



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

BETWEEN:

BRETT CHRISTOPHER O'DEA

Appellant

and

THE STATE OF WESTERN AUSTRALIA

Respondent

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Suitability for Publication

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

Part II: Oral Outline

Ground One

- 20 2. The term 'offence' has a settled meaning in the context of ss 7 and 8 of the *Code*. It refers to the conduct element, being the act or omission which constitutes the offence. It bears the same meaning in s 7(a) as it does in ss 7(b), (c) and (d), and 8.
3. Section 7 is not dependent upon the commission of an offence by a 'principal offender'. It deems the persons within its scope a 'principal offender' and attributes to the persons mentioned in it the acts or omission constituting the offence.
4. The distinction in *Pickett v The State of Western Australia*¹ between an act which is unlawful and an act for which a person is criminally responsible is irrelevant in the present case. *Pickett* concerned s 7(c) and s 8. *Pickett* made it clear that, absent an identified perpetrator, it was necessary to prove that the killing was unlawful,
30 not that the killer was criminally responsible.

¹ [2020] HCA 20; (2020) 94 ALJR 629 (Joint Book of Authorities (**JBA**), Vol 4, Pt D, #15).

5. Ground one presupposes that the parties were ‘acting in concert’ (the meaning of which is taken up in ground two). Under the ‘first pathway’, once it was established as against the appellant that each of the appellant and Mr Webb did an act or acts which constituted the offence (in the sense described in *R v Barlow*²), and that they were acting in concert, the appellant was an offender within s 7(a).
6. It was then only necessary to establish, in the case against the appellant, that he was acting unlawfully. His guilt did not depend on Mr Webb having acted unlawfully.
7. The Court of Appeal did not err. While the distinction between criminal responsibility and lawfulness may potentially give rise to issues involving (for example) the liability of aiders, that distinction is not significant where parties are acting in concert under s 7(a).

Ground Two

8. The appellant argues that it was necessary that the jury be directed that the appellant and Mr Webb had come to an ‘arrangement or understanding to commit a crime’ (emphasis added); that is, an arrangement or understanding to act unlawfully.
9. To the extent that the appellant’s argument contends that the common law concept of ‘joint criminal enterprise’ is the same as ‘acting in concert’ in the context of the *Criminal Code*, that is not the law: *L v The State of Western Australia*.³ When ‘acting in concert’ is used in the context of s 7(a) it has a very specific meaning: *Whitby v The State of Western Australia*.⁴
10. The trial judge directed the jury on ‘acting in concert’ in orthodox terms consistent with *L*⁵ and *Whitby*.⁶ The appellant is wrong to submit that the trial judge directed that it simply meant ‘acting together’.⁷ That assertion is unfairly reductive and ignores the contents of the jury handout⁸ and the directions to the jury.⁹

² (1997) 188 CLR 1, 9 (**JBA**, Vol 3, Pt C, #10).

³ [2016] WASCA 101; (2016) 49 WAR 546 [31]-[33], [41] (**JBA**, Vol 4, Pt D, #13).

⁴ [2019] WASCA 11 [189] (**JBA**, Vol 4, Pt D, #19).

⁵ *L* [31]-[33].

⁶ *Whitby* [189]-[190].

⁷ Appellant’s Reply, [4].

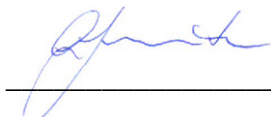
⁸ At pp 2-3 (Core Appeal Book (**CAB**), pp 89-90).

⁹ At transcript pp 531 and 642 (**CAB**, pp 19 and 84).

11. It is not disputed that ‘acting in concert’ in the context of the *Code* involves mutuality, or acting pursuant to an arrangement or understanding.¹⁰ There is however no justification for importing the further requirement that the agreement or understanding be to act unlawfully.
12. Equally, a ‘joint criminal enterprise’ at common law does not necessarily require an agreement to act unlawfully. Specifically, it is not necessary where the accused commits an act or acts which, together with the conduct of another or others, constitutes the offence.¹¹
13. Under the *Code*, while it will often be an implicit aspect of the agreement or understanding that the parties will act unlawfully, it is not a precondition of an agreement or understanding that that be so; the agreement or understanding is to commit the act or acts which constitute the ‘offence’.
14. The cases relied on by the appellant did not deal with this issue. In those cases, it was not in contention that, if there was an agreement, it was to do an act which was unlawful. As such, the statements of principle at common law relied upon, particularly the words ‘to commit a crime’, do not support the appellant’s argument.
15. This Court considered the common law in this regard in *Osland*. McHugh J (with whom Kirby and Callinan JJ relevantly agreed) stated:¹²

Once the parties have agreed to do the acts which constitute the actus reus of the offence and are present and acting in concert when the acts are committed, the criminal liability of each should depend on the existence or non-existence of mens rea or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator.

Dated: 3 May 2022



30 A. L. Forrester SC



S. D. Packham

¹⁰ *O’Leary v The State of Western Australia* [2022] WASCA 4 [75] (**JBA**, Vol 4, Pt D, #14).

¹¹ *Osland v The Queen* [1998] HCA 75; (1998) 197 CLR 316 [72]-[73], [93] (**JBA**, Vol 3, Pt C, #9).

¹² At [93].