IN THE HIGH COURT OF AUSTRALIA No. A30 of 2012

ADELAIDE REGISTRY

BETWEEN:

TUAN KIET DAVID HUYNH
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

PART I: PUBLICATION

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

PART II: SUBMISSIONS

2. In the Respondent's Submissions (**RS**) at [4], it is said that in reality there was one continuous attack rather than two brawls, one at the roadway and one at the gates. Importantly, however, both the prosecutor and trial judge addressed the jury in various places in terms of there being two brawls or attacks, allowing for the possibility that the appellant may have participated in one or other or both. And the trial judge left open to the jury the possibility that the fatal injury happened at the roadway.

3. By way of background, and in response to RS [15]-[33], it is important to distinguish between the operation of the alternative potential heads of criminal responsibility for murder of joint enterprise and extended joint enterprise.

4. The former, sometimes referred to as basic or traditional joint enterprise,[1] is a species of primary liability. Proof of this against the appellant Huynh required that the jury be satisfied beyond reasonable doubt that:[2]

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4.1. Huynh was a party to an agreement to kill or cause grievous bodily harm to the deceased (here, an agreement to assault the deceased with a bladed weapon);

4.2. Huynh participated in the implementation of that agreement in the sense that he acted in furtherance of that agreement with the requisite intention (ie, to cause death or grievous bodily harm, or knowing that some other party to the plan would act with an intent to cause death or grievous bodily harm);[3]

4.3. the deceased was killed by a party to the agreement (the stabber) pursuant to that agreement.

5. The latter, extended joint enterprise, required that the jury be satisfied beyond reasonable doubt that:[4]

5.1. Huynh was party to an agreement to assault (the primary offence) the deceased;

5.2. Huynh participated in the implementation of that agreement with the requisite intention or foresight (ie, with knowledge or foresight of the possibility of an additional offence occurring, namely an assault with an intention to kill or cause grievous bodily harm);

5.3. the deceased was killed by a party to the agreement (the stabber).

The First Issue: 'Participation' in Joint Enterprise Liability

6. The respondent's essential contention is that in cases where the evidence relevant to establishing an agreement is the same as the evidence relevant to participation it is not necessary for the trial judge to direct the jury as to the need to prove participation by each accused with the necessary intention / foresight. (RS [12], [21], [30], [33].)

6.1. This overlooks that even if the evidence led in support of both elements is the same, in many cases it will be open to the jury to find that the evidence establishes one element (eg, agreement) but not the other (eg, participation).

6.2. Further, in this case it is artificial to suggest that the evidence relevant to agreement and participation was the same, not least because the case against the appellant contemplated that the agreement might have been formed at various points in time (eg, at the Duong house, on the way to the Nguyen house, upon arrival at that house, or upon the commencement of the brawls), and that it may have been formed prior to any participation by Huynh.

6.3. Even if it is correct that in some cases it is not necessary to direct the jury separately in relation to the element of participation (which is not conceded), this could only be in cases where the jury *could only*, or *must*, conclude agreement and participation from the same evidence – and not in cases such as the present, where the respondent apparently concedes that the most that could be said is

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[1] In the UK it has been referred to as the "paradigm" or "plain vanilla" version of joint enterprise: *R v Rahman* [2009] 1 AC 129 at [9]; *Brown v The State* [2003] UKPC 10 at [9], [13]; *R v Gnango* [2010] EWCA Crim1691 at [28], citing Sir Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233 at 237.

[2] *Johns v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-114; *Osland v The Queen* (1998) 197 CLR 316 at [24], [72]-[75]; *Gillard v The Queen* (2003) 219 CLR 1 at [109]-[110]; *Likiardopoulos v The Queen* (2012) 291 ALR 1; [2012] HCA 13 at [19]; *Handlen v The Queen* (2011) 86 ALJR 145 at [4]. As the High Court observed in *Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17], citing *Chan Wing-Siu v The Queen* [1985] AC 168; *Hui Chi-Ming v The Queen* [1992] 1 AC 34 and *R v Powell* [1999] 1 AC 1, other common law countries apply similar principles.

