HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA: A14 of 2022

ADELAIDE REGISTRY

BETWEEN:

BENJAMIN JOHN MITCHELL
Appellant

And

THE QUEEN
Respondent

THE APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: The Issues

2. Does the doctrine of extended joint criminal enterprise apply in the context of constructive murder pursuant to s.12A of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**)?
3. If the doctrine does apply, what is it that must be in the contemplation of a secondary participant: is it simply that *any* intentional act of violence might occur or must the accused contemplate the possibility of death caused by an act of violence?

Part III: Certification as to s.78B Notices

4. The appellant's counsel has given consideration to whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903* (Cth). No notice is required to be given.

Part IV: Decisions

5. *Rigney v The Queen* [2021] SASCA 74 (unreported).

Part V: The Relevant Facts

6. The applicant (**Mitchell**) was charged on Information with three others[1] with one count of murder of a Mr Gjabri (**the deceased**), contrary to s.11 of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**) and, although not mentioned on the Information, s.12A CLCA was also relied upon by the Crown[2]. None of the accused was charged with another offence[3].

7. The prosecution case was that Mitchell and three other persons (Carver, Howell, and Tenhoopen) agreed to drive from Murray Bridge to a suburb of Adelaide with a view to entering and stealing cannabis plants from a "grow house" (**the joint enterprise**[4]). Mitchell drove the car to Adelaide and at a place near to the grow house and the four men met up with another man, Rigney. The five men[5] then set off to steal cannabis from the grow house a few streets away. During the process of stealing the cannabis plants, one or more of the accused either murdered the deceased (s.11 CLCA) or committed an intentional act of violence that caused his death (s.12A CLCA). By the end of the trial, it was common ground that none of the accused set out or planned to murder the deceased[6].

8. In proof of Mitchell's presence inside the house, the Crown relied upon some secateurs found inside the house with DNA that may have been Mitchell's[7] (as he was found to be a contributor) but there were also several other contributors of DNA on the secateurs[8] and some CCTV footage that showed 5 men walking in the vicinity of the "grow house"[9]. The quality of the CCTV footage was not such as to enable positive identification of the five men or of the so-called "stick" or "bat" held by one of them[10].

9. Mitchell gave evidence at trial to the effect that his involvement was only as a driver of a vehicle and he agreed to drive another accused (Tenhoopen) to Adelaide to buy drugs in return for which he would receive some money for his time, his petrol and a small quantity

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[1] See the Joint Core Appeal Book (**JCAB**) pg. 6; Carver, Tenhoopen and Rigney. Howell, who was also said to be a participant, was separately charged, and subsequently tried and convicted of murder.
[2] The Information only alleged the one count of murder, but the trial proceeded on the basis that the charge embraced both murder at common law (s.11 CLCA) and constructive murder (s.12A CLCA).
[3] See the Information JCAB pg. 6 and also T19L31-34; see the Appellant's Book of Further Materials (**ABFM**) 1 pg1.
[4] JCAB pg. 47L11-12; pg.48L12-15.
[5] It is not clear whether the Crown were alleging that only 5 persons were involved given that, during the Crown opening reference was made to a commotion and "maybe four, maybe six or seven [men], and three cars": see T22L3-4; ABFM 2 pg2.
[6] JCAB pg.47L5-8.
[7] The chances of its being someone other than Mitchell's were 36,000.
[8] JCAB pg. 97L15-21 and 98L18-22.
[9] T29 L20; ABFM 3 pg3.
[10] JCAB pgs. 57L8-10 and 58L15-20.

of drugs and he had previously done so at the request of Tenhoopen[11]. Due to his hearing problems and drug taking he was not aware of any plan to steal cannabis from a grow house. Mitchell said he was only introduced to Howell that evening[12] and did not know Rigney (who travelled to Adelaide in separate car)[13] and he did not go inside the grow house and was not aware of any plan to steal cannabis plants or to attack the deceased[14]. As part of the Crown case a witness, Ms Carson, gave some evidence that lent some support Mitchell's story that he did not go into the grow house[15].

10. There was no *direct* evidence before the jury as to which person or persons went into the grow-house or as to which person or persons attacked the deceased or of any plan to attack the deceased or that the accused knew that the deceased was in the house[16]. There was *no* evidence given that any of the accused had previously assaulted or attacked a person or that there was any prior discussion that an assault might occur or prior discussion that the grow house was guarded and violence might be required. There was no evidence as to where the "stick" or "bat" came from, at what point it was acquired, or for what purpose. The presence of bricks in the grow house did not necessarily suggest contemplation of violence and there was no evidence that the deceased's injuries were connected to the bricks.

11. There was evidence that some of the accused knew each before the night in question (Mitchell, Tenhoopen, Carver), but there was no evidence that Mitchell knew Howell or Rigney before that night. Other evidence appears to have implicated Carver, Howell and Rigney as the deceased's assailants[17], but not Mitchell.

12. In his closing address, the prosecutor identified the joint criminal enterprise as being an agreement to enter the house and steal cannabis plants and the foundational crime (for s.12A) as being aggravated serious criminal trespass with intent to steal contrary to s.170 CLCA[18], a crime that does not involve an act of violence.

