HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: BENJAMIN JOHN MITCHELL,
ALFRED CLAUDE RIGNEY,
AARON DONALD CARVER
Appellants

and

MATTHEW BERNARD TENHOOPEN
Applicant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: CONCISE STATEMENT OF THE ISSUES

2. The matters in A14, A15, A16 and A17[1] raise the following questions for determination by this Court:

    a. In relation to the offence of murder and the doctrine of extended joint criminal enterprise:[2]

        i. does the doctrine of extended joint criminal enterprise, when applied in the context of an offence of murder, require contemplation of not

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1 While Tenhoopen is yet to be granted special leave to appeal, for brevity, the other parties are collectively referred to throughout these submissions as "appellants".

2 Appeal grounds: Mitchell 2.4, Rigney 2.1, Carver 4 Joint Core Appeal Book ("JCAB") 423, 426, 429), Tenhoopen 1 Core Appeal Book ("CAB") 401.

only the intentional infliction of grievous bodily harm, but also a specific contemplation that death "will" or "may" result?

b. In relation to the construction of s 12A of the *Criminal Law Consolidation Act 1935* (SA) ("CLCA"):

i. do the principles of complicity apply to s 12A, *simpliciter*?[3]

ii. if the principles of complicity apply, does the doctrine of extended joint criminal enterprise apply to s 12A?

iii. if the doctrine applies, what content is to be given to it when s 12A is in issue?[4]

3. The respondent's overarching contention is that should the appellants' arguments be accepted, they require reopening and overruling the decision of this Court in *McAuliffe v The Queen*,[5] and will create incoherence in the way in which common law principles of complicity apply to the offence of murder generally, as well as to the South Australian statutory form of constructive murder.

Part III: 78B NOTICE

4. The respondent has considered whether a notice should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth). No such notice is required.

Part IV: FACTS

5. The respondent does not contest the appellants' narrative of facts or chronology, apart from the appellant Mitchell's account of his involvement in the offending, which is set out immediately below.

6. The appellants were charged with murder in the context of their trespass into and ransacking of a "drug house" in order to steal cannabis that was growing there. Several hours before the murder was alleged to have been committed, the appellant Mitchell and the applicant Tenhoopen were in conversation at Tenhoopen's house at Murray Bridge, over an hour's drive from the drug house.[6]

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3 Appeal grounds: Mitchell 2.1, Rigney 2.2, Carver 2 JCAB 423, 426, 429; Tenhoopen 2 CAB 401.

4 Appeal grounds: Mitchell 2.2, 2.4, Rigney 2.3, Carver 3, JCAB 423, 426, 429; Tenhoopen 3 CAB 401-2.

5 (1995) 183 CLR 108; and, as a consequence, the decisions in *Gillard v The Queen* (2003) 219 CLR 1 and *Miller v The Queen* (2016) 259 CLR 380.

6 JCAB 171ff (Summing Up 163ff).

7. In evidence admissible against Tenhoopen and Mitchell, Tenhoopen was heard to speak of travelling to Adelaide to "take some marijuana" which, he said, would be put in their cars and brought back to Murray Bridge. Tenhoopen was wearing dark clothes. He was heard to tell Mitchell to change because "Aaron [Carver] and the other person wouldn't let him come and he needed to be in darker clothes." Mitchell changed into dark clothes. Mitchell and Tenhoopen were also heard discussing putting socks on their hands before leaving.[7]

8. Mitchell drove Tenhoopen, the appellant Carver and Jason Howell from Murray Bridge to Adelaide, leaving at around 10:30pm. On the way, Carver's phone called the appellant Rigney's phone for 48 seconds at 11.11pm.[8] Rigney's car entered Claudia Street, Para Vista - a backstreet behind the deceased's house shortly after 11.13pm.[9] Rigney's phone then called Carver's phone for 24 seconds at 11.15pm.[10] At about 11.35pm Mitchell's car also entered Claudia Street Para Vista.[11]

9. CCTV from homes in the surrounding streets showed five persons walking in the direction of the deceased's house from where they had parked the vehicles in Claudia Street. At about 12.05am on 9 October 2018, the five persons walked past a house near a building site. The site had loose bricks on it, similar to the two bricks and one half brick subsequently found at the deceased's house.[12] The CCTV footage showed that one of the persons was holding a bat or a stick. The persons walked in the direction of the deceased's house. Approximately 20 minutes later, at 12.28am, CCTV captured flashes of light coming from the direction of the deceased's house.[13] The total distance travelled on foot in the preceding hour, from the backstreet to the deceased's house, was less than one kilometre.