[3] As to the requirement of participation with the necessary intention / foresight, see *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Gillard v The Queen* (2003) 219 CLR 1 at [110]-[112]; *R v Taufahema* (2007) 228 CLR 232 at 238 [7]; *Arafan v The Queen* (2010) 206 A Crim R 216; VSCA 356 at [24]; *Likiardopoulos v The Queen* (2010) 208 A Crim R 84; [2010] VSCA 344 at [59]; *Likiardopoulos v The Queen* (2012) 291 ALR 1; [2012] HCA 13 at [19]; *Osland v The Queen* (1998) 197 CLR 316 at [73] (applying *R v Tangye* (1997) 92 A Crim R 545 at 556-557), and at [217], [225] where Callinan J described "participation" in terms of a causal responsibility or contribution to the death.

[4] *Johns v The Queen* (1980) 143 CLR 108 at 130-131; *McAuliffe v The Queen* (1995) 183 CLR 108 at 115, 118; *Gillard v The Queen* (2003) 219 CLR 1 at [112];*Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17].

that the jury *might* or *could* conclude agreement and participation from the same evidence (cf RS [21], [34], [42]). As to the real risk in this case that the jury might have found agreement based upon different evidence from that which might amount to participation, see the appellant's submissions (**AS**) at [54]-[62].

7. The contention (RS [17], [19], [20]) that participation is no more than being a party to the relevant agreement is unsustainable.

7.1. In RS [17], reliance is placed upon an extract from the reasons in *Likiardopoulos* as supporting the assimilation of agreement and participation. However, the very passage relied upon treats them as distinct requirements. In any event, see [4.2] above, and the authorities referred to in footnote 3, as to the separate requirement of participation.

7.2. The respondent's reliance upon an assimilation of agreement and participation highlights the vice complained of by the appellant, namely the real prospect here that the appellant was convicted on the basis of a finding that he agreed at the Duong house to return with others for the purpose of causing some physical harm back at the Nguyen house (ie, that he was party to an agreement), without any finding either that he personally engaged in any act of participation, or that he had the requisite intention or foresight as to the use of a bladed weapon.

8. In RS [21], the respondent's submissions move to a quite different proposition, namely that the same evidence may establish both agreement and participation.

8.1. However, as set out earlier in this Reply, this does not obviate the need for a separate direction as to each, and certainly does not do so in circumstances where it is open to the jury to conclude that one is established and not the other, and/or where there is an issue as to whether the accused had the requisite intention or foresight at the time of participation.

8.2. The suggestion that the conduct which establishes agreement *may* also establish participation (RS [26]) does not gainsay the proposition that they are separate elements, requiring separate consideration by the jury. Nor does the fact that an agreement can be inferred from participation, or that it may be unstated.

9. The reference to participation through "presence" in RS [22] is a distraction in the context of this case. While it is accepted that presence may, in some cases, establish participation, as the passage extracted from *R v Tangye* (1997) 92 A Crim R 545 at 557 makes plain, that is only where the presence serves to assist or encourage the other participants, or otherwise contributes to the commission of the offence, so as to satisfy the requirement that there be an act in furtherance of the agreement.

10. The submission in RS [27] again erroneously equates agreement and participation, and thereby confuses the requirement of foresight or intention. Once it is understood that participation may occur subsequently to the formation of the agreement, then it follows (a) the issue of foresight or intention must be addressed at this subsequent time, and (b) it cannot always be assumed from the fact of agreement that participation with foresight or intention will be made out subject only to withdrawal from the enterprise.

11. In RS [28], [35]-[40] the respondent criticizes the appellant's focus upon participation occurring proximate to the stabbing or death, pointing out that the participation *can* be at any time or location.

11.1. While participation *can* occur at any time, and in particular, well before the subject crime, here there was no suggestion, let alone evidence, of any act by the appellant Huynh at some earlier point in time that would amount to participation. If that is now being suggested, this highlights the need for an identification of the

act relied upon for this purpose, and for a direction to the jury in relation to the same. Even if there had been evidence to the effect that the appellant Huynh had heard some of the things apparently said at the Duong house (cf AS [23]), this can hardly have been sufficient to establish participation (cf RS [40]).

