

BETWEEN:

TRISTAN KAYE CASTLE
Appellant

AND:

THE QUEEN
Respondent



APPELLANT'S REPLY

Filed on behalf of the Appellant by:
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Part I: Internet publication

1. This reply may be published on the internet.

Part II: Reply to Crown's argument

(i) Crown's statement of facts

- 10 2. At [4]-[17] of the respondent's submissions ("RS") the Crown purports to add to Castle's statement of facts. However, most of what follows is not a statement of facts. Rather, it is a contentious analysis of the evidence in the case: the greater part of RS [7], [8], [11], [12], [13], [14], [15], [16] and [17] is argumentation rather than fact and is not given any express connexion to the issues on the appeal.
3. At RS [12]-[17] emphasis is placed on three matters. First, at RS [12] and [14] emphasis is placed on evidence said to show that "[Castle] and Bucca were making plans to meet McDonald by lying to him about the purpose of the meeting". However, the evidence referred to does not establish this fact.
- 20 4. Secondly, at RS [12] it is asserted that evidence from M that Bucca had possession of a handgun two or three weeks before the shooting was important. On the contrary, it was of little if any significance. There was no evidence (nor does the Crown assert) that any handgun seen in Bucca's possession was the weapon used in the murder: RS [96]. The evidence of M could only have served to prejudice the jury against Bucca (and therefore Castle). Its probative value was negligible¹.
5. Thirdly, emphasis is placed upon evidence said to show that Gange had an alibi, that is to show that he was not (as Castle maintained) with Castle at the car wash at about
30 6.36am on 3 February 2013. In that regard reference is made at RS [16] to the alleged whereabouts of M's phone. However, this evidence does not prove where M's phone was nor where Gange was. Nor does it meet the principal problem with M's evidence, namely the credibility issues arising from her extensive use of ice, drug induced psychosis, paranoia and romantic attachment to Gange: appellant's submissions ("AS") at [18]. This Court could not be satisfied that her evidence established beyond reasonable doubt an alibi for Gange.
6. At RS [17] there is reference to evidence about the whereabouts of "Gange's phone". This is said to corroborate M's evidence that Gange was at Gosfield Crescent with M
40 at the time of the murder and not (as Castle asserted) at the car wash. However, this evidence begs the question of whether Gange had this phone on his person at the relevant times and whether Gange was using the phone described as "Gange's phone". Further, evidence that "Gange's phone" made calls to "Bucca's phone",

¹ See also [5] below re M's credibility.

McDonald's phone and Castle's phone between 6.25am and 6.34am on 3 February 2013 is said to be inconsistent with Gange being at the car wash. Again, this assumes that the phone described as "Gange's phone" is on his person and is being used by him.

7. At RS [17] (final sentence) there is reference to "the phones of both Bucca and [Castle]" moving in a fashion consistent with them both being at the car wash when the killing occurred. However, this omits the evidence of Castle that Bucca's phone (but not Bucca) was in the vehicle with her at the time of the shooting: AB 1307-1308, 1342-1343, 1466-1468.

8. Paragraphs [5]-[7] above show the difficulty in using the telephone evidence to determine Castle's guilt beyond reasonable doubt, given the natural limitations for an appeal court in making findings of fact.

(ii) Extended, joint criminal enterprise

9. At RS [20] the Crown submits that *McAuliffe v R* (1995) 183 CLR 108 "rests upon a principle established in a significant succession of previous cases". However, the Crown does not mention a single case in support of that proposition. And an examination of *McAuliffe* shows that the reasoning in that case is not directly based on any High Court decision² but rather on *Chan Wing-Siu v R* [1985] AC 168 (which was overruled in *R v Jogee* [2016] 2 WLR 681).

10. At RS [21] the Crown asserts that *McAuliffe* "accords with the general principle of criminal law that a person who assists in the commission of a crime or encourages its commission may be convicted as a party to it". However the Crown misquotes p.118 of *McAuliffe* which states that *Chan Wing-Siu* "is in accordance with the general principle of the criminal law that a person who *intentionally* assists in the commission of a crime or encourages its commission may be convicted as a party to it". It is respectfully submitted that if an accused merely has foresight of the possibility of murder, it is very difficult to see how that accused can be said to "intentionally assist in the commission of murder or encourage its commission".