10. Pathological evidence demonstrated that the deceased was subjected to a violent assault, which resulted in blunt force injuries to his head and his skull being fractured. The prosecution case was that the resultant swelling of the brain caused Mr Gjabri's death. He would have survived for at least 35 minutes.[14]

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7 JCAB 172.9-175.3 (Summing Up 164-167).
8 Trial transcript 1213.11-18.
9 JCAB 88.11-88.22 (Summing Up 80).
10 Trial transcript 1266.37-1267.8.
11 JCAB 89.3-8 (Summing Up 81).
12 JCAB 91.7-18 (Summing Up 83). One was found on the front lawn near the front point of entry, one was found inside the front door and one in the back yard near the rear point of entry.
13 JCAB 92.13-17 (Summing Up 84).
14 JCAB 55.3-9 (Summing Up 47).

11. On the following evening, Tenhoopen told a witness he had taken marijuana from a house in Adelaide that was broken into. He said that Mitchell had stayed outside.[15] Contrary to Mitchell's submissions,[16] this statement was inadmissible in the case against Mitchell[17] and so cannot be said to provide any support for his evidence.

12. At trial, there were various pathways to guilt left to the jury by the Judge, including murder on the basis of extended joint criminal enterprise and constructive murder on the basis of extended joint criminal enterprise. In each instance the doctrine of extended joint criminal enterprise was available because the prosecution case was that the five men had agreed to embark upon a joint criminal enterprise to trespass with the intention of committing theft.[18]

13. For the purposes of constructive murder, the foundational offence was aggravated serious criminal trespass in a place of residence, contrary to s 170(1) CLCA, and the intentional act of violence in the course or furtherance of that offence was the assault to which the deceased was subjected.

"Smack" to the back of the leg

14. Throughout their arguments, the appellants variously deploy the remarks by the trial judge that a "strike" or "smack" "to the back of the leg" could be sufficient for the purposes of establishing liability under s 12A CLCA. To dispose of this point immediately, it is important to note that the remark was used as a device to illustrate the differing requirements as to liability for murder and constructive murder.

15. The evidence, as referred to by the trial judge after the first reference to a "strike to the back of the leg", was that the deceased was struck in the head and suffered lacerations to his scalp and a fractured skull - a matter which as the trial judge pointed out, may assist the jury in determining whether or not it had been established that there was an "intentional act of violence".[19]

16. As Doyle JA put simply in the Court below, this was not a case that tested the limits of that aspect of s 12A.[20]

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15 JCAB 175.11-177.6 (Summing Up 167-169).
16 Mitchell submissions [9].
17 JCAB 177 (Summing Up 169); see *Bannon v The Queen* (1985) 185 CLR 1.
18 Contrary to s 170(1) CLCA, an offence with a maximum penalty of life imprisonment.
19 JCAB 50, 56-57, 61-63, 69 (Summing Up 42, 48-49, 53-55, 61).
20 JCAB 346, [18].

Part V: RESPONDENT'S ARGUMENT

Murder, constructive murder and extended joint criminal enterprise: overview of the appeals

17. To commit murder contrary to s 11 CLCA, it must be proved beyond reasonable doubt that an accused caused the death of another, intending to cause grievous bodily harm or death, without lawful excuse or justification.[21]

18. To commit murder contrary to s 11 and s 12A CLCA ("constructive murder"), it must be proved beyond reasonable doubt that an accused committed an intentional act of violence in the course or furtherance of a major indictable offence[22] punishable by imprisonment for 10 years or more that causes the death of another.

