IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A17 of 2015

BETWEEN

HIGH COURT OF AUSTRALIA
FILED
27 APR 2016
THE REGISTRY ADELAIDE

JOHNAS JEROME PRESLEY
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Respondent

APPLICANT'S REPLY

10 **PART I PUBLICATION**

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

PART II CONCISE RESPONSE TO RESPONDENT'S SUBMISSIONS

Proposed ground 1: intoxication and unreasonable verdict

2. In relation to extended joint enterprise, the real question is whether the prosecution was able to prove beyond reasonable doubt that, having agreed with the other three accused to participate in an assault, Presley turned his mind to the possibility that Betts might act with murderous intent in relation to Hall, and decided to and did participate in the joint enterprise either by assaulting King or by participating in the assault on Hall. Even if the Crown established beyond reasonable doubt that Presley was involved in the assault upon Hall in some unspecified way, the prosecution had
20 to prove that Presley participated having actually turned his mind to the possibility that Betts was intending to use a knife with murderous intent, and he decided to participate nonetheless.

3. The significance of intoxication to the unreasonable verdict appeal ground is that whatever may have been the effect of intoxication on Presley's capacity to form an intent, or on his capacity to understand the effects of his own conduct, the prosecution had to exclude the possibility that in his intoxicated state and in the chaotic events which occurred, Presley did not actually turn his mind to the possibility that others (Betts) would intend to cause death or grievous bodily harm, and did not make a decision to participate with that awareness. The prosecution case depended upon inferences being drawn from conduct as to Presley's knowledge and intention. While a jury might be able to draw such inferences from the conduct of a sober man, the same inferences may
30 not be able to be safely drawn in respect of an intoxicated and agitated person – here, an indigenous and unsophisticated teenager.

4. The prosecution had to exclude as a rational hypothesis the effect of Presley's account of events given (without the assistance of a field officer or solicitor) in his record of interview with the police (PAB57), which was to the effect persons in the alleyway had confronted him and Betts when Betts had been struck. Presley pulled him away and they left (PAB48). When he returned carrying a baseball bat with Smith, he struck King once on the elbow and left (PAB56). He only saw the other man (Hall) on the ground (PAB57). He first learned Betts stabbed Hall after his arrest (PAB60). He did not know the fourth person (Miller) (PAB52).

5. The respondent makes a number of submissions regarding intoxication and the involvement of
40 Presley in the attacks upon Hall (and King) to which it is necessary respond.

6. ***First***, in relation to intoxication, and the proposition that there was no evidence that Presley was not an experienced drinker (RS [10]):

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6.1 Presley was described during the first altercation as intoxicated, staggering and swaying around and as having really red blood shot eyes (MAB289-290) and as being intoxicated pretty significantly (MAB708). The respondent's submission that there was evidence Presley did not appear as intoxicated as Betts misapprehends the passage of evidence relied upon, which was to the opposite effect (MAB289);

6.2 Presley's reading was not estimated to be about 0.2% but over 0.2% (MAB1044-1045);

6.3 on the question of capacity to reason despite intoxication, the jury may have viewed Presley as someone who was not only 18 years of age and in a highly agitated state (he "flipped out" (PAB52)) but also as someone who was:

(a) emotionally immature, based on his responses when told he was going to be arrested (he was too young to go to jail, he wanted to see his mum and was crying) (PAB36-37);

(b) somewhat unsophisticated, based on his statement to the police that he understood English "a little bit" and but didn't "understand the full white fella style" (PAB38).

Further, in so far as the prosecution case required drawing inferences that despite his intoxication he appreciated the possibility of how *others* would act, the relevant events occurred over a very short period of time, Presley said he didn't even know Miller's name (PAB56-58) and indeed that he did not know until in the cells that Betts had stabbed King (PAB56, 60). The submissions that Presley was able to walk, talk and turn his mind to whether to bring a weapon along with him (RS [16]-[17]) do not address the key question.

7. ***Secondly***, in response to the respondent's submissions regarding Presley's involvement in the scene itself (and the inferences that might be drawn therefrom) (RS [9]):

7.1 Presley's plea is not inconsistent with his account to police. Otherwise, it does not add to the evidence in the case;

7.2 the submission that there were four people around Hall assaulting him and there were four accused relies on the evidence of Ms Bateman and Ms Turner;

7.3 in fact, Bateman said:

(a) there were a total of at least six persons who came to the alley (MAB310, 343);

(b) two persons were assaulting King and one with a baseball cap and one with a crucifix tattoo (MAB250);

(c) both the persons who were attacking King had something in their hands (MAB250) (cp. Presley's interview (PAB55-56) and King's evidence (MAB183));

(d) one of those assaulting King could have had dark clothes and been topless (MAB315);

(e) she saw King on the ground before she saw Hall on the ground (MAB314);

(f) the two persons assaulting King were doing so right up until they ran away (MAB319) and this was after those assaulting Hall ran away. Those assaulting Hall ran when the dog was let out (MAB319, 347);

7.4 in fact, Turner said there were at least six to eight aboriginal boys in the group that came out of the alleyway (MAB376) and nine altogether (MAB430), and she described six or eight around King (MAB377) and four to five around Hall (MAB383).