13. The Crown submitted that there were two pathways to liability of the accused for murder[19], with both pathways being reliant upon the doctrine of joint criminal enterprise

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[11] T1425L31, T 1426 L 5; ABFM 4 pg4. JCAB pg. 131 and 136-138.
[12] T1427L17; ABFM 5 pg6.
[13] T1464L24-25; ABFM 6 pg7.
[14] T1459-1460; ABFM 7 pg8.
[15] T654L8-9; ABFM 8 pg10.
[16] JCAB pg. 66L2-3.
[17] JCAB pg. 203.
[18] Crown closing T1564 L9-1565L27; and especially at T1564L34-37; ABFM 9 pg12.
[19] See JCAB pg.350[29] quoting the prosecution address.

(**JCE**) or extended joint criminal enterprise[20](**EJCE**), the first, was that (common law) murder was foreseen as an incidental element of the joint criminal enterprise and, the second, was that if *any* intentional act of violence was foreseen by the participants, that was sufficient to attract liability for statutory murder, contrary to s.12A CLCA[21].

The summing up

14. As mentioned, at trial, it was common ground that none of the accused set out or planned to murder the deceased and so (common law) murder was not within the scope of the joint enterprise, rather, the joint enterprise was to break and enter and steal the cannabis, a crime that did not have as an element any act of violence[22]. The foundational offence relied upon by the prosecution for the application of s.12A CLCA, was aggravated serious criminal trespass, a crime that does not have as an element any act of violence[23].

15. The trial judge summed up the law in relation to common law murder, constructive murder, joint criminal enterprise and extended joint criminal enterprise over several pages and in several places[24]. Examples of the relevant parts of the summing up that are challenged are set out below:

…For constructive murder, what they have to contemplate is that one of the people in the joint enterprise might inflict ***an*** *intentional act of violence on Mr Gjabri.*[25]

Not only that, ladies and gentlemen, in relation to extended joint enterprise, the intentional act of violence under their contemplation can be ***any*** *act of intentional violence. They do not have to contemplate that one of their co-joint enterprise participants would strike that intentional blow act of violence. So, … if they contemplated that one of their participants in the joint enterprise might strike Mr Gjabri for example on the back of the leg, that would be a contemplation of an intentional act of violence. They do not have to have within their contemplation that someone would necessarily strike Mr Gjabri on the skull.*[26]

For constructive murder, it does not have to be that intentional act of violence that was inflicted, it can be any intentional act of violence. So it only has to be an intentional act of violence, not the one that was specifically carried out in this case. I think I gave you the example that it could be, an intentional act of violence could be they contemplated that one of the accused in the joint enterprise contemplated that they might inflict their blow on Mr Gjabri's back leg or left leg - he does not have a back leg, a quadriped would have a back leg - on one of his legs, that would be contemplation of an intentional act of violence.[27] (**bold** added for emphasis)

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[20] T1564L34-1565L36 (prosecution closing address); ABFM 9 pg12.
[21] The relevant section is set out in **Part VI** below.
[22] See JCAB pgs.47L5-7; 48L10-15; 269L3-20.
[23] See JCAB pg.349[25].
[24] JCAB at pages 50L13-17; 50L21-51L8; see especially pgs. 61-63, 68-69, 270, 274-275, 277L13-17, 278L2-13.
[25] JCAB pg.50L22-51L1.
[26] JCAB pg. 62L15-63L2.
[27] JCAB p.278L2-10.

16. As appears from the above quotations, the trial judge's directions were, in substance, that if the accused agreed to enter the grow house and steal cannabis plants and if in the process of doing so each of the accused contemplated *any* intentional act of violence that would be sufficient for liability for statutory murder contrary to s.12A CLCA.

17. The jury convicted all accused, including Mitchell, of murder, but the jury did not specify whether it on the basis of s.11 CLCA (i.e. common law) or s.12A CLCA (i.e. statutory murder)[28]. The accused were all sentenced to life imprisonment on the basis that the jury found them guilty of murder on the basis of constructive murder (s.12A CLCA)[29].

Court of Appeal

18. Mr Mitchell and the other co-accused, appealed to the Court of Appeal (**the court below**) and complained, inter alia, about the trial judge's directions concerning the "foundational offence" in s.12A CLCA and extended joint criminal enterprise (**EJCE**)[30].

19. Before the court below the appellants argued, inter alia, that the trial judge erred in the directions he gave to the jury regarding the foresight required by an accused to be guilty of statutory murder[31]. In particular, that it was necessary that an accused foresee more than an intentional act of violence to be guilty of murder.

20. Peek AJA, (with whom Kelly P agreed), wrote the main judgment in the court below. Peek AJA rejected the appellants submission that the "*foundational offence*" for the purposes of s.12A CLCA had to involve an act of violence (CA[103])[32]. Doyle JA's also rejected the submission (CA[10])[33].