11.2. In any event, even if it were open to the jury to find both agreement and participation prior to the brawls, this would only be relevant (ie potentially capable of obviating the need for a separate direction as to participation in brawl(s)) if it was the only reasonable possibility. Here it was obviously possible for the jury to find that agreement occurred prior to arrival at the Nguyen house, but that participation was contingent upon a finding of conduct during the brawls.

12. The example in RS [34] makes the appellant's point rather than undermining it. In the example given, even if the evidence relevant to agreement and participation is the same (which is not this case), if it is possible that the jury might find the former but not the latter from this evidence, then far from being "obviously unnecessary", a separate direction in relation to participation is absolutely critical. Otherwise there is a risk (as the appellant says there was here) of a conviction in circumstances where agreement but not participation was made out. RS [34] is also erroneous in suggesting that agreement and participation may be equated where agreement is to be inferred from actions. Certain actions may provide a basis for inferring agreement but not participation, and vice versa.

13. In RS [43]-[52] (joint enterprise) and RS [57]-[63] (extended joint enterprise) the respondent relies upon various references in the oral summing up to the need to establish that the accused "acted" or "joined in", or similar.

13.1. As explained in AS [48], these references served to obscure rather than illuminate the need to establish participation with the requisite intention/foresight.

13.2. Many such references (particularly the references to "joining in" and "throwing their lot in") were directed to the separate element of agreement, and not participation. The fact that agreement may be inferred from conduct, does not mean that agreement and participation are to be equated.

13.3. To the extent that the references were to conduct separate from agreement, the references were general and imprecise, and removed from any application to the evidence and case against the individual accused, and hence not an adequate substitute for a direction as to the requirement to establish participation.

13.4. Many of the references were to "the accused or any one of them" (RS [51], [59]), or "actions of two or more persons" (RS [46]). Even if addressed to participation, these references did not make it clear that each accused needed to have participated in order to be convicted – as opposed to it being sufficient that a given accused be party to an agreement implemented entirely by others.

14. In relation to the written redirection (RS [53]-[56) (joint enterprise) and RS [64]-[67] (extended joint enterprise)):

14.1. The respondent's reliance upon the earlier oral summing up is no answer given (a) the inadequacies in the oral summing up, (b) the fact that the written directions involved a recasting of the legal directions not linked back to the oral summing up, and (b) the primacy that would have been afforded to the written redirection given its timing and context (see AS [53]).

14.2. The respondent concedes the absence of any specific direction as to participation (or foresight), and (for the reasons already set out) cannot rely upon the direction as to agreement as a substitute for a direction as to participation.

15. The respondent also contends that there was no substantial miscarriage of justice, on the basis that each appellant was present such that if the jury followed the balance of the directions on joint enterprise (or extended joint enterprise) a conviction on the basis of aiding and abetting was inevitable. (RS [13], [68]-[69].)

15.1. The failure to direct as to participation was an error of law. While the Court below did not purport to invoke the proviso in s353 of the *Criminal Law Consolidation Act* 1935 (SA), such an error would not attract the proviso: *Baiada Poultry Pty Ltd v The Queen* (2012) 86 ALJR 459 at [31]; *Cooper v The Queen* [2012] HCA 50.

15.2. Contrary to RS [30], the appellant's reliance upon *Handlen v The Queen* (2011) 86 ALJR 145 is not misplaced. If, as the appellant contends, participation is a separate element requiring a direction from the trial judge, then the trial judge here effectively left to the jury a basis of liability that did not exist.

15.3. In any event, contrary to RS [68], if the jury convicted on the basis of extended joint enterprise, it does not follow that the jury found that the appellant was party to an agreement to use a bladed weapon. Rather the agreement may have been simply to engage in some physical violence, with the use of a bladed weapon being a mere foreseeable possibility.

15.4. Merely being party to an agreement to engage in violence (even if the agreement extends to the use of a bladed weapon) does not necessarily amount to "intentionally encouraging" the stabber to commit the crime charged.

15.5. Finally, the respondent's submissions, like the summing up and written redirection, again deal with the issues in the abstract and without any attempt to tie them back to the evidence and case against the appellant Huynh, the significance of which is expanded upon below.