19. The doctrine of extended joint criminal enterprise holds that a party to a joint criminal enterprise who foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the enterprise, is party to the incidental crime if it eventuates.[23] For example, in *McAuliffe v The Queen*,[24] where a group of three youths engaged in a joint criminal enterprise "variously described as being to 'roll' or 'rob' or 'bash' someone" ,[25] proof that a co-venturer had contemplated the intentional infliction of grievous bodily harm as a possible incident of the enterprise was sufficient to establish the requisite fault element for the offence of murder as against that co-venturer.[26]

20. For the reasons that follow, the trial judge's directions,[27] and the Court of Appeal's judgment,[28] were correct.

Murder and extended joint criminal enterprise - Mitchell 2.4, Rigney 2.1, Carver 4, Tenhoopen 1

The requisite intent for the offence of murder

21. An accused may be convicted of the offence of murder without intending to kill the victim and without specifically contemplating that their act "might" cause, or have

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21 See also *The Queen v Crabbe* (1985) 156 CLR 464 regarding recklessness.
22 A term defined in the *Criminal Procedure Act 1921* (SA) s 5.
23 *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1; *Miller v The Queen* (2016) 259 CLR 380.
24 (1995) 183 CLR 108.
25 *McAuliffe v The Queen* (1995) 183 CLR 108 at 108.
26 *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.
27 JCAB 45-69, 268-279 (Summing Up 38-61, 260-270).
28 JCAB 351-393, [32]-[173].

the "capacity" to cause, death.

22. As was noted in *Clayton v The Queen*, where a person does not intend the death of a victim, but does intend to cause really serious injury to the victim, and the victim dies, that person will be guilty of the offence of murder.[29]

23. This proposition can be illustrated with an example, which is returned to below:

    a. In the course of robbing V, D causes grievous bodily harm to V by shooting him in the thigh, intending to cause V grievous bodily harm.

    b. Notwithstanding the intention to cause V grievous bodily harm, at the time of shooting V, D positively did not intend to kill V.

    c. V's artery is ruptured and V dies as a result of the gunshot.

In this example, although D held a positive intention not to cause death, D is guilty of the offence of murder. The relevant requirement of proof in relation to death is that, as a matter of fact, V dies, and that V's death was caused by D's intentional act. This is so despite the fact that D positively intended for V to live.

24. What follows is that, as a matter of law, there is no requirement for a primary offender to contemplate or foresee the possibility that their intentional infliction of grievous bodily harm might cause death, or is an act capable of causing death, to be guilty of murder. It is enough that they intended to cause grievous bodily harm, running the risk of death. So much was observed by Professor Glanville Williams in his commentary on the fault element for murder of intending to inflict grievous bodily harm, where he remarked that:[30]

> The human body is so fragile, and a person who shows himself willing to inflict really serious injury on another, so causing his death, is so little less blamable than the intentional killer that the law is right in not making a distinction.

25. The appellants' [Mitchell 2.4; Rigney 2.1; Carver 3; Tenhoopen 1] challenge the interaction or overlay of the principles of complicity upon the offence of murder. It is put, variously, that there must be proof of foresight by the co-venturer in the joint criminal enterprise of the possibility of an act causing death or an act capable of causing death or really serious harm.

26. These contentions would require this Court to re-open *McAuliffe*, *Gillard* and *Miller* and alter the content of the doctrine of extended joint criminal enterprise. Tenhoopen

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29 *Clayton v The Queen* (2006) 81 ALJR 439 at [17].

30 Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 1978) page 210-211.

at [33] accepts that his contention on ground 1, albeit in what is described as a "narrow aspect", requires the reopening and overruling of *McAuliffe*.

Joint criminal enterprise and extended joint criminal enterprise

27. The common law concepts of both joint criminal enterprise and extended joint criminal enterprise were summarised by French CJ, Bell, Kiefel, Nettle and Gordon JJ in *Miller v The Queen*:[31]

> 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 enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability).

28. The relevant distinction arising between joint criminal enterprise and extended joint criminal enterprise liability, regarding what the prosecution must prove, was outlined by the Court in *McAuliffe*:[32]

> …where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture…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.

29. This statement of principle, and the reasoning on which it was based, draws on the decision in *Johns*[33] and the advice of Sir Robin Cooke in *Chan Wing-Siu*,[34] that liability for acts done by a primary offender of a type foreseen but not necessarily intended by the co-venturer:[35]

> …turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

30. 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*".[36]

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31 (2016) 259 CLR 380 at [4] (footnote omitted).
32 (1995) 183 CLR 108 at 117-118.
33 (1980) 143 CLR 108.
34 [1985] AC 168.
35 [1985] AC 168 at 175.
36 *Clayton v The Queen* (2006) 89 ALJR 439 at [20]; *Miller v The Queen* (2016) 259 CLR 380 at [34].