21. In relation to constructive murder, Peek AJA accepted the Crown's submission that all that the Crown had to prove was that the accused "contemplated an intentional act of violence *simpliciter*" and it was "*not necessary to prove that the accused contemplated that an intentional act of violence that causes death*" (CA [104]-[124][34]). Peek AJA also rejected an argument that the accused must contemplate an act of violence *of the same sort* as that which in fact occurred (CA[107][35] and [172]-[173][36]).

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[28] JCAB pg. 296-297.
[29] JCAB pg.298L16-18.
[30] *Rigney v The Queen* [2021] SASCA 74 (unreported).
[31] JCAB pg.351.
[32] JCAB pg 373 [103].
[33] JCAB pg 344 [10].
[34] JCAB pg 373[104]-379[124].
[35] JCAB pg 374 [107].
[36] JCAB pg 393 [172]-[173].

22. Doyle JA wrote a separate judgment, in which, he agreed with the views expressed by Peek AJA (CA[11]-[15][37]). Both judges rejected an argument that the trial judges directions concerning a smack on the leg were not erroneous (Doyle JA CA[16]-[18][38] and Peek AJA CA[161]-[173][39]).

23. The applicant submits that the court below erred in upholding the directions given by the trial judge concerning EJCE and s.12A CLCA for the reasons set out below.

Part VI: the Appellant's Arguments

Ground 1: the court below wrongly proceeded upon the assumption that the doctrine of EJCE can apply to a constructive murder in s.12A CLCA.

10 *Leave to raise a new ground*

24. Leave is required to raise this ground as there was no challenge to the assumption before the court below. The appellant relies upon the decision of this Court in *Crampton v R* (2000) 206 CLR 161 as to when this Court may have regard to a new ground of appeal raised for the first time in the High Court.

25. The appellant relies upon the following matters:

a. The new ground raises a question of law as to whether the doctrine of EJCE is compatible with the requirements for constructive murder found in s.12A CLCA.

b. There would appear to be no prejudice to the respondent in the appellant raising a new argument on an issue that was central to his trial.

20 c. No additional evidence is sought to be relied upon by the appellant in reliance upon or in furtherance of arguing the new ground.

d. No question of credibility of any witness is being challenged in this court.

e. This court is not being asked to go beyond the jurisdiction exercised by the court of appeal below.[40]

f. This court is in as good a position as the jury to determine the questions raised by the new ground of appeal.

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[37] JCAB pg 344[11]-345[15].
[38] JCAB pg 345[16]-346[18].
[39] JCAB pg 391[161]-393[173].
[40] *Crampton v R* (2000) 206 CLR 161 at 171[11], 182[47], 203[116]-[121], 214[148].

Section 12A CLCA

26. The argument below proceeds upon the assumption that leave may be granted. It is important to begin with identification of the elements of statutory or constructive murder in s.12A CLCA and its legislative history. The section provides:

> A person who commits an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more (other than abortion) and thus causes the death of another, is guilty of murder.

27. The three elements of the offence consist of: (1) an intentional act of violence while (2) acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more and (3) causing the death of a person. If those elements are satisfied, the perpetrator is guilty of the offence – the critical issue here seems to be whether the acts of the perpetrator can be attributed to another person when an intentional act of violence is not within their contemplation as part of the JCE or EJCE.

28. Several thoughts about the section itself spring to mind: (a) if the elements of the relevant major indictable offence alleged (often called the "*foundational offence*") do not involve an act of violence by any participants, what is the connection or the nature of the connection between the intentional act of violence and the major indictable offence ("*course or furtherance of*") in such circumstances? Need it be only temporal? the intentional act occurred "*in the course*" of the offence and not a *causal* connection ("*or furtherance of*")? And, what role does the word "*thus*" play in such circumstances? (b) there is no statutory requirement for the existence of any anterior "common purpose" of JCE involving violence – in such circumstances, what is it that makes another person (a secondary party) liable *for the murder*?

The legislative history of s.12A CLCA

29. Section 12A was introduced into the CLCA on 1 January 1995. In *The Queen v R*, King CJ said that the common law felony murder rule had been abolished and replaced by s.12A CLCA[41]. Section 12A was drafted in the context of removing the distinction between "felonies" and "misdemeanours" contained within the *Criminal Law Consolidation Act 1935* (SA)[42]. Apparently, that distinction had been the basis upon which crimes were

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[41] (1995) 63 SASR 417 at 420 per King CJ with whom Matheson, Millhouse, Perry and Duggan JJ agreed. Judgment in the case was delivered shortly before *McAuliffe*.
[42] See the second reading speech, Legislative Council, Hansard dated 5 May 1994 at pages 767-768; ABFM 12 pg16.

classified according to their seriousness for the purposes of punishment and for the procedures to be applied to proceedings in respect of the same, but it had outlived its usefulness. The distinction was eroded over time. The legislature decided to retain an offence albeit couched in different language and using an apparently arbitrary period of 10 years. This may be contrasted with the position prevailing in NSW which originally required a crime punishable by penal servitude for life or for 25 years[43] (that is, the equivalent to a sentence for murder).

30. There is nothing in the second reading speech to suggest that those enacting s.12 CLCA turned their minds to the interaction between ECJE and s.12A CLCA. Even if they had, they may not have had access to the judgment of this Court in *McAuliffe's case*, which was decided after the enactment of the section[44].