<u>The Second Issue: Failure to Apply the Legal Directions to the Case against the Appellant</u>

16. The respondent contends that all evidence led in the trial was admissible against all appellants (subject only to an out of court statement by the appellant Sem). However, this overlooks the need to make clear to the jury that while evidence of acts and statements of others not in the presence of the accused may be admissible to establish the fact of an agreement, or the implementation of the agreement by others, they are not able to be used to establish that the accused was a party to the agreement and/or participated in the implementation of that agreement.

17. In any event, even if the body of evidence admissible against each accused was the same, it does not follow that their individual cases raised the same issues. Plainly they did not. The different evidence, and different issues, relevant to the case against the appellant Huynh mean reliance upon *R v Towle* (1955) 72 WN (NSW) 338 is apposite.

18. The respondent's submissions do not address the failure to distil for the jury the evidence / issues relevant to each of the matters set out above in [4.1]-[4.3] (basic joint enterprise) and [5.1]-[5.3] (extended joint enterprise). This would have exposed for the jury's consideration various issues relevant to the case against Huynh, including:

18.1. The need to be satisfied that the stabber (Duong, Kimlong Rim, or some other unidentified person) was a party to the agreement.

18.2. In the case of basic joint enterprise, the need to find an agreement to use a bladed weapon. In this respect, it is significant that while the prosecutor made sweeping references to knives and machetes, in fact the evidence as to the presence of such bladed weapons was very limited. Of the approximately 50 persons who gave evidence of the events at the Nguyen house, and putting to one side Rithy Kheav's evidence (see below), only three gave evidence of bladed

weapons – John King referring to a little knife, being a dagger or a little fishing knife) (T1097-1098; 1AB 483-484); Benjamin Hampton referring to a couple of long blades which you could call a machete (T1441; 2AB 626); and Daniel Smith referring to a machete (T1241-1243; 1AB 499-2AB 501).

18.3. The possibility that such agreement might have been formed at various points in time, including (i) at the Duong house; (ii) on the way to Nguyen house; (iii) upon arrival at the Nguyen house; or (iv) upon the commencement of, or during, the brawls; and the differing evidence relevant to each point in time.

18.3.1. As to (i), (ii) and (iii) the jury should have been reminded that there was no evidence that Huynh heard the reference to a knife about which Ms Francis gave evidence, and that the accused did not all travel together to the Nguyen house.

18.3.2. As to (iv), the prosecution in its closing address[5] identified the case against Huynh as dependent solely upon Ms Pavic (who claimed to have seen Huynh punching the deceased[6]) in relation to the conduct at the roadway and solely upon Mr Johnny Lam (who claimed to have seen Huynh using a log to hit the deceased[7]) in relation to the conduct at the gates. (It did not rely in its closing address upon the evidence of Rithy Kheav as to the presence of a bladed weapon, presumably because of the difficulties inherent in relying upon evidence which suggested that Huynh was the 'second stabber' when there was only one stab wound.)

18.3.3. Neither Pavic nor Lam described seeing Huynh (or anyone else) in possession of a bladed weapon, and it was therefore critical that the jury be directed as to how the evidence of either or both of these witnesses could prove joint enterprise liability.

18.4. The need to be satisfied of Huynh's participation in the implementation of the agreement. This required a consideration of the reliability of the evidence of Pavic and Lam. If the prosecution intended to rely upon some earlier act of participation, then this, together with the relevant evidence, ought to have been squarely identified for the jury's consideration.

18.5. The need to be satisfied that Huynh had the requisite intention / foresight at the time of his participation.

19. The above analysis makes plain not only that the issues as against Huynh were different from those relevant to the other accused, but also that the evidence relevant to making out the various elements vis-à-vis Huynh was very limited. It follows that the failure of the trial judge to separately identify the evidence relevant to the case against Huynh, and to assist the jury to link that evidence to the matters in issue, undermined the jury's ability to properly evaluate the position and defence of Huynh.

Dated: 22 November 2012

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[5] T1804 (2AB 649); T1889 (2AB 734).
[6] See AS 26.1; T842-843 (1AB 392-393).
[7] See AS 26.2; T1316-1318 (2AB 536-538).