IN THE HIGH COURT OF AUSTRALIA No. A 30 of 2012

ADELAIDE REGISTRY

BETWEEN:

TUAN KIET DAVID HUYNH
Appellant

and

THE QUEEN
Respondent

APPELLANT'S WRITTEN SUBMISSIONS

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PART I: PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. Whether the Court below erred in law in not holding that the trial judge erred in failing to direct (either in the oral summing up, or in the written redirection) that liability by way of joint criminal enterprise required proof of an act of participation in the joint enterprise by the appellant Huynh?

3. Whether the Court below erred in law in not holding that the oral summing up and written redirection were also, or alternatively, fatally flawed on account of their failure to apply the legal directions to the evidence and case against the individual accused, and in particular the appellant Huynh ?

PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (Cth)

4. The appellant has considered whether a notice should be given pursuant to s78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV: CITATION

5. The reasons of the Court below on the appeal are reported as *R v Duong & Ors* (2011) 110 SASR 296.

PART V: NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

6. After a trial before a jury, the appellant and his two co-accused, Chansyna Duong and Rotha Sem, were each convicted of murder.

7. The deceased, Thea Kheav, was killed when fatally stabbed in the course of one of two brawls which occurred at the end of an 18th birthday party for Richard Nguyen (held at his parents' house one night in December 2007). The brawls followed the arrival at the party of a group of people travelling in between two and five cars, and numbering between 10 and 40 people. It was accepted that the three accused had returned to the Nguyen house prior to the brawls, however, the extent (if any) of their involvement thereafter in the relevant events was in dispute.

8. The appellant and his co-accused received mandatory sentences of life imprisonment. On 14 April 2011 the trial judge fixed the minimum non-parole period of 20 years for the appellant, commencing on 25 November 2010. His Honour noted that at the time of sentencing the appellant was 22 years of age. The appellant was therefore only 18 or 19 at the time of the events in question.

Overview of the Facts

9. The basic facts leading up to the brawls are set out in Doyle CJ's reasons (**CCA**) at [3]-[18], with which Vanstone and Peek JJ agreed.

10. The appellant, together with Sem, Duong, and a number of others had been at the party at the Nguyen house earlier in the evening.[1] A group, including the appellant and Duong, left and went to Duong's house.[2]

11. Sem stayed at the party and became involved in a verbal altercation with Rithy and Tha Kheav.[3] Sem then returned to the Duong house. He told some of the people there what had happened.[4]

12. According to the witness Ms Francis, Sem was angry and wanted to go back to the party at the Nguyen house. Ms Francis said that Sem might have said "Let's go get them". She said that as the group began to leave the Duong house, she heard someone (she did not know whom) say "Get a knife".[5]

13. The group, or most of them, returned to the Nguyen house in several cars.[6] Witnesses said that they saw between two and five cars, and between 10 and 40 people, arrive at the Nguyen house.[7]

14. Members of the group were armed with various items.[8] Witnesses described Duong and Sem as arriving with pieces of wood and bottles respectively.[9]

15. There was evidence that Duong hit Thea Kheav with a bottle, causing him to fall to the ground, on the roadway outside the Nguyen house.[10] The attack on Thea Kheav continued, with people punching and kicking him.[11]

16. Thea Kheav then got up and made his way to the gate. He tried to climb over the gate, but was pulled from the gate. The attack on him continued.[12]

17. The deceased, Thea Kheav, suffered a number of injuries, but there was only one stab wound, and that was the fatal wound.[13] It is likely that Thea Kheav was fatally stabbed

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[1] CCA [8].
[2] CCA [8].
[3] CCA [9].
[4] CCA [11].
[5] CCA [11]; Francis T901-902.
[6] CCA [11].
[7] CCA [12].
[8] CCA [13].
[9] CCA [13].
[10] CCA [14].
[11] CCA [14].
[12] CCA [16].
[13] CCA [17].

during the second brawl, near the gate.[14] It was the prosecution case that the stabber was Duong,[15] although the trial judge summed up to the jury on the basis that there was a very real possibility that Kimlong Rim (or another unidentified person) was the stabber.[16]

The Prosecution Case

18. The prosecution case was that each accused might be found guilty of murder on four different bases: as a principal (the stabber); as an aider and abetter of the stabber; as a participant in a joint enterprise with the stabber; or on the basis of an extended joint enterprise.[17]

19. The prosecution case was that Thea Kheav was stabbed either on the roadway outside the Nguyen house (the first location), or near that gates that Thea Kheav tried to climb (the second location). As the Court below accepted, the evidence pointed towards the second location.[18] However, the different bases of liability had to be considered in relation to both locations.