Consideration in Arulthilakan's case

31. Section 12A CLCA arose for consideration in *Arulthilakan v The Queen*[45]. In that case three men agreed to rob two other men in circumstances where the relevant agreement was to commit an *armed* robbery and in which the use of a knife was obviously contemplated as part of the robbery. The joint criminal enterprise (JCE) was thus one that obviously contemplated the use of intentional violence during the course of or in furtherance of an armed robbery and so fell squarely within the terms of s.12A CLCA. The three men were convicted of murder. No argument appears to have been advanced at any stage of the proceedings by counsel for the men that the doctrine of EJCE was incompatible with s.12A CLCA and so none was considered by the court.

32. In that case, the trial judge's directions were disapproved of by the High Court in one respect (concerning manifestation of an act of violence) but not as to the directions on causation. Indeed, it does not appear that an argument was advanced by the appellants that for the purposes of extended joint criminal enterprise it was necessary that the accused contemplate the possibility of death, nor that the doctrine was not applicable and there was, therefore, no occasion for the High Court to consider and address the same.

33. However, in *Arulthilakan* the plurality observed that "*[i]n some contexts the identification of an act as causing the death of a victim may be important because it will*

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[43] See e.g. *The Queen v Sharah* (1992) 30 NSWLR 292 at 297.
[44] The judgment in *McAuliffe* was delivered on 28 June 1995 and the amendment to the CLCA introducing s.12A CLCA came into effect on 1 January 1995.
[45] (2003) 78 ALJR 257.

affect issues of voluntariness, intent or other matters relevant to the offence charged.[46]". Section 12A CLCA requires that the act of violence be intentional and that it be the cause of the death.

34. Contrary to the view expressed by Peek AJA in the court below, the case of *Arulthilakan v The Queen*[47] is not a direct authority that supports the trial judge's directions in this case[48] as that case concerned a joint criminal enterprise of armed robbery and EJCE was not invoked.

35. In this case, the prosecution formulated the relevant agreement as being one of entering and stealing (the offence being aggravated serious criminal trespass) a crime that does not involve an act of violence[49] unlike, for example, armed robbery.

36. It is important to note that, although a person (the perpetrator) will be guilty of a s.12A CLCA offence if he or she satisfies the statutory elements, the offence does not, of itself, apply to another person to make them guilty, unless that person was also alleged to be a or the perpetrator and a jury was satisfied upon the evidence that *each* accused committed an act of intentional violence that caused death. On the evidence here, that satisfaction was unlikely to be reached given the way in which the prosecution put its case against Mr Mitchell[50]. Rather, the Crown utilised the doctrine of EJCE to overcome problems of proof of who committed the act(s) of violence. It is convenient to now turn to the doctrine.

The doctrine of extended joint criminal enterprise (EJCE)

37. Recent consideration of the doctrine and its rationale can be found in *Miller v The Queen*[51] (*Miller*) but its origins can, of course, be traced back to earlier decisions of *Clayton v The Queen*[52] (*Clayton*), *Gillard v The Queen*[53] (*Gillard*), *McAuliffe v The Queen*[54] (*McAuliffe*) and *Johns (TS) v The Queen*[55] (*Johns*) and it will be necessary to consider those cases.

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[46] (2003) 78 ALJR 257 at 263[30].
[47] (2003) 78 ALJR 257.
[48] Although her Honour Gordon J may be of a different view: see *IL v The Queen* (2017) CLR 268 at 328[160]-[161].
[49] T1564L34-37; ABFM 9 pg12.
[50] See JCAB pg. 136L5-12.
[51] (2016) 259 CLR 380.
[52] (2006) 81 ALJR 439.
[53] (2003) 219 CLR 1.
[54] (1995) 183 CLR 108.
[55] (1980) 143 CLR 108.

Johns

38. Johns was a party to an agreement with two other men to rob Morris, who was believed to be a receiver of stolen jewellery. Johns' role was to drive the other two men to a location near the planned scene of the robbery and to wait there to collect the proceeds from them and conceal those proceeds at an agreed location. Johns knew that one of the men always carried a pistol and that he was quick tempered; in the event there was a struggle and the man shot and killed Morris. Johns and the other man were both convicted of the murder of Morris.

39. In the Court of Appeal, Street CJ stated that the secondary party bears criminal liability:

> ... for an act which was within the contemplation of both himself and the principle in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture[56].

That statement of principle was adopted in the joint reasons of the High Court in *Johns*. As their Honours explained, the act is within the scope of the agreed criminal enterprise because it is within the parties' contemplation and foreseen as a possible incident of its execution[57]. In *Johns* it was readily foreseeable that the bringing of a pistol to a robbery might result in the death of an individual and the case did not involve consideration of the application of EJCE to constructive murder.

McAuliffe

40. In *McAuliffe's case* three men set out to rob and bash two other men near the cliffs of a popular Sydney beach. During the attack upon the two men, they bashed one so severely that it caused him to fall to his death in the sea. The trial judge gave directions to the jury consistent with the requirements of common law murder - the intentional infliction of grievous bodily harm in the context of a common purpose[58].