31. In relation to the crime of murder, the requisite contemplation of a co-venturer in an extended joint criminal enterprise to establish liability is the intentional infliction of grievous bodily harm or the intentional killing as a possible incident of the joint criminal enterprise.[37] So much was most recently confirmed in *Miller*,[38] where it was observed that the doctrine holds:[39]

> …that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed enterprise.

10 32. The normative justification for extended joint criminal enterprise liability lies in the continued participation in the criminal enterprise with the requisite awareness.[40] In particular, that the decision to continue to participate in a criminal enterprise with the requisite awareness is itself a "*discrete and independent wrong*".[41] Many of the attacks on the doctrine, and this justification, are mounted from the position that extended joint criminal enterprise liability does not properly reflect an offender's moral culpability, or results in harsh consequences that attend conviction for the offence of murder. Accordingly, the attacks continue, the criminal law should be adapted.[42]

33. The authorities considered above establish that the doctrine of extended joint
20 criminal enterprise liability as it applies to the offence of murder, will see a co-venturer convicted of murder if it is proven that he or she contemplates as a possibility that another member of the joint criminal enterprise in which he or she continues to participate might intentionally inflict grievous bodily harm, and, as a matter of fact death results.

34. Returning to, and slightly adapting, the example provided above:

a. D is acting in a joint criminal enterprise with A to rob V.

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37 *McAuliffe* (1995) 183 CLR 108 at 118.

38 *Miller v The Queen* (2016) 259 CLR 380. See also *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 81 ALJR 439; *R v Taufahema* (2007) 228 CLR 332.

39 *Miller v The Queen* (2016) 259 CLR 380 at [1].

40 See, eg, AP Simester, 'The Mental Element in Complicity' (2006) 122(4) *Law Quarterly Review* 578; AP Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133(1) *Law Quarterly Review* 73; *Gillard v The Queen* (2003) 219 CLR 1 at [112], [118]; *Clayton v The Queen* (2006) 81 ALJR 439 at [20]; *Miller v The Queen* (2016) 259 CLR 380 at [34].

41 AP Simester, 'The Mental Element in Complicity' (2006) 122 (October) *Law Quarterly Review* 578 at 600-601; *Miller v The Queen* (2016) 259 CLR 380 at [33]-[34].

42 See, eg J Richards and L McNamara, 'Just attribution of criminal liability: consideration of extended joint criminal enterprise post-*Miller*' (2018) 42 Crim LJ 372; A Dyer, 'The "Australian Position" concerning criminal complicity: principle, policy or politics' (2018) 40 *Sydney Law Review* 289; D Ormerod and W Wilson, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3.

b. While not agreeing to it, A contemplates as a possible incident of the joint criminal enterprise to rob V that D may intentionally inflict grievous bodily harm on V, and, with that awareness, continues to participate in the agreed enterprise to rob V.

c. D causes grievous bodily harm to V by shooting him in the thigh, intending to cause V grievous bodily harm, but simultaneously positively intending not to kill V.

d. V's artery is ruptured and V dies as a result of the gunshot.

e. both D and A are guilty of murder.

This remains so, notwithstanding that there was a positive intention on D's behalf that V continue to live after being shot, and no contemplation by A that D might "cause death" or of the specific mode of causing the harm employed by D.

35. The above does not sweep aside reference to the "incidental crime" as a matter of happenstance[43] but instead is the orthodox application of the doctrine of extended joint criminal enterprise to the elements of the offence of murder.

Contemplation of act causing, or capable of causing, death

36. None of the decisions in *McAuliffe*, *Gillard*, *Clayton*, and *Miller* require that the co-venturer, in addition to contemplating the intentional infliction of grievous bodily harm as a possible incident of the enterprise, must contemplate an act causing death, or an act *capable* of causing death, as the appellants variously contend.

37. Instead, each decision establishes that where there is a contemplation on behalf of a participant in a joint criminal enterprise that a co-venturer may act (or, potentially, omit to act) and in so acting intentionally cause grievous bodily harm to another, the contemplated actions may be sufficient to satisfy the elements of the offence of murder.

38. That the principle is settled is further indicated by its consistent application in relation to manslaughter: no proof of a mental element attaching to the consequence is required to establish either principal or accessorial liability.[44] This is also consistent with the liability of the aider, abettor, counsellor or procurer. As set out by the plurality in *Giorgianni v The Queen*, establishing liability for a secondary party

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43 cf Carver submissions [73].