20. The prosecution case on joint enterprise, as left to the jury, entailed an agreement (to which the appellant was a party) to use a knife or similar bladed weapon to kill or cause really serious bodily harm to a person or persons at the Nguyen house. It contemplated that the agreement might have been made (a) at the Duong house; (b) on the way to the Nguyen house; (c) on arrival there, or (d) during either of the brawls as they unfolded at the Nguyen house.[19]

The Case against the Appellant

21. The evidence as to what each accused did at each stage differed.[20]

22. As is apparent from the summary of the evidence against Duong and Sem in the reasons of Doyle CJ,[21] there were a number of witnesses who gave evidence relevant to the cases against these two accused. There was evidence that both were armed, and involved in the brawls. There was evidence, for example, from Johnny Lam that he heard Sem (at the Nguyen house) say "I'm going to fuck this cunt up".[22] There was

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[14] CCA [16].
[15] T1796.26; T1799.32; T1801.6.
[16] SU125.
[17] CCA [153].
[18] CCA [153].
[19] CCA [153].
[20] CCA [154].
[21] CCA [20]-[21] in relation to Duong, and CCA [22] in relation to Sem.
[22] CCA [22]; J Lam T1310-1311.

evidence from Ms Francis that Sem (at the Duong house) might have said "Let's go get them", and that Duong was with Ms Francis at the time.[23]

23. In relation to the appellant, Huynh, on the other hand, there was no evidence that he heard anyone say "Let's go get them" or "Get a knife" at Duong's house. Nor was there any evidence to suggest that he heard Sem (at the Nguyen house) say "I'm going to fuck this cunt up." The appellant travelled to the Nguyen house in his Nissan car. There was no evidence as to the passengers or conversation in that car. There was no evidence of the discussion or sighting of weapons in the appellant's presence.

24. As to the appellant Huynh's involvement in the brawls, despite the large number of witnesses, only three gave any evidence of involvement by him.[24]

    24.1. In relation to the first location (the roadway), Ms Pavic said that she saw Huynh and Kimlong Rim hit Thea Kheav and throw bottles at him after Sem hit him on the head with a bottle. When Thea Kheav was on the ground, Ms Pavic saw Huynh continue to hit him.[25]

    24.2. In relation to the second location (the gates), Johnny Lam said he saw Huynh pulling Thea Kheav off the gates as he was trying to climb over them. He saw Huynh swing at Thea Kheav with a piece of wood.[26]

    24.3. Also at the second location, Rithy Kheav (the deceased's brother) said he saw Duong *and* Huynh stab Thea Kheav[27] (despite, of course, there being only one stab wound).

25. It followed from the differing evidence against each accused, that the case against each differed. The Court below summarised the differing cases (CCA [159]-[161]).

    25.1. As the Court explained, it was the case for the appellant Huynh that it was a reasonable possibility that he was not involved in any of the attacks on Thea Kheav; that the witnesses who had identified him were unreliable or dishonest.[28]

    25.2. This was in sharp contrast to the cases for the other accused.

    25.3. In relation to the accused Sem, while there was evidence that he arrived back at the Nguyen house with people armed and ready to fight, his case was that

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[23] CCA [11]; Francis T901.
[24] CCA [23].
[25] Pavic T842-843.
[26] J Lam T1316-1318.
[27] R Kheav T476-480, T521-522.
[28] CCA [161]; T2031-2039.

his only involvement was at the roadway, that he had withdrawn from any joint enterprise before the brawl moved to the gates, that he was not involved in the brawl at the gates where the fatal injury was inflicted, and that what happened at the gates was completely unexpected.[29]

25.4. In relation to Duong, different issues again arose, not least because the prosecution case included the possibility that he was the principal, ie the stabber.

26. Returning to the case against the appellant Huynh, at trial, and in the Court below, he relied on both the paucity of the evidence against him, and a challenge to the reliability of the evidence of the three witnesses who identified him as involved.

26.1. As to Ms Pavic, while at one point she appeared to suggest that Huynh kicked and threw bottles at the deceased, in cross examination she agreed that maybe Huynh did not have a bottle, and that she might have been wrong about the kicking, having acknowledged that she said nothing in her March 2008 police statement on these topics.[30]

26.2. As to Johnny Lam, there were differences between the content of the statement he had given to the policy in January 2008, and what he had said about Huynh's involvement during the course of a photo identification in August 2008. When asked about the discrepancies, he said that on the latter occasion he had just woken up – even though the identification took place late afternoon.[31]

26.3. As to Rithy Kheav, a brother of the deceased, the trial judge warned the jury several times of the need for particular care in relying upon his evidence.[32] As trial counsel for Huynh put in his closing address, Rithy Kheav's evidence was inconsistent, contradicted, unreliable and incredible in several respects.[33] RIthy Kheav had not mentioned Huynh as a stabber until the first aborted trial, some weeks before the trial the subject of this appeal. At the photo identification in August 2008 he said Huynh hit Thea Kheav and made no mention of Huynh stabbing. When asked why he also did not mention Huynh as a stabber in his police statement of 21 December 2007 (some three years

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[29] CCA [160].
[30] Pavic T879, T891-892.
[31] CCA [27]-[31]; J Lam T1382-1383.
[32] Summing Up 100.3, 101.9, 102.4, 123.2 and 124.2.
[33] T2031-2034.

earlier), he said "maybe I forgot" and that he was "too busy in his life", also adding that he had tried to put it in the statement but that he couldn't or didn't have time.[34] He said there were two, or continued, stabbings despite there being only one stab wound.[35] The suggestion that Huynh was a stabber was, of course, contrary to the prosecution case that Duong was the principal, and the trial judge's summing up to the effect that it might also have been Kimlong Rim.