41. The Court considered the doctrine of "common purpose" and whether a secondary party would be held responsible for the actions of a principal party in the circumstances pertaining before the Court. The Court reviewed relevant Australian (*Johns TS v The*

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[56] *R v Johns* [1978] 1NSWLR 282 at 290.
[57] (1980) 143 CLR 108 at 130-131.
[58] (1995) 183 CLR 108 at 112-113 per the Court.

Queen[59]) and Privy Council authorities: *Chan Wing-Siu v The Queen*[60] and *Hui Chi-Ming v The Queen*[61] and quoted the following passage from *Hu Chi-Ming*:

> Their lordships consider that Sir Robin used this word [authorization] - and in that regard they do not differ from counsel - to emphasise the fact that mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit *as a possible incident of the common unlawful enterprise* and must, with such foresight, still have participated in the enterprise. The word 'authorization' explains what is meant by contemplation, but does not add a new ingredient. That this is so is manifest from Sir Robin's pithy conclusion to the passage cited: 'The criminal culpability lies in participating in the venture with that foresight.'[62]

(*italics in original*)

42. After quoting that passage, the Court pointed out that this Court in *Johns* did not consider extended joint criminal enterprise and, in the following well known passage, stated:

> There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind. But there is no other relevant distinction. As Sir Robin Cooke observed, the criminal culpability lies in the participation in the joint criminal enterprise *with the necessary foresight* and that is so whether the foresight is that of an individual party or is shared by all the parties. That 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.[63] (italics added)

43. *McAuliffe* was a joint criminal enterprise case in which it was readily foreseeable that the bringing of hammer to bash someone might result in serious bodily injury or death of an individual and did not involve the application of EJCE to constructive murder.

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[59] (1980) 143 CLR 108.
[60] [1985] AC 168.
[61] [1992] 1 AC 34.
[62] (1995) 183 CLR 108 at 117 per the Court.
[63] (1995) 183 CLR 108 at 117-118.

Gillard

44. In *Gillard*, the court applied *McAuliffe*[64], and importantly, the Court considered that even in cases of common purpose or joint enterprise, manslaughter was an available option to a secondary party even where the perpetrator was guilty of murder because of the foresight of different intentions on the part of the secondary party.[65]

Clayton

45. In *Clayton* this Court, by majority[66], reaffirmed that the relevant principles concerning joint enterprise or common purpose, to be applied were expressed in *McAuliffe* and *Gillard*.[67] There was no occasion in *Clayton* to consider the application of EJCE to constructive murder. Importantly, however, both the majority, and the dissenting opinion of Kirby J, referred with approval to the opinion expressed by Professor Simester that joint enterprise liability is a form of *sui generis* liability[68].

Miller

46. The common law doctrine of joint criminal enterprise and extended joint criminal enterprise as discussed in the *McAuliffe*[69], was recently affirmed by the plurality in *Miller* in the following terms:

> [4] The law, as stated in *McAuliffe*, is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the *actus reus*. Each party is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement ("joint criminal enterprise" liability). An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement. Moreover, a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the

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[64](2003) 219 CLR 1 at 9 [15] per Gleeson CJ and Callinan J; Gummow J 15 [31]; Hayne J 36 [112]; cp Kirby J 31-33.
[65](2003) 219 CLR 1 at 14 [25] per Gleeson CJ and Callinan J.
[66] (2006) 81 ALJR 439 Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ: Kirby J dissenting.
[67] *Gillard v The Queen* (2003) 219 CLR 1.
[68] (2006) 81 ALJR 439 at 444[20] and 454 [79].
[69] (1995) 183 CLR 108.

enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability).[70]

47. The passages quoted above are self-explanatory and no further exposition seems necessary. The important point, for present purposes, is the statement concerning the state of mind of the secondary party for the purposes of EJCE. In responding to a perception that "joint enterprise liability" involved "*guilt by association*" the plurality stated:

> The misunderstanding that their lordships identified was that the expression allows a form of "guilt by association" or "guilt by simple presence without more". Nothing in *McAuliffe* supports either conclusion. It is to be appreciated that in the paradigm case of murder, the secondary party's foresight is not that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm it is that in executing the agreed criminal enterprise a party to it may commit murder. And with that knowledge, the secondary party must continue to participate in the agreed criminal enterprise.[71]

48. The critical requirement identified in *Miller* is of foresight that a party may "*commit murder*" or act with "*murderous intention*"[72]. Such a requirement is understandable as it aligns criminal culpability with the punishment given that the consequence to the secondary party, if found guilty of murder, is a sentence of life imprisonment. EJCE should not be used as a means to expose a secondary participant to such a sentence in the absence of such foresight and yet that seems to be, with respect, precisely what would occur if all that need be foreseen is "*an* intentional act of violence".

49. In summary, relevant authorities support the view that the culpability of a secondary participant in a joint venture for an incidental crime, when its commission is foreseen but not agreed to, lies in continued participation in the agreed criminal enterprise with the necessary awareness. In the paradigm case of murder, the secondary party's foresight is that a party "*may commit murder*"[73]. The imposition of liability for the acts of another is justified because of mutual embarkation on a crime with the awareness that murder may be committed in executing their agreement[74] - what is hereafter called "*the rationale*".