44 See *Gillard v The Queen* (2003) 219 CLR 1 at [25].

requires intentional participation in the principal offences, having "*knowledge of the essential matters [going] to make up the offences*" but that did not include a requirement of knowledge that death would result.[45]

39. A requirement of proof of foresight of an act causing death, or an act capable of causing death, in the context of extended joint criminal enterprise liability, is inconsistent with the previous judgments of this Court. The basis for finding an accused guilty of the offence of murder at common law on the basis of extended joint criminal enterprise, where a co-venturer inflicts intentional grievous bodily harm (but not death), was settled by Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ in *Clayton*:[46]

> A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.

40. While powerful criticisms have been made of the extended joint criminal enterprise doctrine,[47] these criticisms, and the arguments underlying them, have been brought repeatedly before this Court.[48] Each time, including, significantly, after the decision of the House of Lords in *Jogee,*[49] the doctrine has been affirmed as forming part of the common law of Australia. Simply because these appeals present a factual matrix where the doctrine interacts with constructive murder[50] does not provide a sound basis for disturbing the doctrine of extended joint criminal enterprise liability as it applies to murder, and as settled in *McAuliffe*, *Gillard*, *Clayton* and *Miller*.

41. For the reasons above, the decisions of this Court dispose of the arguments advanced. The judgment of Duggan J in *Jones*,[51] while it does not bind this Court or dictate the outcome of the appeals, is also not authority for the proposition for which the

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45 *Giorgianni v The Queen* (1984) 156 CLR 473 at 500 (Wilson, Deane and Dawson JJ). See also Gibbs CJ at 482 and Mason J at 495, and the analysis in the joint reasons at 503.

46 (2006) 81 ALJR 439 at [17] (footnote omitted).

47 See, eg, the Hon Justice Mark Weinberg, 'Extended Joint Criminal Enterprise - 'top-down' or 'bottom-up' legal reasoning?' (Remarks at the NSW Supreme Court Conference, 25 August 2018); A Dyer, 'The "Australian Position" concerning criminal complicity: principle, policy or politics' (2018) 40(2) *Sydney Law Review* 289; *Clayton v The Queen* (2006) 81 ALJR 439 at [31]-[131]; *Miller v The Queen* (2016) 259 CLR 380 at [84]-[130].

48 See eg *Clayton v The Queen* (2006) 81 ALJR 439; *Miller v The Queen* (2016) 259 CLR 380.

49 [2017] AC 387.

50 cf *IL v The Queen* (2017) 262 CLR 268 at [107].

51 *R v Jones* (2006) 161 A Crim R 511.

appellants contend.

42. Rigney, and to an extent Carver[52] and Tenhoopen,[53] alleges that Duggan J in *Jones* holds that the doctrine requires contemplation of an act causing death.[54] That statement, which Duggan J himself describes as only provided "*...by way of summary*", is equivocal as to a contemplation of an act causing death or an act capable of causing death or grievous bodily harm. It must also be considered alongside his Honour's subsequent judgment in *R v Bosworth & Ors* where at [66]-[79] his Honour considers a number of the relevant authorities and concludes that extended joint criminal enterprise liability for murder can be established when an accused has contemplated that "*...a co-accused would act with the intention of causing grievous bodily harm.*"[55]

43. This demonstrates that the comment, made by way of summary of an aspect of Duggan J's judgment in *Jones,* does not give rise to any confusion or incoherence. Instead, what can be seen is that, consistent with authority in this Court, Duggan J also held that the doctrine of extended joint criminal enterprise in the context of murder results in liability being established where an accused contemplates, as a possible incident of a joint criminal enterprise, that a co-venturer in the enterprise would intentionally cause grievous bodily harm to another, and as a matter of fact, death results.

44. To accept the appellants' contentions in relation to the operation of the doctrine of extended joint criminal enterprise in respect of murder would generate incoherence with the fault element for murder.