27. Drawing these threads together in the context of the case against Huynh, if the jury were to put to one side the evidence of Rithy Kheav on the basis of its difficulties (including its inconsistency with the prosecution case) and the evidence of Ms Pavic (on the basis that it related to the roadway rather than the gates), then the case against Huynh depended upon the jury accepting the evidence of Johnny Lam. As will be developed below, the jury never had the 'threads drawn together' for them in this very stark way (or at all) to assist them in assessing the case against Huynh.

The Trial and Directions

28. The trial was a lengthy one. The jury was empanelled on 14 October 2010. They returned their verdicts on 25 November 2010, the 21st day of the trial.[36]

29. The trial judge began to sum up late on the afternoon of Monday, 22 November 2010. The summing up resumed the next morning. The jury retired to consider their verdict at about 3.15pm on the Tuesday.[37] Slightly before 4pm (ie after only 40 minutes) the jury returned with a question.[38] The trial judge recounted the question to counsel in the following terms:[39]

> The jury has asked if they could have a written description explaining the components of murder, joint enterprise and aiding abetting and manslaughter, as related to the law to refer to whilst deliberating.

30. Some discussion ensued with counsel, before the Court was adjourned for the day.[40] The following morning (Wednesday), one of the jurors was unwell, and the written redirection or *aide memoire* was the subject of submissions by counsel and was not

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[34] R Kheav T644.
[35] R Kheav T626-627.
[36] CCA [25].
[37] CCA [80].
[38] CCA [80]; SU141.
[39] SU141.
[40] SU154.

ready to be provided to the jury. The trial judge again released the jury and adjourned the trial to the Thursday.[41]

31. On the morning of Thursday, 25 November 2010 the trial judge gave the jury the document they had requested, and read it to the jury.[42] The document was 17 pages long, and contained sections addressing the legal elements of murder, unlawful and dangerous act manslaughter, aiding and abetting (addressing murder and manslaughter separately), joint enterprise murder, extended joint enterprise murder, joint enterprise manslaughter, extended joint enterprise manslaughter and self defence.

32. The jury retired at 10.56am,[43] but then returned so that the trial judge could clarify some matters before retiring again at 11.05am. The jury returned their verdict of guilty in respect of each accused at 3.09pm.[44]

PART VI: SUCCINCT STATEMENT OF ARGUMENT

33. As set out above, the grounds of appeal raise two issues for consideration.

    33.1. The first relates to the trial judge's omission to direct as to the requirement of 'participation' in respect of joint enterprise liability.

    33.2. The second relates to the failure of the trial judge to apply the legal directions to the evidence against the individual accused, and in particular the appellant Huynh.

The First Issue: 'Participation' in Joint Enterprise Liability

34. The Court below acknowledged that 'participation' is an element of joint enterprise liability, and that the trial judge did not identify this as a separate element to be proved in either the oral summing up, or the written redirection.[45]

35. However, the Court rejected the submission that this involved an error of law, apparently on the basis that in the circumstances of this case there was no risk at all that the jury found any one of the accused guilty without finding that the accused participated in the joint enterprise to kill or to cause really serious bodily harm to Thea Kheav.[46]

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[41] CCA [80]; SU155
[42] CCA [80]; SU206.
[43] SU223.
[44] SU227.
[45] CCA [97].
[46] CCA [98]-[99].

36. As Doyle CJ explained:[47]

> As I understand it, the case was based on the conduct of the three accused from which the jury might infer, as the prosecution suggested, an arrangement or understanding to kill Thea Kheav or cause him serious bodily harm, and the carrying out of that arrangement. The issue was whether, from what the accused did, the jury were prepared to find that the necessary arrangement or understanding was made. Any such finding was necessarily based on evidence that amounted to proof of the making of the arrangement or understanding and participation in it.

37. His Honour went on to say:[48]

> ... Participation in any agreement or arrangement was not the issue in this case. The real issue was what the jury made of the conduct of the accused, and whether that conduct established the relevant agreement or arrangement. If it did, it did it by establishing conduct that amounted to participation.

38. The appellant contends that the Court below erred in not concluding that the failure to direct the jury in relation to the essential element of participation (strictly, participation with the necessary foresight) was an error which ought to have been fatal to the verdict.

39. The suggestion that it was not necessary to direct as to participation because the jury must have inferred any agreement from the appellant's participation is not an answer for at least three reasons.

