



## HIGH COURT OF AUSTRALIA

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BETWEEN

**BRETT CHRISTOPHER O'DEA**

Appellant

AND

**THE STATE OF WESTERN AUSTRALIA**

Respondent

**RESPONDENT'S SUBMISSIONS**

**Part I – Internet publication**

1. It is certified that these submissions are in a form suitable for publication on the internet.

**Part II – Concise Statement of the issues presented by this appeal**

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2. The first issue presented by this appeal arise in cases where:
  - 2.1. two or more persons are alleged to have committed an offence;
  - 2.2. the basis of the criminal liability of these persons is alleged to be joint criminal responsibility under s 7(a) of the *Criminal Code*; and
  - 2.3. each person has performed an act or acts which, in aggregate, would constitute an offence if done by one person.

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3. The issue raised by ground one of the appeal is whether it is sufficient for the prosecution to prove that this composite act was unlawful, or whether the prosecution must also prove that a subset of that 'act', namely the acts performed by an accused not presently under consideration, were unlawful independent of any act of the accused under consideration.

4. The issue raised by the second ground of appeal is whether it was necessary for the prosecution to prove that the appellant and his co-accused ‘had reached an understanding or arrangement amounting to an agreement between them...to commit a crime’<sup>1</sup> or whether it was sufficient to prove that the two accused were ‘acting in combination or was collaborating with the other of them or that the appellant and the [co-accused] had joined forces.’<sup>2</sup>

### **Part III – Notice under s 78B of the *Judiciary Act 1903* (Cth)**

- 10 5. It is certified that this appeal does not involve a matter arising under the Constitution or involving its interpretation. Accordingly, notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

### **Part IV – Relevant facts**

6. The respondent accepts the appellant’s narrative of facts as outlined in Part V of the appellant’s submissions. No material fact in the appellant’s chronology is contested.

### **Part V – Argument**

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#### Ground one

7. The central submission advanced by the appellant is that the Court of Appeal erred in applying the decision of this Court in *Pickett v The State of Western Australia*<sup>3</sup> in concluding that the jury were not required to be satisfied that the actions of the co-accused were unlawful before convicting the appellant.<sup>4</sup> The appellant argues that there is a distinction between an excuse from criminal responsibility under Chapter V of the *Code*

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<sup>1</sup> Appellant’s submissions [2(b)]

<sup>2</sup> *O’Dea v The State of Western Australia* [2021] WASCA 61 [137], CAB 161.

<sup>3</sup> *Pickett v The State of Western Australia* [2020] HCA 20.

<sup>4</sup> Appellant’s submissions [23].

(the relevant defence in *Pickett*) and a justification such as self-defence (one of the relevant defences in this case).<sup>5</sup>

8. The appellant correctly distinguishes between:

8.1. Chapter V personal excuses, being excuses contained in ss 22 to 34 of the *Code* which, by virtue of s 36 of the *Code*, apply to all persons charged with any offence against the statute law of Western Australia;<sup>6</sup> and

10 8.2. excuses or justifications primarily found in Chapter XXVI of the *Code* which are relevant to whether an act is unlawful rather than a personal excuse from criminal responsibility.

9. However, that distinction is not relevant to resolving the controversy in this appeal.

10. As noted in *Pickett*, the distinction is relevant to a case where the accused under consideration is an aider in accordance with s 7(c) of the *Code*.<sup>7</sup> However, the distinction is irrelevant to the issue raised by this ground which concerns a pathway to guilt where each accused was said to be jointly liable with the other under s 7(a) of the *Code*. The distinction  
20 identified and emphasised by the appellant does not assist in resolving the issue of whether the actions of the co-accused, attributed to the appellant, also had to be unlawful in the separate case against the co-accused.

11. Under s 7(a) of the *Code*, a person is liable if either alone or, together with others, they do one or more acts in a series of acts that constitute the offence. However, in order for the acts of the other accused to be attributed to the accused under consideration there must be some connection between the acts such that they form a series of acts. It is not enough that the accumulated acts of a number of people, in the absence of any connection, would otherwise constitute an offence.<sup>8</sup> Although this is commonly referred to as multiple accused ‘acting

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<sup>5</sup> Appellant’s submissions [26]-[29].

<sup>6</sup> *Pickett* [42].

<sup>7</sup> *Pickett* [43].

