HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA: **No. A14/2022**

ADELAIDE REGISTRY

BETWEEN:

BENJAMIN JOHN MITCHELL
Appellant
And
THE KING
Respondent

THE APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The appellant certifies that the submission is in a form suitable for publication on the internet.

Part II: Outline of Propositions

2. The substance of Mr Mitchell's evidence is accurately covered in the trial judge's summing up at pages 136-140 and 147-158 of the Joint Core Appeal Book (**JCAB**).
3. Mr Mitchell's evidence was to the effect that he drove Mr Tenhoopen (and two others) at Tenhoopen's request to Adelaide as he had on previous occasions {JCAB: 138,149L10-15}and {AS[9]}.
4. After the freeway, Mr Mitchell was directed to drive to a particular location, and then he remained with his car (a Blue Subaru) whilst the others went off: {JCAB: 138; 151}.
5. Mr Mitchell became aware of attempts Tenhoopen and Howell to put cannabis plants into the boot of his car and, after remonstrating with them, drove away, eventually returning to Murray Bridge {JCAB:139; 152}.
6. Some support for Mr Mitchell's version of events can be found in the evidence of the Crown witnesses Carson {AS [9]} and Codey Passmore {JCAB 128L13-14}, who saw silhouettes of men in the driver's seat whilst the process of stuffing cannabis into the boot of the car was occurring.
7. The prosecution opened the case referring to the possibility that more than five (5) individuals were involved: "*a group of men, maybe four, maybe six or seven*" thus

lending some support to Mr Mitchell's case that he was not one of the five shown on the CCTV {Appellant's Book of Further Materials: 2L3-4}, {AS fn.[5]}

8. The presence of DNA on secateurs found in the grow house to which Mr Mitchell may have been a contributor could not, on its own, place Mr Mitchell in the grow house; as the trial judge acknowledged {JCAB: 97L15-20}{AS[8]}.

If, as anticipated, counsel for Mitchell adopts the oral submissions by counsel for the appellant Carver (Mr Game SC) about the interaction between the doctrine of EJCE and s.12A CLCA, it will not be necessary to orally address the court on the matters below save possibly in respect of "Ground 3".

Ground 1: can EJCE apply in cases of constructive murder?

9. The judgment of the plurality in *Miller v R* (2016) 259 CLR 380 emphasises that the necessary foresight of the secondary party is of an intent on the primary party to commit murder: {*Miller* at paragraphs [1] and [45]} {AS[46]-[49]}.
10. It is the presence of the relevant intent that helps to distinguish liability for murder from manslaughter in JCE and EJCE cases: see e.g. *Gillard v R* (2003) 219 CLR 1 at [15]-[19] and [25]. {AS[44]}
11. By contrast, s.12A CLCA requires only an intentional act of violence causing death and does not incorporate or rely upon the common law distinction between the different intents for murder and for manslaughter. It is a free-standing or stand-alone basis for murder. {AS[56],[75]}
12. Those drafting the section do not appear to have considered consistency with the JCE doctrine and the section came into force before the decision in *McAuliffe v R* (1995) 183 CLR 108: {ABFM: 15} {AS[30]}. Nor does the wording of the section reflect an intention to rely upon EJCE for its efficacy {AS[28]}.
13. Consistency with the development and application of the EJCE doctrine requires that the distinction between the relevant states of mind for common law murder and manslaughter be maintained especially given its *sui generis* nature: *Clayton v R* (2006) 81 ALJR 439 at 444[20]. {AS[50]-[56]}
14. The court below was not asked to address the compatibility of the doctrine with s.12A CLCA and so leave is required: *Crampton v R* (2000) 206 CLR 161 {AS[24]-[25]}. Leave has not been opposed by the respondent.
15. The respondent's views cannot therefore be reconciled with the statements of principle in *Miller* (supra) or *McAuliffe* concerning the requisite foresight and appear to be based

upon an example that is hypothetical (RS at [21] and [34]) and that does not reflect a correct understanding of *Miller* or *McAuliffe*.

Ground 2: the trial judge's directions

16. On the assumption that the doctrine applies, the trial judge directed the jury in terms that the only foresight required was that of "*an*" intentional act of violence and not necessarily the one that inflicted the blows causing death {see e.g. JCAB: 50-51, 62, 69, 270, 277-278}. {AS[15-[16], [70]}
17. The application of EJCE in this context requires consistency with the requirements of s.12A CLCA itself; that is, foresight of death {AS[73]-[77]}.
18. The court below: {JCAB: Doyle JA at [12] and Peek AJA at 379[124]} were therefore wrong in principle to uphold the trial judge's directions for the reasons given in the several appellants written and oral submissions.

Ground 3: "a grow house would likely be guarded"

19. There would appear to have been no evidence given in the trial that would support statement by Peek AJA that it was common knowledge in Australian society that a grow-house would likely be guarded and that violence might well be necessary {JCAB: 392[167]}.{AS[78]}
20. The statement was an essential (but erroneous) step in the reasoning of Peek AJA towards his conclusion at {JCAB:393[172]} and thus calls it into question.

Dated 2 December 2022

Andrew Tokley KC

Senior counsel for the appellant