Attribution

45. The appellants approach the nature of extended joint criminal enterprise liability in a number of different ways.

46. Carver[56] and Tenhoopen[57] advance arguments on the basis that a distinction of importance between joint criminal enterprise and extended joint criminal enterprise liability is that the latter is derivative. They then contend *inter alia* that, due to the derivative nature of the doctrine, any incidental offence is "not authorised"

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52 Carver submissions [80].
53 Tenhoopen submissions [22].
54 *R v Jones* (2006) 161 A Crim R 511 at [188].
55 *R v Bosworth* (2007) 97 SASR 502 at [79].
56 Carver submissions [32]ff.
57 Tenhoopen submissions [40]ff.

notwithstanding an accused's continued participation in a joint criminal enterprise with contemplation of the possible incidental crime.

47. The above characterisation fails to recognise the normative justification of extended joint criminal enterprise as set out above. That is, the effect of the continued participation in an enterprise with the requisite foresight. The continued participation, in the respondent's submission, while keeping in mind the caution sounded by Hayne J in *Gillard* about notions of "authority",[58] amounts to "authorisation" (in the sense that attracts liability).[59]

48. Under the doctrine of extended joint criminal enterprise, what is sheeted home to a participant in a joint criminal enterprise is the liability that arises from an act of a co-venturer, if that act is foreseen as a possible incident of the enterprise itself. The issue of attribution in the context of joint criminal enterprise and extended joint criminal enterprise has been the subject of criticism.[60] However, it has been repeatedly stated that acts of co-venturers in joint criminal enterprises, done in the course of carrying out the enterprise, but incidental to the enterprise, can be attributed to each co-venturer where the relevant foresight can be proven.[61]

49. Though it was outlined above, given its importance to the issue of attribution, it is worth returning to a statement of principle from the decision in *McAuliffe*. There, after considering the decision of this Court in *Johns* and the Privy Council in *Chan Wing-Siu*, the Court noted that in the case of an extended joint criminal enterprise (namely, where a co-venturer in a joint criminal enterprise foresees, but does not agree to, a crime other than that which is planned, and continues to participate):[62]

> …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 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.

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58 *Gillard v The Queen* (2003) 219 CLR 1 at [122].

59 See also the discussion, in the context of "acting in concert" of the attachment of liability due to an "agreement" by McHugh J in *Osland v The Queen* (1998) 197 CLR 316 at [92]-[93].

60 See, eg, A Dyer, "The Osland 'Wrong Turn' and the Problems that Fictions Produce" (2019) 42(2) *University of New South Wales Law Journal* 500.

61 *Johns v The Queen* (1980) 143 CLR 108 at 130; *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Osland v The Queen* (1998) 197 CLR 316 at [25]-[27]; *IL v The Queen* (2017) 262 CLR 268 at [26].

62 *McAuliffe v The Queen* (1995) 183 CLR 108 at 117-118.

50. Immediately after the statement of principle, the Court in *McAuliffe* observed that the prosecution had run its case at trial in accordance with the relevant principles. In particular, that participants in extended joint criminal enterprises were responsible for the *act or acts* of the co-venturers, and liable for murder, where along with the physical elements of the offence, there was the "*individual contemplation of the intentional infliction of grievous bodily harm*" as a possible incident of the venture.[63]

51. The above accords with the reasoning of the Court below and the directions given by the trial judge.[64] Given that the issues of death and causation were not in issue, in relation to murder, if a participant foresaw as a possible incident of the joint enterprise that a co-venturer would intentionally inflict grievous bodily harm on the victim, their liability for the offence of murder for that act of the co-venturer would be established. Similarly, and explored in greater detail below, if they foresaw as a possible incident of the joint enterprise (to commit a "foundational offence" for the purposes of s 12A, *i.e.* a major indictable offence punishable by greater than 10 years imprisonment) that a co-venturer would commit an intentional act of violence, then the pathway to the offence of murder provided by s 12A would be satisfied.

52. The "primary" and "derivative" liability issue explored by the appellants is, in the respondent's contention, either not a "relevant distinction" as outlined in *McAuliffe*, or, it is a distinction without a difference in respect of the liability of co-venturers in extended joint criminal enterprises for acts foreseen or contemplated as possible incidents of an enterprise in which they continue to participate.

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63 *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.
64 JCAB 55-58, 273-274 (Summing Up 47-50, 265-266).

Construction of Section 12A

53. The correct construction of s 12A CLCA will determine the disposition of the remaining grounds and related arguments. In this connection, the respondent contends that the trial judge, and the Court below, correctly construed s 12A CLCA.