Compatibility of EJCE with constructive murder in s.12A CLCA

50. The question that arises is whether *the rationale* can enable the application of the doctrine of extended joint criminal enterprise (EJCE) to statutory murder? (Error 1) And,

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[70] (2016) 259 CLR 380 at 388[4].
[71] (2016) 259 CLR 380 at 402 [45].
[72] (2016) 259 CLR 380 at 402 [1]
[73] *Miller v The Queen* (2016) 259 CLR 380 at 402 [45]; see also 387[1] "*acting with murderous intention*".
[74] *Miller v The Queen* (2016) 259 CLR 380 at 398[34].

assuming it can, is the only foresight required that of *an* intentional act of violence and not foresight of an act that may cause death or or commit the crime of murder? (Error 2) It is submitted that there are several strands to consider to answer the first question.

51. *First*, the common law of murder as developed over the last three centuries requires that, before a person can be convicted of murder, he or she must *intend* to kill or to inflict serious bodily harm. That development was traced in outline by Sir Owen Dixon, writing extra-judicially, when he wrote of "*an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act*"[75].

52. EJCE shifts the focus from the secondary participant's intention to "*foresight*" of another's murderous intention on the basis that it is consistent with accessorial liability[76] (even though it would appear to be *sui generis* form of liability for murder[77]). If EJCE is to apply to constructive murder, then the question is what exactly must the secondary party "foresee", if anything? Must the secondary party foresee that the other party will act with murderous intention or commit murder, which would ensure consistency with the doctrine in relation to common law murder? or is it sufficient for the secondary party to foresee merely the acts sufficient to give rise to constructive murder under s.12A CLCA?

53. *Secondly*, the doctrine of joint criminal enterprise (or common purpose) has been developed by judges largely in the context of common law murder cases,[78] and not constructive murder cases (as shown above), where *the rationale* for the doctrine has (over time) been squared with notions of criminal culpability and accessorial liability, such that it is accepted as a just outcome for a secondary party to be guilty of the incidental offence, in circumstances, where it is readily understandable as to why that should be so[79]. It is within ordinary human understanding and contemplation that a knife or gun or similar weapon brought to or carried during a robbery or assault could be used with deadly consequences and to reason *from such circumstances* provides a reasonable justification of the extension of liability to a secondary party[80].

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[75] "The Development of the Law of Homicide" reproduced in Jesting Pilate and other papers and addresses by the Rt. Hon. Sir Owen Dixon, 3rd Edition. (Ed. Crennan and Gummow) Federation Press (2019) at page 151.
[76] See *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.
[77] See *Clayton v The Queen* (2006) 81 ALJR 439 at 444[20].
[78] *Johns (TS) v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1; Clayton (2006) 81 ALJR 439; *Miller v The Queen* (2016) 259 CLR 380 and *IL v The Queen* (2017) 262 CLR 268.
[79] See the extended discussion in *Miller v The Queen* (2016) 259 CLR 380 at 396-399[30]-[38] and see *McAuliffe v The Queen* (1995) 183 CLR 108.
[80] See e.g. *McAuliffe* (1995) 183 CLR 108 at 115.

54. However, if no weapon is brought or if there is no common purpose for the intentional use of violence, then *ex hypothesi* the circumstances in which *foresight* of the use of violence and any knowledge of the use of violence justify the imposition of liability for murder on the basis of either JCE or EJCE are not present. In such circumstances, it also seems inconsistent with the *sui generis* basis upon which liability is extended to the secondary participant.

55. *Thirdly*, in *Clayton* this Court referred with approval to the view of Professor Simester, that the doctrine of joint criminal enterprise liability is *sui generis* and in "*joint enterprise cases the wrong lies in the mutual embarkation on a crime and the participants are liable for what they foresee as the possible results of that venture.*" (*Clayton* at [20]). Such "*mutual embarkation*" is not a pre-requisite for s.12A CLCA.

56. *Fourthly,* as outlined above in paragraph [30], statutory murder in South Australia has an altogether different origin (felony murder) to the doctrine of extended joint criminal enterprise[81] and although it was said to have a popular appeal[82] it cannot be said to enjoy principled support and many criticisms have been made of the felony murder doctrine. Section 12A CLCA is a "free-standing" basis of liability for murder and is not dependant for its operation upon JCE or EJCE. Moreover, it seems to be inconsistent with the basic principle of the common law that a person is criminally liable for the *intended* consequences or *foreseen* acts, for the two bases of liability to be married together.

57. *Fifthly,* the justification for the imposition of responsibility in EJCE is said to be consistency with the general principle of accessorial liability. But, the question of whether EJCE is, in truth, compatible 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.*"[83] is open to doubt in the circumstances contemplated in paragraphs 52-54 above[84], where a secondary party does not "*intentionally*" assist in the commission of the crime *of murder* or even *statutory murder*, but in a crime in respect of which no violence towards another was intended.

