IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No. A28 of 2015

BETWEEN:

EVERARD JOHN MILLER
Applicant

10 and

THE QUEEN
Respondent

RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

Part I: INTERNET PUBLICATION

20 1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: STATEMENT OF ISSUES

2. The Respondent accepts the issue identified by the Applicant (AS [2]) arises in relation to the question of special leave to appeal and submits that the answer to that question is "no". Accordingly, special leave to appeal should be refused.

Part III: NOTICES UNDER s 78B OF THE JUDICIARY ACT

3. The Respondent considers that no notice is required to be given pursuant to s 78B of the *Judiciary Act 1903 (Cth).*

Part IV: FACTUAL BACKGROUND

30 4. The facts are accurately summarised in the judgment of the Court below.[1] The Respondent adopts the factual background in his written submissions filed on 25 January 2016.

Part V: SUMMARY OF ARGUMENT - Leave to Amend Notice of Appeal

5. The Respondent relies on, without repeating, the arguments made in the written response to the same proposed ground of appeal in the submissions in relation to the

[1] [2015] 122 SASR 476 at AB1763-1769:[2] – [34]; AB1770:[42] – [44]

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co-offenders Mr Smith and Mr Presley. In addition, the Respondent adds the following submission, which addresses additional arguments raised specifically by this Applicant.

6. The Applicant's primary argument (AS [29][37] – [39]), unlike that of the Applicants Smith and Presley, is not that *Jogee* gives rise to the need to reconsider *McAuliffe*, but rather that *McAuliffe*, properly understood, sits consistently with *Jogee* and requires intention on the part of the accused.[2] That is, the *ratio decidendi* of *McAuliffe* is that if D2 contemplates or foresees that D1 might, in the course of committing crime A, also commit crime B, D2 must *also intend* to *assist* D1 to commit crime B or *encourage* D1 to commit crime B.

7. If the Applicant contends that *McAuliffe* stands for that *ratio*, that argument was available at both trial and on appeal to the CCA, and he should have run that argument below. No complaint was made, either at first instance or on appeal about the directions being erroneous in this regard. The Applicant has not explained why he did not do that; nor does the Applicant explain how, in light of that, it is nevertheless appropriate for special leave to be granted, at least on this submission. Nor, in those circumstances, has the Applicant explained why this argument provides a basis to reconsider *McAuliffe*.

8. In any event, the Applicant's submission as to the ratio in *McAuliffe* is misconceived.

Ratio in *McAuliffe*

9. This Court in *McAuliffe* was considering the correctness of the trial judge's direction in relation to the accused Sean McAuliffe which was as follows:[3]

> *"Next, you must be satisfied beyond reasonable doubt that the accused [ie Sean McAuliffe] either shared that common intention of inflicting grievous bodily harm upon him or contemplated the intentional infliction of grievous bodily harm by one or other of them upon him was a possible incident in the common criminal enterprise."*

10. It was argued by the appellants that this direction was incorrect because it did not require the prosecution to prove that the intentional infliction of grievous bodily harm was something which was tacitly or expressly agreed between *both* parties.[4]

11. The Court in *McAuliffe* upheld the trial judge's directions. The Court concluded that if one party (D2) to a joint criminal enterprise foresees the possibility of, *but does not agree to*, another crime being committed, and continues to participate in the venture

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[2] Whilst the Applicant says that he adopts the applicant Smith submissions filed on 23 March 2016 and the applicant Presley submissions filed that same day, he says that he refines those submissions as articulated in his submissions (at [20])

[3] The direction in relation to the other accused, David McAuliffe was to the same effect: see *McAuliffe* (1995) 183 CLR 108 at 113

[4] *McAuliffe* (supra) at 113

regardless, D2 is criminally culpable for that second crime (crime B); the culpability lying in the participation in the joint criminal enterprise with the necessary foresight.[5]

12. In light of that, to argue, as the Applicant has done, that an intention to assist or encourage the other party to the joint criminal enterprise (D1) to commit crime B, is the *ratio decidendi* of *McAuliffe* is accordingly flawed for four reasons.

13. *First*, the submission is not borne out by a proper reading of the judgment. The culpability lies in the *participation* in the joint criminal enterprise with the necessary foresight. The Applicant's interpretation adds an additional element of *mens rea* to proof of an extended joint criminal enterprise (over and above participation with the necessary foresight). There was no discussion in *McAuliffe* of a requirement that D2 must also *intend* to *assist* or *encourage* D1 to commit crime B. To say that this nevertheless formed part of the *ratio* of the case is novel and with respect erroneous. The argument puts a gloss to the reasoning in *McAuliffe* which cannot be sustained. It finds no support in the judgment. *McAuliffe* has repeatedly been considered and applied by this Court, and not surprisingly, the decision has never been interpreted in the manner now contended for by the Applicant.