11. At RS [21] the Crown submits that the decision in *McAuliffe* is not "premised" on the decision in *Chan Wing-Siu v R* [1985] AC 168. However, (as noted by the UKSC in *R v Jogee* [2016] 2 WLR 681 at [60]) *McAuliffe* followed that decision and it is clear that *Chan Wing-Siu* and the cases explaining it were the principal decisions relied upon in *McAuliffe*.

12. At RS [22] the Crown asserts that the decision in *R v Jogee* [2016] 2 WLR 681 does not provide a sufficient basis to reconsider the correctness of *McAuliffe*. However, there is precedent for this Court reconsidering the correctness of an earlier High Court

² Although *Johns v R* (1980) 143 CLR 108 is discussed in *McAuliffe* it is described as a case involving a different situation from that in *McAuliffe* (see pp.115 and 117).

decision where a recent decision of the House of Lords has overruled a House of Lords case relied upon in that earlier High Court decision. A recent example is *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 where the correctness of *Giannarelli v Wraith* (1988) 165 CLR 543 was re-examined after *Saif Ali v Sydney Mitchell* [1980] AC 198 (followed in *Giannarelli*) had been overruled in *Arthur J. S. Hall & Co v Simons* [2003] 1 AC 615.

10 13. At RS [21] and [27] it is asserted that there are important and valid public policy justifications for the doctrine of extended joint criminal enterprise. However, there is no attempt to expound those public policy arguments in RS.

14. Further, the public policy reasoning adopted by Sir Robin Cooke in *Chan Wing-Siu* is (with respect) open to serious question. In that case, Sir Robin made the following observations (at p.177):

20 “What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they in fact are used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance on a nuance of prior assessment only too likely to have been optimistic.”

30 15. This issue was addressed by the UKSC in *Jogee*. At [74] Lord Hughes and Lord Toulson said that Sir Robin’s policy rationale “may be thought to oversimplify the question of what is the enterprise to which he has intentionally lent himself, but it also implies that he would escape all criminal liability”. They added that on the law as stated in *Jogee* the defendant would not escape liability because “he would be guilty of homicide in the form of manslaughter, which carries a potential sentence of life imprisonment”.

30 16. At RS [29] the Crown asserts that the solution advocated in *R v Jogee* [2016] 2 WLR 681 (i.e. that “the law of aiding and abetting could simply apply”) results in a “lacuna” because “accessorial liability does not readily accommodate those circumstances where the (inherent) unpredictability of the actual consequences of a joint criminal enterprise come to fruition”. However, there is no “lacuna”: in a case such as the present the accused may either be prosecuted for manslaughter (see *Jogee* at [74]) or for the crime the actual subject of the common purpose (here assault).

40 (iii) Proviso

17. At RS [31] the Crown accepts that the Full Court’s determination of error by the trial judge on the “admissions” issue may be “characterised as a wrong decision on a question of law or a basis on which there was a miscarriage of justice” within the meaning of s.353 of the *Criminal Law Consolidation Act 1935* (SA).

18. At RS [32]-[41] the Crown purports to summarise the law relating to the proviso in largely unexceptionable terms. However, the comments made in relation to this

Court's decision in *Reeves v R* (2013) 88 ALJR 215 at RS [38], [43] and [47] merit a response. In these paragraphs it seems to be suggested that support for the Full Court's approach on the issue of whether Castle's guilt was proved beyond reasonable doubt may be garnered from this Court's decision in *Reeves*. However, the decision in *Reeves* does not support the approach of the Full Court. In *Reeves* this Court endorsed the reasoning of Bathurst CJ ([2013] NSWCCA 34 at [90]-[99]) who held that on the *one* relevant point of fact (see [92]) he was persuaded of the complainant's version over that of the accused because her version was supported by various acknowledgments made by the accused and at least three "objective"³ items of documentary evidence. Where there is only one relevant issue of fact and the objective evidence is all one way (or virtually so), persuasion on the part of the appeal court of that one fact beyond reasonable doubt may be open (as this Court found). However, that situation is manifestly very different from the present case. Here there are multiple issues all of which involved substantial differences (and matters of credit) among the witnesses. The judgment of the Full Court and the submissions of the Crown do not adequately confront this difficulty. It is only by clearly laying out *all* the evidence on *all* the disputed questions of fact (as Bathurst CJ did at [90]-[99]) that an appeal court can determine whether it is satisfied of an accused's guilt beyond reasonable doubt. Here this court cannot be so satisfied particularly given the natural limitations on fact finding inherent in reviewing a written record.