39.1. First, a failure to direct as to an essential element of an offence (at least where, as here, it has been put in issue) constitutes an error of law which is fatal to a verdict, subject only to the application of the proviso. (The Court below did not invoke the proviso, but in any event there would have been no basis for doing so in circumstances where the jury was invited to determine guilt on the basis of proof of matters which did not include the essential element of participation.[49])

39.2. Secondly, it cannot be said that the jury must have inferred agreement from participation in circumstances where the case put by the Crown, and left to the jury by the trial judge, encompassed scenarios in which agreement might be inferred from evidence separate from, and earlier in time than, any participation of the accused in the brawls.

39.3. Thirdly, in any event, reasoning that the jury must have inferred an agreement from participation is to use 'participation' in the loose sense of involvement in the brawl(s) rather than 'participation' in the sense of the legal element of joint

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[47] CCA [100].
[48] CCA [102].
[49] *Handlen v The Queen* (2011) 86 ALJR 145 at [46]-[47].

enterprise liability (requiring an act or acts in furtherance of the joint enterprise with the necessary foresight).

40. To the extent that the trial judge made any reference to 'participation' in his summing up and written direction, it was in the loose (and somewhat confusing) contexts of either 'involvement in the brawls' or 'party to the agreement or joint enterprise', and not in the sense of the legal element.

Joint Enterprise Liability – 'Participation with the Necessary Foresight'

41. It was an essential element of joint enterprise liability that the jury be satisfied beyond reasonable doubt that Huynh 'participated' in the joint enterprise, ie that he engaged in an act or acts in furtherance of the relevant agreement, with the necessary foresight (ie as to the use of a knife or similar bladed weapon to kill or cause really serious bodily harm).

42. The element of participation was recently confirmed by this Court in *Likiardopoulos v The Queen* [2012] HCA 13 at [19], where it was observed that joint enterprise liability requires the accused's "participation in the enterprise while possessed of the requisite intention".

43. The requirement of participation in the enterprise with the necessary foresight has also been confirmed in a number of earlier authorities.[50]

44. For example, in *McAuliffe v The Queen* (1995) 183 CLR 108 at 118 the Court said:

> ... the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresigh is that of an individual party or is shared by all parties.

45. This statement of the law was referred to with approval by Hayne J in *Gillard v The Queen* (2003) 219 CLR 1 at [110]-[112].[51]

Summing Up / Written Direction as to 'Participation'

46. The Court below accepted not only that 'participation' was an element of joint enterprise liability, but also that the trial judge did not identify it as a separate element: CCA [97].

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[50] Including *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Gillard v The Queen* (2003) 219 CLR 1 at [110]-[112] per Hayne J (with whom Gleeson CJ and Callinan J agreed at [10], and Gummow J agreed at [31]); *R v Taufahema* (2007) 228 CLR 232 at 238 [7], *Clayton v* R (2006) 81 ALJR 439 at 443 [17], *Osland v R* (1998) 197 CLR 316; *Arafan v R* (2010) 206 A Crim R 216; [2010] VSCA 356 at [24]; *Likiardopoulos v R* (2010) 208 A Crim R 84; [2010] VSCA 344 at [59]; Gillies, *The Law of Criminal Complicity* (1980), pp96-102.

[51] With whom Gleeson CJ and Callinan J at [10] and Gummow J at [31] agreed.

47. There can be no doubt about this omission. To the extent that the trial judge made reference to participation at all, it was only in passing, and generally in the different and loose senses of 'involvement' in the brawls or being a 'party' to the relevant agreement.

48. In relation to the summing up:

48.1. In describing the legal basis for joint enterprise liability (SU63-65), the trial judge made reference to the "implementation" of an arrangement previously agreed (SU64), and to the need for "involvement" beyond mere presence (SU65). The former was a general reference to the need for a finding that the agreement or arrangement was implemented, rather than the need for acts of implementation (let alone participation with the necessary foresight) on the part of each accused. The latter was in the context of distinguishing 'mere' presence from presence pursuant to an agreement. Neither was a clear reference to the element of participation with the necessary foresight.

48.2. The trial judge also referred to the need for "proven conduct" and "proven acts" to show that the accused were party to a plan (SU66); and to the question being whether the accused "agreed to join in" (SU69) and "agreed to participate" (SU71). These references were in the context of inferring agreement from conduct (ie in the context of consideration of the element of agreement) rather than in the context of a separate element of participation.

48.3. Further, when his Honour came to summarizing the evidence relating to joint enterprise liability (SU103-125), he did not ever clearly address the issue of participation. The reference at SU103 to "participants" was in the sense of parties to the agreement or joint enterprise, and the reference at SU107 to "participate" was in the loose sense of involvement in the relevant events. While his Honour referred to the requirement of "participation" (SU123), the overwhelming focus of his Honour's address was upon whether there was an agreement, and the parties to it (ie who "threw their lot in", to use his Honour's terminology).

