



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM
THE COURT OF APPEAL OF THE SUPREME COURT OF SOUTH AUSTRALIA

No A17 of 2022

10 BETWEEN: MATTHEW BERNARD TENHOOPEN
Applicant

and

THE KING
Respondent

20 **OUTLINE OF ORAL SUBMISSIONS OF THE APPLICANT TENHOOPEN**

Part I: Certification

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

Part II: Propositions to be advanced in oral argument

Disconnect between the act of violence causing death and a secondary offender's foresight

2. For a *primary* offender to commit murder under s 12A of the CLCA, it is not sufficient just that they commit *any* intentional act of violence in the course of or in furtherance of the commission of a serious major indictable offence. While the relevant act of violence may be of "*any*" kind, a primary offender is only liable for the commission of the *particular* intentional act that, in fact, causes the death of a person. **AS [49], AR [5]**
- 30 3. The primary offender is thus in a position to assess the risk associated with – and must accept criminal responsibility for – whatever turns out to be the consequence of their *actual* act of violence if they do run that risk. **AS [50], AR [3]**
4. In contrast, on the directions given to the jury in this case, a person who merely contemplates the possibility that a co-venturer may commit *some* intentional act of violence, of *whatever* kind, is liable for murder if a co-venturer commits *any* intentional act of violence, including an act completely *different* from that contemplated, if death is the consequence of that different, unforeseen, intentional act of violence. **AS [51]-[56]**
5. If the directions given in this case were accepted as correct, there would be a complete disconnect – that is, a lack of correspondence – between the intentional act that is

foreseen (*any* intentional act of violence) and the intentional act of violence that is committed (an act of violence that in fact caused a person’s death) – a disconnect that is not apparent, or inevitable, from the terms of s 12A and which could not have been contemplated when it was enacted. **AS [53], AR [5]-[6], [10]**

6. If that were sufficient for liability for murder, then liability would be extended far beyond the rationales underlying s 12A and EJCE. That should not be accepted.

7. The question is whether, and how, s 12A should be construed and applied in a sensible way, so that it does not extend liability for murder far beyond the rationales for s 12A and for EJCE. Tenhoopen has identified four alternative possible approaches, each of which would better reflect the justification for EJCE liability than the directions of the trial Judge and the submissions of the respondent. **AS [57]-[82]**

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First submission: EJCE has no application to s 12A of the CLCA

8. Section 12A of the CLCA only creates liability for murder for a person who “commits” an “intentional” act of violence. Consistently with its text and purpose, a person should be liable only for acts which they both *commit* (whether personally or through attribution) and which they *intend*. A party to an agreement to commit an offence – where the agreement does not itself extend to the commission of any act of violence – who merely foresees the possible commission of an act of violence by another co-venturer neither *commits* that act nor *intends* it. **AS [58]-[67], AR [4]**

20 ***Second submission: must contemplate co-venturer “committing murder”, including death***

9. The justification for the doctrine of extended joint criminal enterprise, as explained in *Miller v The Queen* (2016) 259 CLR 380, is that a co-venturer is liable to be convicted of an incidental offence committed by another co-venturer because, having agreed to participate in the foundational offence, they contemplate, or foresee as a possibility, that one of their co-offenders *may commit the incidental offence*, and yet continue to participate in the joint enterprise with that state of mind. **AS [18]-[42]**

10. Given the rationale for EJCE liability, a co-venturer should be liable for the offence of murder (whether at common law or under s 12A) only if they foresee or contemplate the possibility of death. **AS [43]-[46], [68]-[69], AR [14]**

30 11. However, even if EJCE liability for *common law* murder may arise without foresight of death, that must be because of special considerations applicable to common law murder, where foresight of the intentional infliction of grievous bodily harm is effectively

equated with foresight of murder. In relation to EJCE liability for murder *under s 12A*, the principle in its general form should be applied, requiring that the offender *foresee that a co-offender may commit the offence*, including foresight of death. **AS [70]-[72]**.

Third submission: must contemplate an act of violence of the kind actually committed

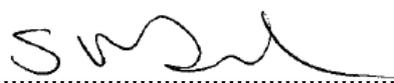
12. For a secondary offender to be guilty of murder under s 12A on the basis of EJCE liability, they must contemplate the possibility that a co-venturer may intentionally commit an act of violence *of the same kind as the particular intentional act of violence that the co-venturer did in fact commit and which did in fact cause the death*. This follows from the requirement that the *intentional act of violence* which a principal must commit in order to be guilty of murder under s 12A is one by which the principal “*thus causes* the death of another”. **AS [73]-[77]**

Fourth submission: must contemplate an act of violence capable of causing death

13. A secondary participant in a joint criminal enterprise, to be guilty of murder under s 12A, must foresee or contemplate at least an intentional act of violence that would be likely to cause death, or that is at least realistically capable of causing death. In relation to this final proposition, Tenhoopen expects to rely on his written submissions and on the submissions of the three appellants Rigney, Mitchell and Carver. **AS [78]-[81]**

Dated: 5 December 2022

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