<sup>8</sup> *Whitby v The State of Western Australia* [2019] WASCA 11 [189].

in concert', that phrase is merely a short-hand summation of the operation of s 7(a) of the *Code*, read in conjunction with s 10(c) of the *Interpretation Act 1984*.<sup>9</sup> That short-hand phrase does not import, into the *Code*, common law concepts concerning who is liable as a party to an offence which do not otherwise emerge from the text of the statute.

12. The complaint advanced under this ground does not take issue with the proposition that the jury, by its verdict, must have found that the both the appellant and Webb were acting together, and each did certain acts which, in aggregate, caused the complainant to suffer grievous bodily harm.

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13. The question then raised in the case against each accused separately was whether the composite act of causing grievous bodily harm, which included the acts performed by the accused under consideration and the acts of the co-accused attributed to them by way of joint 7(a) liability, was an unlawful act by the accused under consideration. Whether the prosecution was able to prove that the co-accused's contribution to this series of acts, in isolation, was also unlawful is irrelevant. The question is whether the act which caused grievous bodily harm (which consisted of an aggregation of acts of both accused) was unlawful insofar as the appellant is concerned. That the same issue might be decided differently as against the co-accused is not to the point.

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14. On the evidence adduced in this case, it was open to the jury to conclude that the appellant's act for which he was liable (being his own acts and the attributed acts of his co-accused) was unlawful. It was open to the jury to reject, on the evidence, that the appellant's act (understood in this sense) was not done in defence of Ms Dimer, to prevent an assault or likely assault of Ms Dimer or to overcome force used by the complainant in resisting arrest or in preventing the complainant from escaping.<sup>10</sup> That conclusion is reached regardless of whether the acts of the co-accused, considered in isolation and not as part of a series of acts on which they are a part, could be proved to be unlawful.

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<sup>9</sup> *O'Dea* [113], CAB 156.

<sup>10</sup> *O'Dea* [43], CAB 137-138.

15. The jury was instructed that it needed to be satisfied beyond reasonable doubt of the various matters<sup>11</sup> under the first pathway before they could convict the accused under consideration. Specifically, with respect to the first pathway the jury was (correctly) instructed that they needed to find that it was the ‘relevant accused’s acts’ which were unlawful.<sup>12</sup> This may be contrasted with the direction on the element of unlawfulness on the second pathway where the jury was directed that, to convict either accused, it had to be satisfied that the acts of both accused were unlawful.<sup>13</sup>

10 16. As set out in *R v Barlow*<sup>14</sup> and *Pickett*, the meaning of the word ‘offence’ as it appears in ss 7 and 8 of the *Code* does not refer to the concatenation of elements and circumstances that establish liability to punishment, but to the conduct element of an offence (an act or omission) which, if combined without circumstances, renders the offender question liable to punishment.<sup>15</sup> Thus the word offence in ss 7 and 8 is used ‘to denote the element of conduct ... which, *if* accompanied by prescribed circumstances, or *if* causing a prescribed result or *if* engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment.’<sup>16</sup>

20 17. The offence for which the appellant was convicted, that of causing grievous bodily harm with intent contrary to s 294 of the *Code*, contains a prescribed state of mind, namely an intention to maim, disfigure or disable or do some grievous bodily harm. The offence also contains a prescribed outcome, namely that grievous bodily harm was caused to another.<sup>17</sup> Of relevance to this appeal, the offence also contains a prescribed circumstance that the act or omission was unlawful.

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<sup>11</sup> See *O’Dea* [41], CAB 136 and ‘Summary in respect of the first pathway’, CAB 90.

<sup>12</sup> ‘Summary in respect of the first pathway’, CAB 90, third enumerated point.

<sup>13</sup> ‘Second Pathway – Aiding’, CAB 91, second enumerated point.

<sup>14</sup> *R v Barlow* (1997) 188 CLR 1.

<sup>15</sup> *Pickett* [57].

<sup>16</sup> *Barlow* at 9 (emphasis added), *Pickett* [109].

<sup>17</sup> While many outcomes are prescribed by s 294(1) of the *Code*, it is the outcome of causing grievous bodily harm with which the appellant was charged and convicted.