48.4. In any event, regardless of how the jury might have understood the above references, the concluding passage of the trial judge's summing up in relation to joint enterprise was apt to lead them into error. In summarizing the position in relation to joint enterprise liability (SU125-126), the trial judge directed the jury as follows:

> Ladies and gentlemen, it will be evident to you from all that I have said particularly about joint enterprise and aiding and abetting, that the very real possibility, and it remains a very real possibility that Kimlong Rim or yet another unidentified person murdered Thea Kheav by stabbing him would not necessarily excuse the accused of murder. It would not excuse them if the prosecution have proved that the accused or any one of them contemplated that someone might use a knife to cause grievous bodily harm, that is, it does not matter who that other person was, Kimlong Rim or someone else, as long as it was a person who had thrown in their lot in a criminal enterprise in the way that I've described it.
>
> So let me just repeat, if the prosecution have proved beyond reasonable doubt that the accused or any one of them did contemplate the use of a knife to intentionally cause grievous bodily harm, the accused, or that particular accused is guilty of murder ...

48.5. Thus, in summarising joint enterprise liability, the trial judge overlooked any reference to the need for a finding of participation with the necessary foresight, thus encouraging the jury to find joint enterprise liability without requiring a finding that the relevant accused participated (ie, engaged in an act in furtherance of the enterprise with the necessary foresight).

49. In relation to the written redirection:

49.1. It was clearly deficient. It identified four elements of joint enterprise murder, which did not include "participation with the necessary foresight".

49.2. The redirection in relation to joint enterprise murder (page 8 of the written redirection) should have included an element between the paragraphs numbered 1 and 2 making it clear that a further element was a finding beyond reasonable doubt that the appellant participated in the enterprise with foresight of the use of a knife or other bladed weapon to kill or cause really serious bodily harm to a person or persons at the Nguyen house.

49.3. It used the word "participant(s)" (page 8), but did so in the different (and somewhat confusing) sense of an accused being a party to the relevant agreement, and not necessarily someone who has done an act in furtherance of the enterprise with the necessary foresight.

49.4. Prior to reading the written redirection to the jury, the trial judge said that one of the questions the jury needed to consider was "What did the accused actually do and with what intention did he do it ?" (SU207) While this invited the jury to consider the accused's conduct and intention, it was one of a number of very general questions by way of general introduction to the written redirection canvassing all heads of liability. It was not directed to joint enterprise liability, and was in no way a substitute for a direction as to the element of participation with the necessary foresight.

50. By way of summary, to the extent that participation was mentioned at all, the oral summing up (and the reasoning of the Court below) tended to conflate involvement with participation. The trial judge's passing references to participation were thus apt to confuse the jury rather than to cure in some way the omission to refer to the element of participation in the summing up and written redirection.

51. Even if the passing references in the oral summing up would otherwise have been sufficient, the subsequent prominence given to a 'list' of the elements in the written redirection, which list did not include 'participation' as an element, rendered the trial judge's directions defective.

52. The problem was compounded when the written redirection used the word participant to describe persons who were parties to the relevant agreement or plan. In this way, the written redirection would have led the jury into error in that it suggested that to the extent that they had gleaned from the summing up that it was necessary to consider 'participation', they would have understood from the written redirection that it was sufficient to make out participation that the accused was a party to the agreement or plan.

53. While, as a general proposition, a written redirection should be read against the background of the oral summing up (rather than be afforded primacy over the oral summing up), it is significant here that:

53.1. the written direction was in the nature of a written redirection to a jury in response to a question indicating some degree of uncertainty as to the legal elements they were required to consider, as opposed to an *aide memoire* provided to the jury at the outset for them to consider while listening to the oral summing up (*R v McKechnie* (1992) 94 Cr App R 51 at [63]) and hence in circumstances where the relationship between the written direction and the summing up will be clear;

53.2. the practical reality of the provision of a written redirection is a tendency to assume undue prominence as something akin to a checklist, or a short cut or "answer" to the case – not least because a written summary becomes a permanent record which may be before the jury for hours.[52] This serves not only to enhance the significance of errors in a written direction, but also to

[52] *R v Muir* [2009] SASC 94 at [40]-[42] per Sulan J, at [68]-[69] per Vanstone J, applying Duggan J's earlier observations to this effect in *R v Tulisi* (2008) 258 LSJS 428; [2008] SASC 306 at [55]; *R v M* [2000] 1 WLR 421 at 433-434; *Hurst v Tasmania* [2011] TASCCA 12 at [21].

create a tendency to approach the case at a level of abstraction which is divorced from, and may overlook consideration of, the factual issues relevant to the resolution of the case.

Inferring Agreement from Participation

54. For the three reasons set out earlier, there was no basis for holding that the failure to direct as to the element of participation was not productive of error.

55. In relation to the second of these reasons (ie the suggestion that there was no risk of a jury having found an agreement without finding participation because the former could only be inferred from the latter), the Court below erred in conflating the quite distinct issues of whether (i) there was an agreement to inflict really serious bodily harm or kill the deceased (and that the stabber was a party to the agreement); (ii) the particular accused was a party to the agreement; and (iii) the particular accused participated by committing an act in furtherance of the agreement with the necessary foresight. Different evidence may be admissible in respect of each.[53]

56. But even if it be accepted that the fact that a person is a party to an agreement may, in some cases or situations, be inferred from participation, it is another thing altogether to hold, as the Court below did here, that this was the *only* way the jury could have reasoned. It is an erroneous holding in circumstances where the jury was expressly invited to consider finding an agreement based on evidence other than (and prior to) any participation in the brawls.

