

PICKETT v THE STATE OF WESTERN AUSTRALIA (P45/2019)
MEAD v THE STATE OF WESTERN AUSTRALIA (P46/2019)
MEAD v THE STATE OF WESTERN AUSTRALIA (P47/2019)
ANTHONY v THE STATE OF WESTERN AUSTRALIA (P48/2019)
TSM (a child) v THE STATE OF WESTERN AUSTRALIA (P49/2019)

Court appealed from: Court of Appeal, Supreme Court of Western Australia
[2019] WASCA 79

Date of judgment: 21 May 2019

Special leave granted: 11 September 2019

On 27 January 2016, Patrick Slater died as a result of a stab wound that was inflicted in the course of an attack by a group of eight males, each of whom was charged with murder. Their ages ranged from 11 years to 29 years. The youngest ("PM") was tried separately in the Children's Court of Western Australia. The others were tried in the Supreme Court of Western Australia. On 11 July 2017, after a trial before Martino J and a jury, each of them was convicted of murder.

The prosecution case was that one, and only one, of the accused was guilty of murder as the principal offender under s7(a) of the *Criminal Code (WA)* ("the Code"). The prosecution alleged that all the accused, other than the principal offender, were guilty of murder by operation of ss 7(b), (c) or 8 of the Code, which extend criminal responsibility beyond the person who does the act which constitutes the offence to secondary offenders such as "aiders", and parties to an unlawful common purpose.

It was not in dispute that it was reasonably possible that the principal offender was PM. Because he was under the age of 14 years, but over the age of 10 years, s 29 of the Code was relevant to the question of his criminal responsibility. Section 29 relevantly provides that "*a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.*" At the trial the prosecution led no evidence relevant to PM's capacity.

In their appeals to the Court of Appeal (Buss P and Mazza JA), Beech JA dissenting), the appellants contended that the prosecution did not prove at the trial that PM had capacity under s 29; consequently, if PM had stabbed the victim, PM did not commit an offence; therefore, the appellants could not have any derivative liability under ss7(b), (c) or 8. In dismissing the appeal, the majority held that the effect of s 7(b) and (c) and s 8 is to deem a person falling within their terms to have done the relevant acts which the principal has done, and not to deem that person to be liable to the same extent as the principal. The sections are not concerned with the criminal responsibility of any person who is a party to an offence, including whether any person who has killed another person was authorised or justified or excused by law in killing the other person. Criminal responsibility is dealt with in Chapter V of the Code, which includes s 29. By operation of s36 of the Code, the provisions of Chapter V operate to excuse a person who would otherwise be criminally responsible for an act or omission. In particular s 29 of the Code confers on a child between the ages of 10 and 14 years a *personal* exemption or immunity from criminal responsibility for an act or omission.

The majority held that if the principal, as a *person*, was not criminally responsible by virtue of s 29, as it applied to the principal pursuant to s 36, the principal's personal exemption or immunity did not preclude the appellants from being liable for the victim's death as an "aider" under s 7(b) or (c) or as a secondary party under s 8.

Beech JA (dissenting) found that if a person who did the acts that constituted an offence was not criminally responsible because of the application of any of the provisions in Chapter V of the Code, then that person would not have committed an offence. In those circumstances the preconditions for the operation for ss 7 and 8, namely that 'an offence is committed', could not be established and, as a result, no person could be found to have committed the offence by operation of any of s7(b) or (c), or s 8.

The ground of appeal is:

- The majority of the Court of Appeal erred in holding that the appellants could be guilty by the operation of section 7(b) or (c), or section 8, of the *Criminal Code* (WA) of an offence founded upon the act of an 11 year old child "PM", who was an alleged co-offender, when the act of PM did not constitute an offence because the prosecution had not proved beyond reasonable doubt (or at all) that PM was criminally responsible for the act.