18. It is common ground that the jury could only have convicted the appellant by way of the first pathway open to it. As such, the jury must have concluded that the two accused were acting together or ‘in concert.’
19. Once the conclusion was reached that the appellant did an act which caused the grievous bodily harm (being the combination of his own actions and the actions of the co-accused which were attributed to him) the question is whether this composite ‘act’ was unlawful.
20. The acts could only have been unlawful if the State negated the “self-defence” provisions of s 248 of the *Code* and other statutory provisions which justified the use of force to overcome resistance to arrest, prevent escape or prevent an assault being committed.<sup>18</sup>
21. Those raised defences need not have been resolved against each accused in the same manner, even though the question is to be assessed against a single composite ‘act’ which consisted of the actions of the accused in question and together with the attributed actions of the co-accused.
22. The question the jury was faced with was whether the appellant’s act (being a composite of his own actions and those of the co-accused attributed to him) was unlawful insofar as the case against him was concerned.<sup>19</sup> No question arose as to whether the co-accused’s actions in isolation, or even the appellant’s own actions in isolation, were unlawful.
23. The text of ss 7 and 8 of the *Code*, particularly the meaning of the word ‘offence’ in those sections as set out in *Barlow* and *Pickett*, does not compel a conclusion that the acts of a co-accused, acting in concert with the accused under consideration, must be unlawful before they may be attributed to the accused under consideration. Sections 7 and 8 of the *Code* are not concerned with any prescribed circumstances, result or state of mind which renders a person liable for punishment.

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<sup>18</sup> These provisions are discussed in the appellant’s submissions at [27].

<sup>19</sup> The evidence in the trial of the appellant and the trial of the co-accused was not identical. The interview of each accused was only admissible in their own case, and the defences upon which they relied (such as self defence) contain both objective and subjective components: see *Goodwyn v The State of Western Australia* [2013] WASCA 141 [84] to [96].

24. The task of determining what the relevant ‘act’ is which constitutes the ‘offence’ under s 7 is logically anterior to the task of determining whether the act is unlawful. That act may, in the circumstances of a given case, consist of a single act by a single actor or, as in the circumstances of this case, consist of a composite of acts performed by the appellant himself and also the acts of the co-accused which are attributed to him. The question as to whether a subset of the conduct which constitutes the ‘act’ was unlawful in and of itself is not to the point.

10 Ground two

25. Ground two presupposes that it is necessary to import, into the language of the *Code*, common law concepts governing party liability which do not emerge from the statutory text of section 7. Giving primacy to the statutory text is particularly important in the context of construing a criminal code intended to replace the common law.<sup>20</sup>

26. The phrase ‘acting in concert’ has a technical meaning at common law. It is an aspect of the common law doctrine of joint criminal enterprise. The phrase has also come to have an acquired or accepted meaning in the context of s 7(a) of the *Code*. The appellant’s  
20 submissions conflate these different meanings.

27. As Hall J observed in *Whitby v The State of Western Australia*, the phrase ‘acting in concert’ is liable to be misunderstood when removed from the context of s 7(a) of the *Code*. In the context of s 7(a), the phrase has ‘a very specific meaning.’<sup>21</sup>

28. The words ‘acting in concert’ and other similar terms do not appear in the text of s 7(a). However, the phrase has been used as a convenient shorthand to explain how liability may attach under that section where more than one person has done more than one act which  
30 constitutes the offence.

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<sup>20</sup> *L v The State of Western Australia* [2016] WASCA 101 [52].

<sup>21</sup> *Whitby v The State of Western Australia* [2019] WASCA 11 [189].



29. When the prosecution seeks to establish joint 7(a) liability, it must prove more than the fact that the various separate or disparate acts of a number of people when aggregated constitute the offence. It is also necessary to establish a connection between the acts of the various people which together form a series of acts which constitute the offence.<sup>22</sup>

30. For an accused to be liable as a joint 7(a) offender, their act or omission must form part of the offence and the act or omissions must be part of a series of acts or omissions committed with others while acting together. As Hall J observed in *Whitby v The State of Western Australia*.<sup>23</sup>

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‘A person is liable under s 7(a) if he or she does the act that constitutes the offence or, together with others, does one or more acts in a series of acts that constitutes the offence. Where the prosecution alleges that the accused committed one (or more) acts that, together with the acts of others, constitutes an offence, it will be necessary to show a connection between the acts that form the series. It is not enough that the various acts of a number of people constitute an offence when accumulated. For an accused to be liable as a joint principal, he or she must do an act or make an omission that forms part of the offence and the act or omission must be part of a series of acts or omissions committed with others whilst acting together.’

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31. There is Queensland authority on the construction of s 7 of the *Code* which supports this construction of s 7(a). In *R v Webb; Ex parte Attorney-General Macrossan* CJ (Lee J agreeing) concluded (emphasis added):

‘It is now settled that s 7(a) can include cases where there are several persons acting in concert **each doing some act so that the actions, in totality, would constitute all of the elements** if the offence were committed by one person.’<sup>24</sup>

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<sup>22</sup> *Whitby* [190].