54. At the appellants' trial, section 12A of the CLCA provided:[65]

> **Causing death by an intentional act of violence**
>
> 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[1]), and thus causes the death of another, is guilty of murder.
>
> **Note—**
>
> 1. i.e. an offence against section 81(2).

55. The provision was inserted into the CLCA by the *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA). In his second reading speech, the Attorney-General made statements indicating that the Government's intention "*was to make minimal, if any amendments to the substantive criminal law, apart from the abolition of the distinction between felony and misdemeanour*".[66]

56. The provision was considered in *obiter* by King CJ, with whom Matheson, Millhouse, Perry and Duggan JJ agreed, in *R v R*, where the Chief Justice observed that it was "…*more or less equivalent*" to the common law position.[67]

57. The provision, despite creating an additional pathway to guilt of the offence of murder created by s 11, is to be construed by reference to the ordinary principles of statutory construction.[68]

58. Statutory construction involves the attribution of legal meaning to statutory text, read in context.[69] Consideration of context is undertaken at the first stage of the process of construction.[70] Here context is to be understood in its widest sense, including surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute read as a whole, legislative history, the purpose and policy of a

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65 The terms "other than abortion", the note, and the Division in which the offence of abortion resided were removed by the *Termination of Pregnancy Act 2021* (SA), which came into effect on 7 July 2022.

66 Parliament of South Australia, Legislative Council, *Hansard*, Tuesday, 11 August 1994 page 126.

67 *R v R; R v G* (1995) 63 SASR 417 at 420. See also the discussion by Matheson AJ in *R v Maurangi & Anor* (2000) 80 SASR 295, especially at [23]-[26] and *R v Kageregere* [2011] SASC 154, especially at [134]-[147].

68 *The Queen v A2* (2019) 269 CLR 507 at [52].

69 *Taylor v Owners-Strata Plan 11564* (2014) 253 CLR 531 at [65].

70 *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at [69]; *R v A2* (2019) 269 CLR 507 at [33].

provision, and the mischief that the statute is intended to remedy.[71] Understanding context has utility in that it assists in fixing meaning to the statutory text.[72]

59. Section 14 of the *Legislation Interpretation Act 2021* (SA)[73] provides that *"the interpretation that best achieves the purpose of the Act…is to be preferred to any other interpretation.*" Both a statute's purpose, and the legislative intention it reflects, reside in its text and structure.[74]

60. For the purposes of this matter, section 16 of the *Legislation Interpretation Act 2021* (SA) now governs the use of extrinsic materials in interpretation.[75] Section 16 provides:

> (1) In the interpretation of a provision of an Act or a legislative instrument, if any material not forming part of the Act or instrument is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material—
>
> a. to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or instrument and the purpose or object underlying the Act or instrument and, in the case of a legislative instrument, the purpose or object underlying the Act under which the instrument was made); or
>
> b. to determine the meaning of the provision—
>
> i. if the provision is ambiguous or obscure; or
>
> ii. if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or instrument and the purpose or object underlying the Act or instrument and, in the case of a legislative instrument, the purpose or object underlying the Act under which the instrument was made) leads to a result that is manifestly absurd or is unreasonable.

61. To the extent that construing a provision requires the modification of its meaning, any modification must be consistent with the legislative intent ascertained in the ordinary way.[76] Further, should it be accepted that words are not to be read into the provision, it must be borne in mind that the phrase "major indictable offence" is defined in s 4 of the *Legislation Interpretation Act 2021* and as such is to be interpreted by reference to its technical legal meaning, for the purposes of s 12A.

62. Three matters are ascertainable from the second reading speech accompanying the passage of the Bill:

a. first, the then Government's primary intention in introducing the Bill was to

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71 *R v A2* (2019) 269 CLR 507 at [33], [124]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

72 *FCT v Consolidated Media Holdings* (2012) 250 CLR 503 at [39].

73 Applicable to the CLCA: *Legislation Interpretation Act 2021* (SA) s 3.

74 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26].

75 Formerly a matter governed by the common law: *AEU v Department of Education and Children's Services* (2012) 248 CLR 1 at [33]; *K-Generation Pty Ltd. v Liquor Licensing Court* (2009) 237 CLR 501 at [50]-[51].

