

BETWEEN:

**ROBERT CHRISTOPHER JAMES PICKETT**

Appellant

and

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**THE STATE OF WESTERN AUSTRALIA**

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

**Part I:**

1. This outline is in a form suitable for publication on the internet.

20 **Part II:**

2. The core issue is whether an 'offence is committed' for the purposes of ss 7 and 8 if the person doing the act is not criminally responsible for their act upon application of a provision of Ch V of the *Code*.
3. Sections 7 and 8 do not create offences. Each section is brought into operation by the commission of the offence itself and then liability for that offence is attributed to various people based on their conduct.<sup>1</sup>
- 30 4. The term 'offence' in these sections is used to describe the element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed

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<sup>1</sup> Respondent's submissions [6]; *R v Wyles; Ex parte Attorney-General* at 176.

circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind.<sup>2</sup>

5. Assuming that PM was the actor, as long as he was shown to have engaged in the conduct which constituted the offence (in this case, an unlawful killing with the necessary intention) he was deemed to have committed the offence and to be guilty of it for the purposes of the trial against the alleged co-offenders.<sup>3</sup>
6. *Criminally responsible* means liable to punishment as for an offence. As found by the majority below, 'as for' in this sense means 'with regard to'.<sup>4</sup>
7. If no offence is committed unless a person is proved to be criminally responsible for the act or omission which constitutes it, a person could not be criminally responsible 'as for' an offence. The construction suffers from circularity.
8. Further illustration of the distinction between an offence and criminal responsibility for it may be found in s 5 of Appendix B of the *Criminal Code Compilation Act 1913*. A person who is not criminally responsible is not liable to punishment as for an offence. However, they may be liable to other consequences as a result of their conduct, unless the act was lawful.<sup>5</sup>
9. It is the act which renders the person doing the act liable to punishment which is called the offence. The person then may or may not be excused from criminal responsibility for the act or omission by Chapter V. The absence of Chapter V criminal responsibility on the part of the actor does not inform consideration of the liability of others who fall within the scope of ss 7(b) to (d) or 8. To hold otherwise would be to import notions of derivative liability, a concept which does not emerge from the text of the *Code*.<sup>6</sup>

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<sup>2</sup> *Barlow v The Queen* at 9, JBA Part C at 600.

<sup>3</sup> Respondent's submissions [5]-[7].

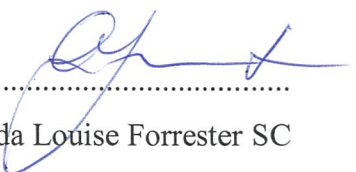
<sup>4</sup> Reasons [149], JCAB 189; Respondent's submissions [15].

<sup>5</sup> Respondent's submissions [25].

<sup>6</sup> Respondent's submissions [7], *Warren and Ireland v The Queen* at 320, 324.

10. Beech JA's conclusion at [438]-[443] that the final paragraph of s 7 supports his construction is founded upon an unstated yet erroneous premise, namely that the *only* situation in which an 'agent' could be 'innocent' is if the agent is not criminally responsible. This fails to account for situations in which no offence is committed because an element of the offence does not exist.<sup>7</sup>
11. Reference to common law concepts is of little assistance in resolving this issue of statutory construction. At its most basic, the common law requires proof of *mens rea* in order to prove that an offence has been committed. At common law, *mens rea* and criminal responsibility are intertwined. The Code eschews notions of an element of *mens rea* – intent is *not* an element of any offence unless expressly stated.<sup>8</sup> Other common law doctrines such as derivative liability, acting in concert, joint criminal enterprise and extended joint criminal enterprise are concepts foreign to the Code, even if analogous heads of liability can be found in ss 7 to 9.
12. Under the common law doctrine of *doli incapax*, there is a presumption that a child is incapable of possessing criminal intent.<sup>9</sup> The absence of criminal intent amounts to an absence of *mens rea* and, as such, no offence is committed by the child.
- 20 13. Under the Code, the elements of murder are an unlawful killing, accompanied by a murderous intent. 'Unlawful' in this context means not authorised, justified or excused. The relevant justifications and excuses are to be found in Ch XXVI and not Chapter V.<sup>10</sup>

Dated: 13 March 2020

  
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Amanda Louise Forrester SC

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<sup>7</sup> Respondent's submissions [33].

<sup>8</sup> Respondent's submissions [16].

<sup>9</sup> Reasons [96], JCAB 175.

<sup>10</sup> Respondent's submissions [30]; Letter from Sir Samuel Griffith to the Attorney-General of Queensland, 29 October 1897, p XI, JBC Part E at 854.