<sup>23</sup> *Whitby* [190].

<sup>24</sup> *R v Webb; Ex parte Attorney-General* [1990] 2 Qd R 275 (283).

32. At common law, a person participates in a joint criminal enterprise by being present when a crime is committed pursuant to that joint criminal enterprise even if only one of the participants performed the act constituting the offence.<sup>25</sup> The principle may not even require presence at the scene for a party to a joint criminal enterprise to be liable, let alone presence in the absence of a relevant act or omission.<sup>26</sup> Those concepts are not to be found in the text of s 7(a) of the *Code*. While participation in an unlawful common purpose is a prerequisite to liability under s 8 of the *Code*, it forms no part of s 7(a). Neither the text of s 7(a), nor the authorities which address its construction, deem a person who is not present when the offence is committed to be a party under that paragraph.

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33. The appellant's submissions on this issue rely upon the decision of this court in *McAuliffe v The Queen*<sup>27</sup> to the effect that the concept of joint criminal enterprise was interchangeable with concepts such as 'common purpose', 'common design' and 'concert.'<sup>28</sup> The flaw in the appellant's submission is that it is premised on the notion that the common law doctrine of joint criminal enterprise is relevant to the interpretation of the party provisions of the *Criminal Code*, particularly s 7(a). It is not.<sup>29</sup> The appellant's submissions do not refer to authorities which deal with the non-application of the doctrine of joint criminal enterprise to the construction of s 7 of the *Code*, let alone advance any argument as to why those authorities are wrong.

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34. The statutory text of s 7(a) of the *Code*, applied to joint offenders, requires nothing more than the joint offenders be acting together in order for their acts to be a series of acts which amount to the commission of the offence. Contrary to the appellant's submissions, the trial judge was not required to direct the jury that at the time the relevant injury was inflicted

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<sup>25</sup> *Osland v The Queen* (1998) 197 CLR 316 [73]; *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-114.

<sup>26</sup> *Osland* [27]

<sup>27</sup> *McAuliffe v The Queen* (114).

<sup>28</sup> Appellant's submissions [44].

<sup>29</sup> *L v The State of Western Australia* [51] to [54]; *Roberts v The State of Western Australia* [2019] WASCA 83 [57].

‘there was an understanding or arrangement amounting to an agreement (which might be inferred) to act unlawfully.’<sup>30</sup>

35. As the Court of Appeal concluded, the jury were instructed ‘on more than one occasion’ that

35.1. it was not enough that the various acts of the appellant and his co-accused, when put together, constituted the charged offence; and

10 35.2. for either the appellant or his co-accused to be criminally responsible as a ‘joint principal’ under s 7(a) of the *Code*, each must have done an act that formed part of the charged offence, which act was part of a series of acts committed with the other of them, while the appellant and his co-accused were acting together.<sup>31</sup>

36. It was unnecessary to direct the jury that there was an understanding or agreement to act unlawfully. The agreement or an understanding to act together need not be for an unlawful purpose, as the question of whether the ‘act’, being a composite of the actions of both the appellant and co-accused, is determined separately from the question of whether the joint ‘act’ is unlawful.<sup>32</sup>

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37. All that was required was that the jury be satisfied, with respect to the accused under consideration, that both accused were ‘acting in combination’, or were ‘collaborating with the other’ or that they had ‘joined forces.’<sup>33</sup> As the Court of Appeal correctly concluded, there was no reasonable possibility that the jury could have failed to have understood these concepts.<sup>34</sup>

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<sup>30</sup> Appellant’s submissions [48].

<sup>31</sup> *O’Dea* [136], CAB 160-161. As to the various occasions upon which the jury were directed on these points see *O’Dea* [127] to [132], CAB 158 to 159.

<sup>32</sup> See the respondent’s submissions above concerning ground one.

<sup>33</sup> *O’Dea* [137], CAB 161.

<sup>34</sup> *O’Dea* [137], CAB 161.

**Part VI – Estimate of length of oral argument**

38. The respondent estimates it will require 1.5 hours for the presentation of the respondent's oral argument.

Dated: 18 February 2021

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L. M. Fox SC

**ANNEXURE – STATUTORY PROVISIONS**

Relevant statutory provisions, in addition to those listed by the appellant, are:

<b>No.</b>	<b>Legislation</b>	<b>Sections</b>	<b>In Force</b>	<b>Version</b>
1.	<i>Criminal Code</i> (WA)	ss 22-34, 36	Yes	Reprint 19