved an accused contemplated the possibility that another participant in the JCE might act with murderous intent.⁴⁷

76. However, in a minority of cases, it will not necessarily follow that a secondary participant in a JCE must have contemplated the possibility that a co-participant might do an act that will cause death, simply because they contemplated a co-participant might do an act with the intention of causing grievous bodily harm.

77. The appellant submits that this case is such a case, because the JCE did not include any element of violence and there was a paucity of evidence that weapons were taken to the grow house by the five men. The only apparent object taken by (one of) the five
10 men was a stick of some description.

78. The trial Judge's directions about the elements of common law murder according to the principles of EJCE are at CAB 50-51, 57-58, 270 and 273-274.

79. The directions were to the effect that what had to be proved for guilt was that the accused contemplated that in carrying out the JCE to break into the house and steal the cannabis, one or more of them, if they came across someone in the house, might inflict violence on that person with the intention of either killing them or causing them really serious bodily harm.

80. The trial Judge failed to direct the jury that the act of violence the accused had to contemplate was one that might cause death or was capable of causing death. The
20 appellant submits that was an error of law.

Ground 3 – Section 12A murder according to EJCE principles

81. Section 12A creates a statutory offence which is commonly referred to as constructive murder. Whilst s 12A states that a person who commits the offence is guilty of murder, the effect of this is simply to deem that murder has been committed by the offender, in order that the mandatory sentence for murder of life imprisonment in s 11 of the Act applies, together with the minimum 20-year non-parole period provided for in s 47(5)(b) of the *Sentencing Act 2017* (SA).

82. The statutory offence in s 12A contains the following elements:

- 30 a. A person commits an intentional act of violence (IAV).

⁴⁷ Richard and McNamara, 'Just Attribution of Criminal Liability: Considerations of Extended Joint Enterprise Post-Miller', (2018) 42 Crim LJ 372, 379.

b. The IAV is committed by the person while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more **(the foundational offence)**⁴⁸.

c. The IAV thus causes the death of another.

83. The appellant's following submissions assume that the common law principles of JCE and EJCE apply to the offence created by s 12A. The appellant submits that if they do, those principles apply to s 12A in the same way as for any other criminal offence. The application of the common law principles of JCE and EJCE to the offence of constructive murder in s 12A largely depends on the terms of the section itself. There are material differences between the offence of constructive murder in s 12A and statutory provisions creating offences of constructive murder in other Australian States, such that authorities about the other provisions are of little assistance in the present case.⁴⁹

84. Where the foundational offence (the object of the JCE) itself involves the commission of an IAV, such as with the offences of robbery, rape, arson etc. (the type of offences that are commonly the foundational offence for crimes of constructive murder), the application of the principles of EJCE will not usually arise; the principles of JCE alone can inculcate a secondary participant who does not commit the IAV which causes death.

20 85. This is because an IAV is a part of the JCE (it is part of what has been agreed upon or is jointly contemplated by the parties). *Arulthilakan* was just such a case. All the parties to the JCE already had the *mens rea* necessary to commit s 12A murder (an intention to commit the foundational offence and an intention that an IAV be committed in the course of it). The IAV committed was attributed to all the parties to the JCE according

⁴⁸ Section 12A as it stood at the time of the offence excluded the offence of abortion in s 81(2) of the Act from being a foundational offence. That exception was removed from s 12A on 7 July 2022 as the offence of abortion was abolished.

⁴⁹ Compare *Crimes Act 1900* (NSW), s 18; *Crimes Act 1958* (Vic), s 3A; *Criminal Code (Qld)*, s 302; *Criminal Code* (WA), s 279; *Criminal Code* (Tas), s 157. The closest analogue in Australia to s 12A is s 3A of the *Crimes Act 1958* (Vic), but that differs from 12A by allowing an unintentional act of violence causing death to be sufficient, whilst restricting the foundational offences to those that contain violence as a necessary element. The constructive murder offence in s 18(1) of the *Crimes Act 1900* (NSW) differs from s 12A, *inter alia*, because it does not require the act causing death to have been intentional or violent. It also contains its own provision for the liability of accomplices. The appellant submits that little assistance can be drawn from cases considering other constructive murder provisions. Gordon J emphasized the need such caution in *IL v The Queen* (2017) 262 CLR 268 at [155].

to JCE principles. Nothing more needed to be proved for all participants in the JCE to be guilty of s 12A murder.

86. The policy which applies in this situation, that all persons who agreed to commit a foundational offence which involved the commission of an IAV are liable for the s 12A offence if an IAV causes death, is understandable and reasonable. It accords with the policy rationale for the former common law felony murder rule: that a perpetrator should be liable for the unintended consequences of their actions during the commission of a felony, because in engaging in a **violent or dangerous** felony they must accept responsibility for what occurs in the course of it.⁵⁰

10 87. However, in the more uncommon situation where the foundational offence (the object of the JCE) does not involve the commission of an IAV at all, a secondary participant who does not commit the IAV that causes death can only be guilty of s 12A murder by the application of the principles of EJCE.

88. The present case involves this uncommon situation, because the foundational offence the prosecution chose to rely upon as the JCE was ASCT with the intention to commit Theft, an offence which did not involve the commission of any intentional act of violence.