57. As mentioned, the Court below acknowledged (CCA [153]) that the prosecution case on joint enterprise contemplated an agreement or arrangement that might have been made (a) at the Duong house, (b) on the way to the Nguyen house, (c) on arrival at the Nguyen house, or (d) during the brawl as it unfolded at the Nguyen house.

58. Not only was this the prosecution case, but also the trial judge's summing up expressly invited the jury to find an agreement based upon evidence other than participation. For example, the trial judge (SU104-105) expressly raised the possibility of the jury finding that the men, including the accused, at the Duong house had heard reference to a knife; that they left the Duong house with the aim of assaulting the persons at the Nguyen house; that they might have seen and discussed the weapons that their group had with them. The trial judge continued in a similar vein at SU106 raising various possible bases for inferring an agreement prior to arrival at the Nguyen house. It was

[53] *Handlen v The Queen* (2011) 86 ALJR 145 at [4], [54]-[55]; *Tripodi v The Queen* (1961) 104 CLR 1 at 6-7; *Ahern v The Queen* (1988) 165 CLR 87 at 94-95, 99; Gillies, *The Law of Criminal Complicity* (1980), pp259-266.

only subsequently at SU107 that the trial judge turned to the possibility of inferring knowledge of a bladed weapon (and, it would seem, agreement to use the same) during the course of the brawls.

59. Similarly, the prosecution closing address expressly invited the jury to find an agreement or joint enterprise based upon evidence other than (and prior to) participation. For example, the prosecutor said:[54]

> Their actions, their behaviours, tell us what they were really up to. It shows that they formed the intention to assault the Kheav brothers, to seek retribution back at Mr Duong's house. We have got clear evidence of that from Kathleen Francis. But the evidence builds from there.
>
> The evidence builds with the reference to the knife as they are leaving. It builds from the fact that they got out of the care with weapons. It builds with the fact that they arrive en masse, demonstrated by their behaviour when they pull up in convoy in Pearson Street; demonstrated by the fact that they moved from Pearson Street down to the party as a group, yelling, running, throwing bottles, carrying weapons. The way they did that, the manner in which they did that, proves not only a joint enterprise I suggest between them to attach the people at the party, but it tells us something about the scope of that plan, about what their true intentions were.

60. It follows that the Court below erred in excusing the trial judge's failure to direct the jury as to the requirement of participation. Not only was this an essential element of any joint enterprise liability, but further it was not correct for the Court below to reason (as it did at CCA [102]) that participation was not in issue. As the Court later observed, when summarizing the case against each of the accused (CCA [161]), participation was a central issue in the case for the appellant Huynh.

61. Further, and in any event, while it may well be that this case can be characterized as one where the relevant agreement or plan *might* be inferred from participation, it is another thing altogether to posit a case where the agreement *can only*, or *must* have been, inferred from participation. To assume that the jury reasoned from participation to infer agreement is inappropriate.[55]

62. More fundamentally, in the circumstances of this case, to make such an assumption would also be to ignore the nature of the prosecution case. The Crown and the trial judge through his summing up had expressly invited the jury to find an agreement on bases which were not confined to inferring it from participation.

The Second Issue: Failure to Distill, and Apply the Legal Directions to, the Case against Huynh

63. The evidence as to what each accused did at each stage of the events differed.[56] The evidence against each is summarized in the reasons of the Court below: CCA [20]-[23].

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[54] T1811-1812.
[55] *Santos v R* (1987) 61 ALJR 668; *Handlen v The Queen* (2011) 86 ALJR 145 at [46]-[47].
[56] CCA [154].

64. Likewise, the case for each of the accused differed. Again the three separate cases are summarized in the reasons of the Court below: CCA [159]-[161].

65. Despite these differences, the trial judge confined himself to a narrative style summing up in relation to the facts. He did not ever distill for the jury the evidence and case relevant to each accused, and in particular the appellant. He did not ever direct the jury as to how they should apply, or link, his directions as to the law to the case and evidence against the individual accused.

66. This error was compounded by the provision of the written redirection. Despite a question from the jury indicating a degree of uncertainty, and requesting an explanation, the written redirection made no attempt to link the legal directions back to the case and evidence relevant to the individual accused. Indeed, by providing the jury with a recast 'list' of the elements of each of potential heads of liability, the written redirections, if anything, encouraged the jury to reason in a general or abstract way, without any guidance as to how the cases of the individual accused should be approached.