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[81] *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263[27]-[28].
[82] See JCAB pg 354 which reproduces the relevant passages from South Australia, Parliamentary Debates (Hansard), Legislative Council, 5 May 1994, 767-768.
[83] *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.
[84] *Miller v The Queen* (2016) 259 CLR 380 at 398[34] referring to *Clayton* (2006) 81 ALJR 439 at 444[20] and Professor Simester's views.

58. *Sixthly*, as observed by Gageler J in *Miller v The Queen*[85] at [117], those views do not appear to sit comfortably with the views expressed by Gibbs A-CJ (as his Honour then was) in *Markby v The Queen*[86].

59. *Seventhly*, although it may well be criticised as a "policy" consideration, the imposition of the penalty of life imprisonment on a secondary party who contemplated an intentional act of violence, is harsh when weighed against their involvement in an agreed enterprise to commit a crime that was not supposed to involve any intentional act of violence.

60. As well as the authorities considered above there are some other authorities that need to be mentioned.

The Queen v Sharah

61. It is appropriate to mention the case of *The Queen v Sharah*[87] as it would appear to be an authority for the proposition that constructive murder (at least in NSW) requires more than contemplation of an act of violence. In *Sharah* the Crown put the case against the accused on two bases: murder and felony murder[88].

62. Section 18(1)(a) of the *Crimes Act* (NSW), which encapsulates both common law murder and constructive murder, provided as follows:

> Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of a crime punishable by penal servitude for life or for 25 years.

63. Carruthers J set out the elements of both common purpose murder and felony murder. As to the latter he stated:

> (i) that there was a common purpose between the appellant and Attard in company to rob John whilst Attard was, to the knowledge of the appellant, armed with an offensive weapon, namely a sawn-off double barrel shotgun;
> (ii) that during the course of the armed robbery Attard wounded John and during the course of such armed robbery with wounding or immediately thereafter, Attard discharged the gun causing the death of Nick;

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[85] Quoted with approval by Gageler J in *Miller v The Queen* (2016) 259 CLR 380 at 420[117]].
[86] (1978) 140 CLR 108 at 112. See also *Gillard v The Queen* (2003) 219 CLR 1 at 10-14 [16-25] per Gleeson CJ and Callinan J.
[87] (1992) 30 NSWLR 292 at 297-298.
[88] (1992) 30 NSWLR 292 at 296.

(iii) that the discharge of the gun by Attard during or immediately after the armed robbery with wounding of John, *was a contingency which the appellant had in mind*, whether or not the gun was fired intentionally and whether or not in furtherance of the common unlawful purpose. (italics added)

64. Because the wording of section 18(1)(a) of the *Crimes Act* (NSW) is quite different from s.12A CLCA (reproduced at paragraph [26] above), it is not possible to make a direct comparison between the two sections for the purposes of drawing any particular conclusions about the role that EJCE has to play in the context of constructive murder.

IL v The Queen

10 65. The decision in *IL v the Queen*[89] is also relevant for two purposes. First, because the court considered the doctrine of joint criminal enterprise and the basis upon which the acts of an accused are attributed to a secondary party, and secondly, because some members of the court considered the decision in *R v Sharah*.

66. In *IL* two accused set out to manufacture drugs and while doing so, he lit a gas ring and a fire ensued killing him (the deceased). The survivor was charged with the murder of the deceased. It was argued that the survivor was engaged in a joint criminal enterprise with the deceased. The outcome ultimately turned upon whether under the statute a person could be guilty of self-killing and also whether the acts of the deceased could be attributed to the survivor. A majority of the court held that the relevant provision did not apply to

20 self-killing and the survivor[90].

67. A majority of the court explained that the decision in *Osland*[91] decided that what is attributed to a participant in a JCE are the *acts* of a crime and not *liability* for a crime[92].

68. Bell and Nettle JJ observed that the decision in *Sharah* had been questioned (at [89]). Whereas Gageler J noted that *Sharah* has been followed in New South Wales and may be explained by reference to and be consistent with basic principle (at [102]), Gordon J (at [163]-[166]) considered it to be wrong[93].

69. It is timely to consider the application of the doctrine of extended joint criminal enterprise to constructive murder. Its application, as this case demonstrates, carries with it the risk that a person who did not do the act, or intend the resulting death, or even

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[89] (2017) 262 CLR 268.
[90] Kiefel CJ, Keane and Edelman JJ, Bell and Nettle JJ.
[91] (1998) 197 CLR 316.
[92] (2017) 262 CLR 268 at 272-273[2], 281[26]-287[40] per Kiefel CJ, Keane and Edelman JJ; 299[74]-302[77] per Bell and Nettle JJ; 312 [107] per Gageler J; 323[145] per Gordon J.
[93] (2017) 262 CLR 268 at 329-330[164]-[166].

contemplate the resulting death as part of the foundational crime, and who (in this case) may not even have contemplated any act of sufficient violence of sufficient causality, but if considered to have contemplated "*an*" intentional act of violence, is as guilty as a principal who did the act, intended to do so and was in a position to contemplate the outcome of their actions.

Ground 2: the court of appeal erred when it upheld the trial judge's directions to the jury on the question of what needed to be contemplated by an accused.