8. ***Thirdly,*** in so far as the respondent argues that there is eyewitness evidence that implicates Presley as physically involved in the attack on Hall, the respondent relies on the evidence of

Bateman and Turner, but fails to take into account the numbers they describe as involved in assaulting both King and Hall at the same time, and ignores the irreconcilable conflict between their two accounts.

8.1 The respondent contends that someone meeting Presley's description and having a silver pole was hitting Hall with that pole as well as stomping on Hall's stomach, relying on Turner's evidence (MAB383). However:

(a) Turner said the person she saw with the silver pole was definitely not one of the two boys involved in the earlier altercation (MAB437);

(b) she described silver shiny basketball shorts that looked new and said that they were not matte or a flat grey colour (MAB434), namely the colour of Presley's grey boxers seized. Further, the baseball bat was not silver but black (MAB616);

(c) she said the person had no top on (MAB382), and therefore she could not be talking about the same person Bateman was referring to who she identified as wearing a red basketball singlet (MAB289).

8.2 The respondent contends that there is eyewitness evidence identifying Presley as being at the scene and "involved in the beating of Mr Hall", relying on Bateman's evidence (MAB269). It should be noted that Bateman (who was drinking Jack Daniels and coke (MAB232) and said the events happened very fast (MAB318):

(a) identified the person as the same person she had seen at the earlier altercation based solely on his clothing, in particular, a red basketball top and three quarter length blue shorts (MAB322, 323, 329). She also described another person wearing a red basketball top and three-quarter pants and white shoes who she said was carrying a shovel (MAB248) (see also "red basketball tops" (MAB253));

(b) she described the person she identified as wearing white sneakers (MAB322). White sandshoes (Ex P48) were seized from Miller upon which blood spots and the DNA of Hall was located (MAB886, Ex P67, Ex P68); however

(c) Presley had grey boxer shorts (MAB761) and there were a number of witnesses who saw him without a top and bare feet around the time of the second incident (MAB733 (Eylander), PAB16 (McQuade), PAB25 (Bos). See also King's description of the first altercation (MAB93-94)); and

(d) Findlay-Smith described a man with a baseball bat and basketball singlet with a shaved head (which Presley did not have) (MAB554), and he did not think that the person he had seen earlier at the fish and chip shop (MAB577-578) was one of those around Hall (MAB585).

(e) Furthermore, Bateman saw King on the ground before she saw Hall on the ground (MAB314) and said the two boys with King were with him right up until they ran away (MAB319, 347);

(f) she said both of those attacking King had something in their hands and one looked like he had a pole (MAB250, 315) (consistently with King who said he was struck by two persons, one with a pole and the other with a baseball bat (MAB182-183), and consistently with Presley's statement to the police that he and Smith struck King and then he left (PAB55-56));

(g) Bateman said one of the two hitting King could have been topless (MAB315).

9. ***Fourthly,*** in response to the respondent's reliance upon the evidence that, before returning to Grant Street with a baseball bat, Presley said "*Let's go back and see what these people – go and see what the problem is*" (RS [5]), it must be remembered that, in the initial altercation, Betts was

punched to the mouth and Hall was seen to push one of the two aboriginal men (CCA [9]; MAB1764). This is despite the evidence of some observers of the initial altercation that no violence was directed towards Presley and Betts in the initial altercation, which may be partly explained by the evidence of Finlay-Smith that King had subsequently told him that he would not be popular if he disclosed this and that if he did "no-one will get a victims of crime" (MAB1544). In context, Presley's taking of a baseball bat did not manifest an intention to act with murderous intent. Indeed, although Presley was involved in an assault upon King, plainly, despite opportunity to do so, he refrained from inflicting grievous bodily harm upon King (either in retribution for the earlier conduct or for any other reason).

10. ***Fifthly,*** in response to the respondent's submission that the unchallenged evidence was that Presley and Betts left Presley's house together with Miller and Smith on foot (RS [6]), the evidence does not present any clear picture to the effect that the various accused travelled together to the scene[1].

11. ***Sixthly,*** the respondent asserts that it was open to infer that Presley knew when they walked to Grant Street that Betts was carrying a knife (RS [7]). Apart from the question of whether the various accused were in close proximity, the fact is that none of the witnesses, including Willis, saw Betts carrying or holding a knife, even those who witnessed the confrontation.

