IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P45 of 2019

BETWEEN:

ROBERT CHRISTOPHER JAMES PICKETT
Appellant
-and-
THE STATE OF WESTERN AUSTRALIA
Respondent

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No. P46 of 2019

BETWEEN:

STEFAN LAZBA MEAD
Appellant
-and-
THE STATE OF WESTERN AUSTRALIA
Respondent

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No. P47 of 2019

BETWEEN:

CLINTON FREDERICK MEAD
Appellant
-and-
THE STATE OF WESTERN AUSTRALIA
Respondent

No. P48 of 2019

BETWEEN:

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DYLAN TERRANCE WAYNE ANTHONY
Appellant
-and-
THE STATE OF WESTERN AUSTRALIA
Respondent

No. P49 of 2019

BETWEEN:

TSM (a child)
Appellant

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-and-
THE STATE OF WESTERN AUSTRALIA
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. I certify that this outline is in a form suitable for publication on the internet.

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Part II:

1. The central question in this appeal is whether it was necessary for the prosecution to prove at the appellants' trial that PM (an 11 year old child) was criminally responsible for the act of stabbing the deceased by proving that he had capacity to know that he ought not do that act for the purposes of s29 of the *Criminal Code* (WA) ('the Code') in order to then prove that each of the appellants were guilty of murder by operation of ss7(b), 7 (c) or 8 of the Code (as 'secondary parties'). This question arises in circumstances in which it was reasonably possible that PM was the person who inflicted the injury that caused the deceased's death, where the 10 prosecution did not adduce any evidence of PM's capacity, and where the trial Judge did not direct the jury that they could not convict any of the appellants unless they were satisfied beyond reasonable doubt that PM did not cause the deceased's death.

2. Sections 7(b), 7(c) and s8 of the Code operate when 'an offence is committed'. It is a precondition to the operation of s7 that 'an offence is committed' and is also a necessary component of the facts necessary for s7(b), (c) and (d) to be enlivened. Section 8 operates only when an 'offence is committed'.

3. The second paragraph of Section 29 of the Code provides that: "A person under the age of 14 years is not criminally responsible for an act or omission, unless it is 20 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." Section 1 provides that: "The term criminally responsible means liable to punishment as for an offence; and the term criminal responsibility means liability to punishment as for an offence." Section 2 of the Code provides: "An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence."

4. It follows from these provisions that an act or omission done by a child under the age of 14 years is not an offence unless it is proved that the child had the capacity described in s29 of the Code. The act or omission of the child is not an offence as 30 the child is not liable to punishment. An act or omission by someone who is not criminally responsible is not an offence within the meaning of s2 of the Code because it is not an act or omission which renders a person undertaking the conduct liable to punishment.

5. As Beech JA concluded, if a principal offender is not criminally responsible for an act or omission then that person is not liable to punishment as for an offence in relation to that act. It follows that the act will not be called an offence, and the principal offender will not have committed an offence. As a consequence, ss7 and 8 will not be enlivened as no offence will have been committed, with the result that there will be no basis to conclude that another person will be liable for the same act or omission as a secondary offender.

6. That conclusion is consistent with:

   a. the ordinary meaning of the language of the relevant definitions and provisions. (AB 256.9; CA [426]-[437])

   b. The phrase 'as for an offence' in the definition of criminal responsibility in s1 of the Code, which indicates that any issue of criminal responsibility needs to be determined to inform whether an offence has been committed. AB 257.35-258.5; CA [431]-[435])

   c. with the last paragraph of s7 which addresses 'innocent agent' situations. (AB 259.39-261.17; CA [438]-[444])

   d. observations made by Gageler, Gordon and Edelman JJ in *Pickering v The Queen* [2017] HCA 17 [40]; (2017) 260 CLR 151 and Brennan CJ, Dawson and Toohey JJ in *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1 for the reasons outlined by his Honour. (AB 262.18-267.23; [449]-[464] CA)

7. As was explained in *Barlow*, the definition of offence involves a conduct element in combination with circumstance, intent or result elements which together attract liability to punishment. The provisions in Chapter V are addressed to these elements suggesting that whether an offence is committed depends on whether the person committing the offence was criminally responsible. (AB 259.1- 259.38; CA [436]-[437])

8. The process of reasoning by the plurality in *Barlow* that led to the construction of s8 that was adopted also supports the conclusion that the operation of s7(b), (c) and (d) depend upon a principal offender doing an act or making an omission for which they are criminally responsible: *Barlow* at 9-11 (JBA, Part C, 600-602). The construction of ss7 and 8 contended for also finds support in the observations made by Gageler, Gordon and Edelman JJ in *Pickering* at [40] (JBA Part C, 588).

9. A critical step in the CA majority's reasons for considering that s29 confers a personal exemption or immunity from criminal responsibility for an act or omission (AB 194.15; CA [170]), and cannot have any relevant effect for the purposes of ss7(b)(c) or 8, is the eighth reason that "the provisions of ch V operate to excuse a *person* who would otherwise be criminally responsible for an act of omission". The majority's reasoning heavily depends on s36 of the Code. In this regard, the appellant adopts the reasons of Beech JA (AB 261.20-262.1; CA [445]-[447].

10. There are four further reasons for concluding that while the provisions of Chapter V do confer personal exemptions or immunities from criminal responsibility, it does not follow they cannot affect the liability of other persons under ss7 and 8:

    a. If a child is not liable to punishment due to not having capacity under s29 then no offence will have been committed, having regard to the definition of offence in s2 of the Code, and ss7 and 8 are not enlivened.

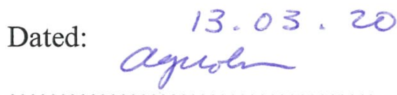
    b. The effect of s36 is not to limit the operation of the provisions of Chapter V to persons who have been charged with an offence but to declare that the provisions of Chapter V also apply to persons charged with any offence against the statute law in Western Australia.

    c. Whether an offence is charged does not alter whether the act constitutes an offence in the sense that the accused is 'liable to punishment' for the act.

    d. The appellants were charged with an offence against the statute law of Western Australia.

11. The majority's conclusion that even if PM was the person who inflicted the fatal wound to the deceased, with the requisite intention for murder, the appellant's liability under ss7(b), 7(c) or 8 was not precluded was wrong. The prosecution *was* obliged to prove at the appellant's trial that PM had the capacity, in accordance with s29 of the Code, to know that he ought not to do the act or make the omission that caused the deceased's death in the prosecution case against the appellants. The trial Judge's failure to direct the jury that the appellants could not be found guilty of murder if the jury could not exclude beyond reasonable doubt that PM was the person who caused the deceased's death was an error of law.

Dated: 13.03.20



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Andrew Robson Sam Vandongen SC