70. In this case, the trial judge's directions were to the effect that the co-accused merely had to contemplate *any* intentional act of violence for liability to attach[94] and he did not direct the jury that it was necessary for the co-accused to have in *contemplation* that, another person may die from an intentional act of violence or that, one of them may commit constructive murder. Examples of the relevant passages from the summing up are set out above and similar examples can also be found in the JCAB at pages 266-270, 277-278.

71. The court below upheld the trial judge's directions and supported the directions on two bases: (a) that it was consistent with authority that all that the secondary party had to foresee was that the primary party commit an intentional act of violence and did not need to foresee the consequences of that intentional act of violence[95]; and (b) that, in any event, the trial judge's directions would not have distracted the jury from consideration of the actual blows to the head that were necessary to cause death[96].

72. The appellant submits that the court below erred in upholding the trial judge's directions for the following reasons.

73. *First,* it is one thing to foresee *an act* of violence – breaking down a door is an act of violence and so is a smack on the leg - but it is another thing to contemplate an intentional act of violence that *causes the death of a person* (which is one of the statutory requirements of s12A CLCA) and to nevertheless continue to participate in the commission of the agreed crime (which itself does not involve any act of violence or any contemplation of death).

74. *Secondly*, for a secondary party to be guilty of common law murder it is necessary that they foresee the possibility that the primary party will act with murderous intention or will commit murder, and something less will not suffice. The *sui generis* nature of and the

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[94] See above paragraph 15.
[95] JCAB pg. 345[12] Doyle JA; 379[124] Peek AJA.
[96] JCAB pg. 392[164]-[165].

rationale for EJCE really leaves no room for contemplation of mere act of intentional violence and there would appear to be no case that authoritatively decides otherwise.

75. *Thirdly*, s.12A CLCA is a stand-alone basis upon which a person may be guilty of murder, and it does not appear to have any direct analogue in other State legislation. It is a legislative provision that does not rely upon the common law for its rationale or its justification. In the choice of the statutory requirements, there appeared to have been no consideration given to coherence with other common law principles.

76. *Fourthly*, if, under the doctrine of JCE, attribution of the act of the principal offender to a secondary offender is required, that act must form part of the *actus reus* of the offence: see e.g. *IL v The Queen*[97] per Bell and Nettle JJ at [65] and [77]. The trial judge's suggestion that a "*smack to the back of the leg*"[98] was sufficient to attract liability for murder was surely erroneous, as there was no evidence sufficient to justify any causal link between such an act and the death and thus for attribution as an act forming part of the *actus reus* of the crime.

77. As to the reliance by the jury upon the directions, the problem with the way in which the court below dealt with this aspect of the directions ("*smack on the leg*")[99] is that it is simply not known upon what basis the jury reasoned to a conclusion of guilt for Mr Mitchell. For example, the jury may have accepted that Mr Mitchell stayed with his car and did not go into the grow-house and he was not an assailant, but that he nevertheless contemplated *an act* of violence – and given the trial judge's directions, that was sufficient, in their minds, to attract statutory murder. Indeed, the trial judge gave an example of a person sitting in a car a couple of streets away for the purpose of transporting the cannabis: see JCAB at page 52L14-20.

78. Finally, the view expressed by Peek AJA that, "[it] *is common knowledge in Australian society that such a grow house would be likely guarded and that violence might well be necessary to overcome the guard*" (CA[167])[100] was not, with respect, the subject of evidence at the trial and could not be used as a basis to reason to a conclusion, as he did, that "*...the appellants each had in contemplation that an 'intentional act of violence' might occur*" (CA[172])[101].

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[97] (2017) 262 CLR 268 [65]-[77].
[98] JCAB pg. 69L8.
[99] [2021] SASCA 74 at [16]-[18] Doyle JA, [165] Peek AJA.
[100] JCAB pg 392 [167]; [2021]SASCA 74 at [167]
[101] JCAB pg 393 [172].

79. There is a significant tension between the doctrine of EJCE and the elements of constructive murder in s.12A CLCA, which, on the trial judge's directions merely required foresight of an intentional act of violence. It is respectfully submitted that consistency between the formulation of the doctrine for the purposes of common law murder and its application in the context of constructive murder, requires that a secondary party foresee that the primary party act with murderous intention or commit murder. In that way, coherency in the law will be maintained and an individual will not be punished by imprisonment for life merely because he or she contemplated *an* intentional act of violence.

10 **Part VII: Orders sought**

1.1. The Appeal be allowed;

1.2. Set aside the order of the Court of Appeal of the Supreme Court of South Australia made on 10 August 2021; and

1.3. Order that there be a new trial of the matter.

Part VIII: Estimate of time.

1. Approximately 1.15 hours. It is anticipated that the appellant's counsel will not address the same matters to be addressed by other counsel.

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Dated: 5 August 2022

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LIST OF LEGISLATIVE PROVISIONS

s11 *Criminal Law Consolidation Act 1935* (SA)

s12A *Criminal Law Consolidation Act 1935* (SA)

s78B *Judiciary Act 1903* (Cth)

s18 *Crimes Act* (NSW)