12. ***Seventhly,*** it is asserted that there was evidence that Hall was hit with something consistent with a baseball bat, implying involvement by Presley, and reliance is placed upon spots of blood on Presley's shorts (RS [9]). These matters were addressed at AS [25.4]-[25.5].

Proposed ground 2: reconsidering *McAuliffe*

13. The respondent submits that the applicant has not grappled with the issues arising from the reasoning in *Jogee,* nor with the reasons given in *Clayton* for declining to re-open *McAuliffe* (RS [22]).

Overcoming previous reasons to decline to re-open *McAuliffe*

14. As to the latter, the reasons why it is submitted *McAuliffe* should be reconsidered are those set out by Kirby J in *Clayton* (summarised at AS [71]-[72]) and the additional factor that, contrary to the position which obtained at the time of *Gillard* and *Clayton,* the position in *McAuliffe* is now at variance with that of another court of final appeal (reached after consideration of the Australian position and the earlier decision of the Privy Council (*Chan Wing-Sui*) which proved influential in *McAuliffe*).

15. The point that was sought to be made at AS [85] was both that the law as reflected by *McAuliffe* is not long-standing and that further, unlike principles of private law upon which it might reasonably be supposed that citizens have taken advice and structured their affairs, there is a limited sense in which parties act in reliance upon variations to doctrines of criminal law.

16. Further, the respondent is wrong to characterise AS [89] as a significant concession militating against a reconsideration of *McAuliffe* (RS [42]). The point being made was that it is obviously difficult to identify from decided cases that the operation of the *McAuliffe* approach has resulted in an unjust conviction because in cases involving a jury verdict it will usually be impossible to divine the precise basis upon which the conviction has been entered. What is clear, and accepted

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[1] For example, the witness Eylander of 48 Butterfield Road described a slightly lighter skinned bare chested person sprinting past on the road (towards the scene of the attack), followed "not long after" by two darker skinned people walking in the same direction on the footpath (MAB1553-1557, MAB731-733). The witness Strobl of 19-21 Green Street saw a bare chested male holding a pole in the intersection of Green Street and Butterfield Street who was approached by a car and told to "get in the car, get in the fucking car", but did not do so and continued on towards the lane which led to the scene of the assault (MAB1555-1557; MAB592-600).

in many other legal contexts[2], is the risk of hindsight reasoning with respect to the foreseeability of risk in cases where that risk has materialised. A test for liability which may be satisfied by a finding of foresight of a possibility carries an inherent risk of miscarriage of justice because of the risks associated with hindsight bias. In other words, even accepting that foresight *should* be sufficient to justify liability, there is a risk that miscarriages will occur by virtue of wrong findings as to whether there was the requisite foresight.

Policy justifications for reformulating the relevant principles

17. In relation to the underlying policy issues, Presley respectfully adopts the comprehensive submissions of Smith as to the unsoundness of the *McAuliffe* formulation of a doctrine of extended joint enterprise. As those submissions demonstrate, leaving cases of aiding and abetting a principal offender to one side, in justifying a finding of guilt in respect of a crime the physical elements of which were carried out by another, the doctrine of joint enterprise relies critically upon the notion of agreement or authorisation.

18. The notion of extended joint enterprise as formulated in *McAuliffe* and subsequently by Australian Courts departs from that critical requirement and responds to the unilateral contemplation of a possibility that others will act beyond the scope of any agreement or authorisation (Smith [24]-[32]). Such an extension produces the anomalies, asymmetries and practical difficulties comprehensively addressed in Smith's written submissions (Smith [45]-[68]).

19. The respondent's submission that the reformulation of principle proposed by Smith and Presley would "substantially increase" divergence with the position in those jurisdictions where the matter is governed by statute (RS [35]) is difficult to understand. With the exception of the position under s 8 of the *Criminal Code Act* (NT), the regimes to which reference is made by the respondent do not contemplate liability based upon mere foresight of a possibility; they require recklessness or an awareness of a probability (or in one case an objective probability). The difference is significant[3].

20. Reformulation of the common law position in the terms proposed by Smith and Presley would not (and clearly could not) bring about complete alignment with the various statutory approaches. However, the prospect that different results would follow depending upon the location of the relevant conduct would be much reduced. In many cases where it could be concluded beyond reasonable doubt, either objectively or subjectively, that it was probable that another party to the enterprise would act with murderous intent, the same evidence is likely to suggest a broader scope of the expressly or impliedly agreed enterprise. As their Lordships said in *Jogee* (at [66]), participation by D2 in crime A with foresight that D1 may commit crime B may sometimes be powerful evidence of authorisation. Participation by D2 in crime A with foresight that D1 will probably commit crime B will ordinarily be powerful evidence that in fact the scope of the agreed enterprise includes crime B.

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2 See, eg, *Road Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at 353; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [126]-[129].

3 *Darkan v The Queen* (2006) 227 CLR 373 at [40].