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19. At RS [44]-[83] the reader is treated to a very lengthy summary by the Crown of the Full Court's reasoning as to why it was satisfied of Castle's guilt beyond reasonable doubt. However, these paragraphs contain little by way of response to the various difficulties in the Full Court's reasoning on this issue articulated in AS [60]-[67].

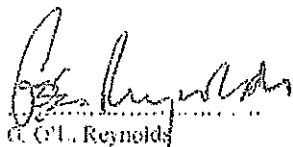
(iv) Summing-up of Castle's case

20. At RS [84]-[93] the Crown deals with Castle's submissions about the alleged inadequacy of the summing-up in dealing with her case and evidence.
21. At RS [84] the Crown states that "if Gange was not in the car there was no dispute the gunman must have been Bucca". This is not accurate. At the trial, no such concession was made by counsel for the two accused. Even if the jury did not accept that Gange was the shooter, the Crown still had to prove beyond reasonable doubt that the gunman was Bucca.
22. At RS [85] the Crown purports to summarise the trial judge's obligations in summing-up the accused's case by reference to two very brief statements by this Court in *Domican v R* (1992) 173 CLR 555 at 561 and *RPS v R* (2000) 199 CLR 62 at [41]. However, the statement in *RPS* that the trial judge must put to the jury fairly the case which the accused makes is not a complete statement of a trial judge's obligation either generally or in the circumstances of this case.

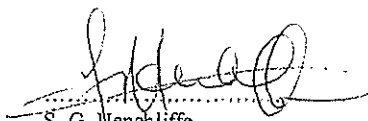
³ HCA at [46].

23. At RS [86] the Crown asserts that the salient aspects of Castle's evidence were referred to in the summing-up. However, the trial judge made scant reference to the matters summarised in AS at [68]. Castle gave a detailed version of the events of 2-3 February 2013 (and of other relevant matters) and was entitled to a summing up of her account as a coherent whole regardless of whether her account was perceived by the trial judge to be persuasive.
- 10 24. At RS [87]-[88] the Crown asserts that the only real evidence of Castle of any significance was her evidence that Gange was the shooter, her evidence otherwise being "silent as to the balance of the key issues". This is not a fair summation of her evidence. The Crown case was based essentially on circumstantial evidence and a substantial number of factual matters and circumstances were relevant to that case. A fair and balanced summing up required that Castle's version of all the relevant circumstances (particularly on 2-3 February) be reviewed in a full, clear and accurate way.
- 20 25. At RS [88] and [90] the Crown suggests that the trial judge's recitation of portions of Castle's barrister's address was sufficient. However, the obligation of the trial judge to summarise the accused's case is not wholly dependent on the manner of address by counsel for the accused. Even where counsel for the accused does not rely upon (or even expressly abandons) matters this does "not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused": *Pemble v R* (1971) 124 CLR 107, at 118.
26. At RS [93] reference is made to the absence of complaint about the summing up by Castle's counsel at the trial. However, this ground of appeal has often been run successfully even where the point was not raised at trial: see, for example, *R v Veverka* [1978] 1 NSWLR 478⁴; *Szekely v R* (1978) 19 SASR 431; *R v Tomazos* NSWCCA unreported 6.8.71. See also [25] above.
- 30 27. Finally, the Crown does not address in terms the submissions of Castle on the proviso in respect of this ground of appeal: AS [78]-[80]. Presumably this means that the Crown does not seek to defend the Full Court's conclusions at [66], [106] and [127].

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⁴ At p.480 citing *Pemble* at p.118.