

CLAYTON v THE QUEEN (M156/2005)
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Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 24 October 2005

These applications concern the question of whether, on a trial of joint accused for murder, proper directions were given in respect of the requirements of "extended common purpose". Each of the three applicants was charged and convicted of the murder of Stephen Borg and of intentionally causing serious injury to Paula Rodwell. The affray arose after Borg had deliberately rammed and damaged vehicles parked at the applicants' home. The applicants subsequently armed themselves and drove to Borg's house, bashed Ms Rodwell and then assaulted Borg, who died from the effects of multiple stab wounds. The Crown contended that although it could not identify who inflicted the fatal wound, each was guilty on the basis of complicity on any of 3 bases: (1) in the course of the implementation of a plan to cause really serious injury to Borg; (2) each had agreed to assault Borg and reasonably foresaw the possibility that death or really serious injury might be intentionally inflicted by one of them in carrying out the agreed lesser crime; or (3) two of them aided and abetted the principal offender by helping the principal in their commission of murder.

The appeals to the Court of Appeal (Charles, Chernov & Nettle JJA) alleged inter alia that the trial judge (Smith J) misdirected the jury as to the operation of the principle of extended common purpose. It was said that His Honour failed to make clear that the jury needed to be satisfied that the accessory foresaw not only the *actus reus*, but also the necessary intention. The Court dismissed the appeals, holding that the judge's charge made this perfectly clear and that a check list given by the judge to the jury had been adequately explained and would not have misled them.

On 16 June 2006 Justices Hayne and Heydon made orders that so much of the applications for special leave as concerned the issue of extended common purpose be adjourned for argument before a Full Court as on appeal.

The relevant proposed ground of appeal is:

- There has been a substantial miscarriage of justice as there is a real possibility that the [applicant] was convicted of murder on the basis of "extended common purpose" which is a head of complicity that should not be accepted as part of the common law of Australia because it does not reflect a proper relationship between moral culpability and legal responsibility.