20 89. The appellant submits that in the present case, where the evidence could not prove who committed the IAV that caused Gjabri's death, to prove the appellant was guilty of the offence of constructive murder in s 12A, according to the principles of EJCE, it had to be proven that:

a. The appellant was a party to a JCE with the four other men to commit the foundational crime of ASCT with the intention of committing Theft.⁵¹

b. One or more of the five men committed an IAV against Gjabri while acting in the course or furtherance of the foundational crime and thus caused his death.

c. The appellant contemplated the possibility that one or more of the four other men might commit the s 12A offence (the incidental crime).

90. To prove that the appellant contemplated the possibility that one or more of the four other men might commit the s 12A offence, the prosecution was required to prove that

⁵⁰ *R v R; R v G* (1995) 63 SASR 417 at 421.

⁵¹ Which is an offence with a maximum penalty of ten or more years imprisonment and so qualifies as a foundational offence for s 12A.

the appellant contemplated (or had the foresight) that all elements of the s 12A offence might occur.

91. As the prosecution nominated the foundational offence as one that did not involve an element of violence⁵², the commission of an IAV was not part of the foundational offence. That had consequences for what the prosecution had to prove for the appellant to be found guilty of s 12A murder. It meant the prosecution had to rely on the principles of EJCE, instead of JCE, for the appellant and co-accused to be found guilty. This expanded what the prosecution had to prove they contemplated.
92. The appellant could not be found guilty of constructive murder where the foundational offence agreed upon was not an offence involving violence, unless it was proven that he contemplated (or foresaw) the possibility that one or more of the other men might, while acting in the course or furtherance of the foundational offence, commit an IAV and thus cause the death of another.
93. The requirement in the case of EJCE liability for proof that the appellant contemplated the possibility of an IAV being committed of sufficient seriousness to cause the death of another is in accordance with the usual principles of EJCE (as explained above) and is appropriate, so there remains a reasonable correlation between moral culpability and legal responsibility. The appellant's culpability in that regard would be established by his continuing participation in the commission of the foundational offence whilst contemplating the possible commission of the s 12A offence during the course of it.
94. The trial Judge's directions about the elements of s 12A murder according to the principles of EJCE are at CAB 50-51, 62-63, 68-69, 269-270 and 277-278.
95. His directions were to the effect that what had to be proved was that the appellant and co-accused contemplated that in carrying out the foundational offence of ASCT, one or more of them, if they came across someone in the grow house, might inflict an intentional act of violence on that person. The trial Judge directed the jury that the intentional act of violence contemplated could be any act of intentional violence and gave as an example that the back of Gjabri's leg might be struck or smacked. (CAB 62-63, 69)

⁵² This was the prosecution's tactical choice. As the submissions above show, the prosecutor also opened on the basis that the foundational offence was Robbery or ASCT with an intention to commit Robbery, both of which did involve an element of violence. The prosecutor later resiled from these foundational offences and relied solely on a foundational offence of ASCT with an intention to commit Theft, the elements of which were the easiest to prove.

96. The trial Judge failed to direct the jury that proof of s 12A murder according to the principles of EJCE required them to be satisfied beyond reasonable doubt that the appellant and co-accused contemplated the possibility that one or more of them might, while acting in the course or furtherance of the foundational offence, commit an IAV and thus cause the death of another.

97. The trial Judge's directions were substantially wrong at law.

98. The nature of the trial Judge's error precludes the operation of the proviso. The error went to the root of the proceedings and denied the appellant a reasonable prospect of acquittal.⁵³

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Part VII: Orders sought

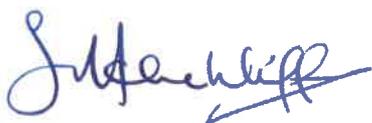
99. The orders sought by the appellant are:

- (a) The appeal is allowed.
- (b) Set aside the order of the Court of Appeal dismissing the appellant's appeal against conviction.
- (c) The appellant's appeal to the Court of Appeal is allowed, his conviction is quashed and the matter is remitted for a retrial.

Part VIII: Time required for the presentation of the appellant's oral argument.

20 100. The appellant estimates that 1.5 hours will be required to present his oral argument.

Dated: 5 August 2022



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⁵³ It must be noted that the trial Judge sentenced the appellant and co-accused on the basis that the jury convicted them of murder pursuant to s 12A, and not common law murder. Each was sentenced to life imprisonment with a non-parole period of 20 years for committing the s 12A offence (CAB 298-310).

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

A15 of 2022

ALFRED CLAUDE RIGNEY

Appellant

and

10

THE QUEEN

Respondent

**ANNEXURE TO THE APPELLANT'S SUBMISSIONS
LIST OF STATUTES AND STATUTORY INSTRUMENTS REFERRED TO**

STATUTES

1. *Criminal Law Consolidation Act 1935* (SA), sections 11, 12A (as at 9.10.2018) (an immaterial amendment commenced on 7.7.22), 134, 137, 168 and 170.
- 20 2. *Sentencing Act 2017* (SA), subsection 47(5)(b).