The Need to Distill, and Apply the Legal Directions to, the Case against each Accused

67. A fundamental aspect of the task of the trial judge in summing up is to not only summarise the legal issues and the evidence, but also identify the real issues in the case and the facts relevant to those issues, and to provide an explanation as to how the law applies to those facts.[57]

68. It is not necessary for the trial judge to identify every piece of evidence or argument relevant to the accused.[58] On the other hand, it is not sufficient for the trial judge to give a general exposition of the law, followed by a summary of the evidence in chronological form. There must be a collection or crystallization of the evidence relating to the various ingredients of the offences in question, with a brief outline of the arguments relevant to that evidence.[59]

69. While the above is true of any summing up, it is particularly critical in the case of a trial of multiple accused where the evidence relevant to each is quite different, and raises quite different issues. A separate crystallization of the case against each accused is required.

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[57] *Fingleton v The Queen* (2005) 227 CLR 166 at 197 [47] per McHugh J; *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ; *RPS v The Queen* (2000) 100 CLR 620 at 637 [41] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ.
[58] *Domican v The Queen* (1992) 173 CLR 555 at 561.
[59] *R v Zorad* (1990) 19 NSWLR 91 at 105.

70. As Street CJ explained in *R v Towle* (1955) 72 WN (NSW) 338 at 340:

> Where more than one are being tried together, except in unusual cases, it is the clear duty of the trial judge to separate for the jury's consideration the evidence properly relevant and material in the case of each, and to present the case made against each of the accused separately. The jury should be specifically told of the evidence which they may consider against each individual accused, together with appropriate directions as to the legal principles involved. In this connection it is insufficient to rest such a direction upon the formula that each case must be considered separately, without further explanation. To this extent we are of opinion that the summing-up was defective by reason of the omission to give the jury such directions as would enable them to consider only the evidence admissible against each of the accused as if they had been tried separately.

71. Where, as here, the cases against multiple accused are different, it is also necessary for the trial judge to identify the evidence which is admissible against each accused. It is important that the jury[60] understand that the evidence of acts or involvement of others was not admissible as against the appellant in determining whether he was a party to the agreement or plan.

72. This approach was applied by the South Australian Court of Criminal Appeal in *R v Singh* [1993] SASC 4109. Duggan J said as follows (omitting reference to authority):[61]

> The fact that this was a joint trial of a number of accused rendered it necessary for the trial judge to direct the jury that they were required to consider the case against each accused separately. In a case such as the present it is not adequate to confine the direction to a simple statement in those terms ... The jury must be given clear directions as to the evidence which it is permissible to use against each accused and the circumstances in which and the purposes for which it can be used... They must be warned not to use evidenced against an accused which is not admissible in the case against that accused ... and this will involved identifying such evidence... Finally it is essential to remind the jury of the case presented on behalf of each accused. The extent to which it is necessary to canvass the facts in so doing will depend upon the particular case....
>
> ... It is my view that the summing up would have left the jury with the impression that the defence was the same for all accused.
>
> After reading the evidence and summing up I have reached the view that the failure to distinguish between the actions of the various accused and to explain to the jury the circumstances in which the evidence and threats allegedly used by Charnjit could be used againstthe other three requires the setting aside of the convictions recorded against those three appellants.

73. As Duggan J explained, the failure to identify and distill the cases against the different accused runs the risk of conflating their cases, and leaving the jury with the impression that there is in reality only one 'defence', or defence case.

Analysis

74. Here, after setting out in general terms the elements of murder, manslaughter, aiding and abetting, and joint enterprise liability (SU59-75), the trial judge summarized the evidence relevant to these potential heads of liability.[62] However, in doing so he confined himself to a narrative or sequential summary of the evidence relevant to all

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[60] Consistently with the approach required by this Court in *Tripodi v The Queen* (1961) 104 CLR 1, *Ahern v The Queen* (1988) 165 CLR 87 and *Handlen v The Queen* (2011) 86 ALJR 145

[61] At [11]-[14].

[62] For example, as to liability for aiding and abetting at SU89-103, and as to joint enterprise liability at SU103-125.

accused, and did not ever separately crystallize or summarise the evidence and case against the individual accused, or the differing legal and factual issues which arose in relation to each.

75. The directions ought to have identified clearly for the jury, in one place, the limited evidence against Huynh (as summarized above) and the need to be satisfied both as to its reliability, and as to its ability to establish both that Huynh was party to a relevant agreement[63] and that he participated in that agreement. This is particularly critical in a case such as the present where there were multiple accused, the evidence against each differed markedly, and there were numerous possible alternatives as to the timing and nature of any agreement or participation in such agreement by the various accused.

76. In rejecting the appellant's contentions on this ground, the Court below commenced by acknowledging that the trial judge did not separately crystallize or summarise the case against each accused, but rather approached the events in a narrative form.[64] The Court went on to hold that it was sufficient that in the course of his narrative account, the trial judge identified the evidence implicating each accused, and canvassed the limitations on and criticisms of that evidence.[65] Having identified instances where the trial judge had linked the evidence to the individual accused,[66] the Court below held that trial judge had discharged his duty – or at least that there was no significant blemish in what he said.[67]

77. However, even if one were to accept, as the Court below did, that the trial judge did link the evidence to the individual accused in the course of his narrative account of the evidence and facts, this is insufficient. The obligation of the trial judge is not merely to identify the evidence relevant to individual accused (in the course of a lengthy narrative address). It extends to explaining to the jury how to apply the legal directions to the evidence, facts and issues relevant to each accused.

