



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P 53 of 2021

BETWEEN:

BRETT CHRISTOPHER O'DEA

Appellant

and

THE STATE OF WESTERN AUSTRALIA

Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

Ground 1

2. Ground 1 raises the issue of whether, in circumstances in which the respondent relied on s 7(a) of the *Criminal Code* (WA) to attribute the acts of Webb to the appellant on the basis that they were acting in concert, the respondent was required to prove that Webb's acts were unlawful.¹ This question arises because the jury were directed to consider, in the case against Webb, whether the prosecution had proved that his acts were unlawful by reference to s 231 and s 248 of the *Criminal Code* (WA) (**Code**), and to s 24(1) of the *Criminal Investigation Act 2006* (WA).²
3. The Court of Appeal (CA), referred to the decisions of this Court in *Pickett v The State of Western Australia*³ and *R v Barlow*,⁴ and held that the jury was entitled to convict the appellant even if not satisfied that Webb's acts were unlawful.⁵ However, no issue was raised in *Barlow* concerning the effect of Ch V of the Code, or of the potential

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¹ Appellant's Submissions [2].

² CAB 137; CA [43]. Appellant's Submissions [27], [28].

³ *Pickett v The State of Western Australia* [2020] HCA 20; (2020) 94 ALJR 629 [58], [59] and [66].

⁴ *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1, 9 – 10.

⁵ Appellant's Submissions [23], [24].

relevance of unlawfulness to the operation of s 7 or s 8 of the Code. In *Pickett* it was held that it is the doing of the act or the making of the omission that constitutes an offence by the actor that is attributed to another person by operation of s 7 and s 8, not the criminal responsibility of the actor as determined by the provisions in Ch V of the Code.⁶

4. The Court of Appeal appears to have erroneously assumed that it followed from the reasoning in *Pickett*, which was concerned with the excuse provisions in Ch V of the Code, that the jury was entitled and obliged to convict the appellant even if they were not satisfied that Webb's acts were unlawful based on a defence under Ch XXVI.⁷
- 10 5. In considering the prosecution case against the appellant it was necessary for the jury to determine whether Webb's acts were unlawful, and therefore were capable of constituting part of the conduct element of the offence, before they could be attributed to the appellant by operation of s 7(a) of the Code.⁸
6. As Nettle J concluded, the Code maintains the fundamental distinction between justifications and excuses at common law. That distinction determines the scope of liability arising at common law in relation to conduct that is subject to a defence,⁹ and is consistent with the notion that a lawful act or omission is not the conduct element of an offence for the purposes of s 7 and s 8 of the Code.¹⁰
- 20 7. The respondent appears to accept that what was said at [43] of *Pickett* applies to s 7(c) of the Code.¹¹ There is no reason in principle, or based on the text of s 7, to reason that the same conclusion does not also apply to the other parts of s 7.
8. If what was said at [43] of *Pickett* does not have general application, and lawful acts can be the conduct (or form part of the conduct) element of an offence for the purposes of s 7(a), then it will unduly limit the scope of defences in Ch XXVI, including self-defence.

⁶ Appellant's Submissions [25] to [28].

⁷ Appellant's Submissions [25] to [28], [32] to [34]. See also s 24(1) of the *Criminal Investigation Act*.

⁸ See *Pickett* at [43]. Appellant's Submissions [29].

⁹ See *Pickett* at [102] to [104], and [110].

¹⁰ Appellant's Submissions [30].

¹¹ Respondent's Submissions [10].

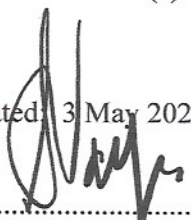
9. The respondent’s submission that the question of unlawfulness fell to be determined by reference to the aggregate of the appellant’s own acts and the acts of Webb should be rejected.¹² That is not how the jury were directed, and such an approach would introduce unnecessary complexities in connection with the application of defences.

Ground 2

10. The issue raised by this ground is whether the directions that were given to the jury, that they need to be satisfied that the appellant and Webb had been ‘acting in concert’ and ‘acting together’ before convicting the appellant based on the ‘first pathway’, were adequate.¹³ The CA found that it was open to some of the jury to have concluded that they were not satisfied beyond reasonable doubt that that the respondent had negatived all of the defences that were relied on by Webb.¹⁴ The CA also concluded that it was open to the jury to convict the appellant based on the first pathway. Therefore it was open to the jury to conclude that the appellant and Webb had two different purposes, albeit that their physical acts were occurring together or in concert with each other.

11. In those circumstances, that the jury had to be directed that before convicting the appellant in accordance with the first pathway they had to be satisfied that the appellant and Webb had reached an understanding or arrangement amounting to an agreement between them to commit an offence is:

- (a) a conclusion that is consistent with long-standing authority;
- (b) is supportedop by what was said by the CA in *O’Leary v The State of Western Australia*¹⁵; and
- (c) consistent with the structure and the operation of the balance of s 7, and also s 8, of the Code.¹⁶

Dated: 3 May 2022

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Sam Vandongen SC


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Anthony Karstaedt

¹² Respondent’s Submissions [19].
¹³ Appellant’s Submissions [41], [42]; Appellant’s Reply [4].
¹⁴ CAB 168; CA [174].
¹⁵ *O’Leary v The State of Western Australia* [2022] WASCA 4 [63] to [77].
¹⁶ Appellant’s Reply [13], [14].