14. *Second,* the Applicant's argument is contrary to the reasoning in *McAuliffe* and the rationale underpinning this basis of liability. *McAuliffe* was specifically concerned with whether, where there is an agreement to commit an unlawful act, individual foresight of a possibility (being crime B being committed by D1) was sufficient *mens rea*, even though D2 may not have agreed to crime B being committed.[6] If the Court is considering a situation where D2 did not agree to or want D1 committing crime B (but continued to participate with the relevant foresight), it would be illogical to require proof of an additional element, that D2 also intended, nevertheless, to assist or encourage D1 to commit that crime. That is not a conclusion which logically flows from the reasoning in *McAuliffe.* It ignores the basis on which D2 is culpable for crime B; the continued participation in the agreement to commit a crime with the necessary foresight.[7]

15. *Third,* there is no basis to contend, as the Applicant does, that the Court's reasoning in *McAuliffe* required proof of an additional intention on the part of D2, to assist or encourage D1 to commit crime B, simply because the Court emphasized that D2's culpability lay in *participating* in the joint criminal enterprise with the necessary foresight.[8] The additional element contended for cannot be extrapolated from the term "*participation*". Reference to participation in the context of an extended joint enterprise is not the same as reference to a requirement that D2 intends to assist or encourage D1

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[5] *McAuliffe* (supra) at 117-118
[6] *McAuliffe* (supra) at 115-117 and see: *Gillard v The Queen* (2003) 219 CLR 1 at [112]
[7] And see *Clayton v The Queen* (2006) 81 ALJR 439 at [20]
[8] *McAuliffe* (supra) at 117-118

to commit crime B. Proof of the former does not involve proof of the latter. As this Court held recently in *Huynh v The Queen*:[9]

> *"A person participates in a joint criminal enterprise by being present when the crime is committed pursuant to the agreement. ... However, proof that an appellant was a party to an agreement ... [does] not depend upon proof that he had engaged in any particular conduct at the scene."*

16. What is involved in "participation" is presence at the scene pursuant to the agreement with the necessary foresight. Nothing more need be proved (although more may be helpful, of course, to prove the relevant agreement in the joint criminal enterprise).[10] This concept is entirely different from a requirement that a person "assist or encourage" another in the commission of an offence. For a person to do that, something more than presence at the scene (pursuant to the agreement) is required. The Applicant in his submissions does not propose any explanation for this inconsistency.

17. As noted above, it is the continued participation in the agreed criminal venture with the relevant foresight as to the possible results of the venture which forms the basis of culpability in an extended joint criminal enterprise.[11] Given the basis of culpability, and the meaning of participation in that context, there is no basis in law (certainly not in *McAuliffe*) or logic for requiring proof of the additional mental element contended for by the Applicant.

18. *Fourth,* a requirement that D2 intends to assist or encourage D1 to commit crime B clearly adopts the language of aiding and abetting. In *Giorgianni v The Queen*[12] Wilson, Deane and Dawson JJ explained aiding and abetting as follows:

> *"Aiding, abetting counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence."*

19. As such, what the Applicant seems effectively to be doing in his submission is to either apply the law of aiding and abetting as a component of extended joint criminal enterprise, or he is conflating the two different concepts.[13] Whichever way the argument is put by the Applicant, it is legally incorrect. The Applicant does not address or grapple in his submissions how exactly the requirement of an intention to encourage or assist another to commit crime B sits coherently within the law of joint criminal enterprise as it currently stands in Australia. This complexity has, rather, been glossed over by the Applicant in his submissions. The Respondent has explained in his written submissions

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[9] (2013) 87 ALJR 434 at [38]-[39]
[10] Ibid at [39]
[11] See *Gillard v The Queen* (supra) at [112]
[12] (1985) 156 CLR 473 at 506
[13] See *Gillard v The Queen* (supra) at [109]

filed in Smith and Presley why the law of aiding and abetting is a distinct concept to that of joint criminal enterprise, and why it cannot simply be applied to that doctrine.[14] With respect, there is no basis for this Court to accept the Applicant's submissions in this regard; the Court in *McAuliffe* was clearly alive to the differences between aiding and abetting and joint criminal enterprise,[15] there is nothing in the reasoning of that case which suggests that the Court had any intention of conflating the two areas of law.

Consistency with *Jogee*

20. If the Court accepts the Respondent's submissions as to the ratio in *McAuliffe* then the Applicant's contention that *McAuliffe* sits consistently with *Jogee* falls away.

21. The reasons why the restatement of principles in *Jogee* are inconsistent with *McAuliffe,* or why they should not be applied in Australia, are comprehensively explained in the Respondent's written submission in Smith and Presley. [16]

Summing up for Miller

22. The summing up in relation to the Applicant (AS [46] – [48]) is in accordance with the well accepted interpretation of *McAuliffe*.

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[14] See Respondent Smith's submissions filed 13 April 2016 at [61]-[66] and see [76]-[78] as well as [51]-[60]
[15] See at 113-114 and note that when the Court referred to aiding or abetting the Court cited *Giorgianni v The Queen* (at 114 fn 13)
[16] See Respondent Smith's submissions filed 13 April 2016 at [70]-[78]; Respondent Presley's submissions filed 13 April 2016 at [24]-[41]