78. In its analysis of the summing up,[68] the Court below identified instances where the trial judge did link the evidence to the individual accused. However, as mentioned, the critical failure of the trial judge was his failure to link his directions on the law to the evidence and case against the individual accused, and in particular the appellant

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[63] Bearing in mind that there was no evidence that Huynh was present when Ms Francis heard somebody say "get a knife", or that Huynh otherwise heard, said or witnessed anything to do with weapons.
[64] CCA [156].
[65] CCA [157].
[66] CCA [165]-[166]
[67] CCA [168]-[173].
[68] CCA [162]-[173].

Huynh. Indeed, the Court below accepted that while, from time to time, the trial judge did link his directions as to matters of law to the facts, in doing so he did not differentiate between the three accused.[69] While this criticism applies to the oral summing up, it applies *a fortiori* to the written direction.

79. In response to the contention that the trial judge failed adequately to link the directions as to the law to the cases against the individual accused, the Court below excused this failure on the basis that it was not necessary to provide this linkage in relation to each accused, and that to require otherwise would necessitate a substantial addition to the summing up, and to run the risk of unduly burdening the jury in terms of length and complexity.[70]

80. First, to suggest that it was not necessary to address the (differing) cases of the accused separately runs contrary to approach required by *R v Towle* (extracted above).

81. Secondly, a distillation of the case against each of the accused need not have added unduly to the length and complexity of the summing up. The Court below was able to summarise the evidence and cases against each of the accused very succinctly in its reasons.[71] Certainly there would have been no difficulty in separately and succinctly distilling the evidence and case against the appellant Huynh.

82. Thirdly, and in any event, to the extent that a separate distillation of the cases against the individual accused would have added to the complexity of the summing up, this is not a matter which can or should be visited against the accused, or in some way compromise their entitlement to an appropriate summing up. If anything, it is a product of the prosecution adopting the undesirable approach of leaving multiple heads of liability to the jury in respect of multiple accused.[72]

83. Fourthly, it is necessary to take into account the form of the jury's question. In the situation of oral redirections the courts have emphasized the need not only to be balanced,[73] but also complete. The form of any question giving rise to a redirection will often dictate the level of detail required.

84. In *R v Olasiuk* (1973) 6 SASR 255 the jury, after deliberating for a couple of hours, returned with a question asking the trial judge to "define the definition (sic) between manslaughter and murder." In answering this question, the trial judge confined his

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[69] CCA [162].
[70] CCA [174].
[71] CCA [20]-[23]; [159]-[161].
[72] *R v Tangye* (1997) 92 A Crim R 545 at 556; *R v Pham* [2005] NSWCCA 9 at [109].
[73] *R v Gassy* (2008) 236 CLR 293

answer to the distinction between the mens rea required for each. In allowing the appeal, the Court (Bray CJ, Hogarth and Mitchell JJ) reasoned (at 259-260):

> What his Honour there said would, of course, be defective as an exposition of the law of manslaughter as applicable to the facts of this case if it were taken by itself. It makes no reference to provocation, drunkenness or excessive self-defence ... On the passage cited above taken alone [the jury] might well have thought that if there was an intention to cause serious bodily harm, and no self defence as a complete exculpation, the only possible verdict was one of guilty of murder. In short, it seems to us that that direction, taken by itself, deprived the appellant of the best weapon in his somewhat defective armoury, namely excessive self defence.
>
> But, of course, that passage did not stand alone. It has to be considered together with the learned Judge's exposition of provocation, intoxication and excessive self defence in the body of the summing up. The jury, it was argued, would have so read it and not regarded it as a self-contained and complete definition of the crime of manslaughter.
>
> If the passage had occurred at the end of an uninterrupted summing up and there had been no reason to suppose that the jury were in any doubt or confusion on the topic, this might well have been a sufficient answer. But the foreman's question indicates conclusively that that was not the position ... Clearly, despite the references in the summing up, the jury, or some members of it, were still in doubt on the topic. We think the situation demanded that the matter be approached as a *tabula rasa* and that an entirely new departure was called for as if nothing had been said about it previously...

85. Here, even if the question did not itself require a *tabula rasa*, the trial judge's decision to recast his directions on the law in terms which differed from those in his summing up required such an approach. By recasting his directions as to the law, the trial judge created uncertainty as to the status of his oral directions, and further removed their consideration of the legal issues from the facts of the case against the individual accused. The jury was provided with no assistance in applying the written directions to the facts so as to distill, as against each accused, the real issues in the case and the evidence relevant to each.

PART VII: APPLICABLE STATUTORY PROVISIONS

86. There are no statutory provisions of relevance to the appeal.

PART VIII: THE ORDERS SOUGHT

87. The appellant seeks the following orders:

1. That the appeal be allowed.
2. That the appellant's conviction be quashed and sentence be set aside, and a new trial be directed.

Dated: 28 September 2012

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