76 *Taylor v Owners-Strata Plan 11564* (2014) 253 CLR 531 at [39]-[40].

enact legislation abolishing the felony/misdemeanour distinction.

b. Second, abolishing the felony/misdemeanour distinction had consequential ramifications for some areas of the criminal law, one being the felony murder rule.

c. Third, bearing in mind the Government's aim of abolishing the anachronistic distinction between felonies and misdemeanours, and the popular appeal of the felony murder rule, the Government determined to adopt the same course as had been taken in Victoria[77] by "*enacting a provision retaining the rule to a large degree*".[78]

10 63. Relevantly, the mischief that the Bill sought to address may be described, in part, as the enactment of the felony murder rule *to a large degree* in the wake of, and necessitated by, the abolition of the distinction between felonies and misdemeanours.

64. The intention was not to enact a provision that mirrored the common law, hence the Deputy Premier, in that portion of his speech that explained clause 12A, said that the "*provision may be seen as providing a statutory replacement for the common law 'felony-murder rule', although the scope of the statutory rule is somewhat different as it applies only to serious crimes. There is, however, a specific exception for causing death in the course of or furtherance of an illegal abortion, to preserve the common law leniency in relation to this offence*".[79]

20 65. It follows that consideration of the mischief that the Bill was intended to address demonstrates that the Government intended to enact a pathway to the offence of murder with different content to the common law felony-murder rule. Moreover, the Government turned its mind to the breadth of the felony murder rule and decided that the breadth of the offence that the Parliament would be invited to enact in substitution would be different.

66. Importantly, after so turning its mind, Parliament, in enacting s 12A as it did, limited the pathway to a specific legal category of offences ("major indictable offence[s]"), which it further limited by imposing a minimum threshold of seriousness as determined by the applicable maximum penalty ("punishable by imprisonment for
30 ten years or more") and explicitly excluded a specific major indictable offence from

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77 *Crimes Act 1958* (Vic) s 3A.
78 Parliament of South Australia, House of Assembly, *Hansard*, Tuesday, 23 August 1994 page 232.
79 Parliament of South Australia, House of Assembly, *Hansard*, Tuesday, 23 August 1994 page 233 (emphasis added).

providing the pathway ("abortion" being the former[80] offence against section 81(2)).

67. The observation that the specific exclusion of a certain form of conduct was to "*…preserve the common law leniency*" indicates that the Parliament was aware that the provision, like the rule it retained "*to a large degree*", could result in harsh consequences. Thus, to the extent that the consequences were not further ameliorated, it may be accepted that their harshness was contemplated.

68. The Parliament also chose a specific type of act that was sufficient to establish liability, namely "an intentional act of violence". In considering the arguments about the type, nature and extent of the causative act advanced by the appellants, this aspect of s 12A can be contrasted with the lack of any requirement for the causative act to be violent in the equivalent provision in New South Wales.[81]

69. Each of the specific category of offences, the minimum threshold of seriousness of that category of offences, and the specific type of act sufficient to establish liability are discrete indicators of Parliament turning its mind to the requisite degree of criminality required to establish an offence of murder by way of the pathway provided by s 12A. As textual indicators they militate against a construction that modifies any of the relevant thresholds, as they establish Parliament's determination that, people who commit an intentional act of violence in a way that causes the death of another in the course or furtherance of another sufficiently serious criminal offence, may be held criminally responsible as murderers.

70. Lastly, the provision does not reference, directly or indirectly, the principles of complicity.[82] To that extent, there is no manifest intention to exclude the operation of the common law principles of complicity as they may operate in relation to the pathway to murder which the provision provides. This issue is explored further below, but at this stage it is worth noting the provision neither explicitly nor implicitly displaces the common law principles of complicity.

71. What the above demonstrates is that there is no ambiguity in the provision that justifies reading further words in, or otherwise altering the meaning outlined to diverge from the ordinary.

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80 As noted above, this explicit exclusion was removed when the related offence formerly contained in Division 17 CLCA was abolished.

81 See eg *IL v The Queen* (2017) 262 CLR 268 at [60].

82 The Bill enacting the provision abolished the distinction between accessories before the fact and principals in the second degree by enacting the formula of "aiding, abetting, counselling or procuring" and making it applicable to all offences. The doctrine of joint criminal enterprise (or extended joint criminal enterprise) was not mentioned or otherwise disturbed.

72. This approach gives proper effect to s 12A's text, context and purpose, and does so in a way that recognises, consistent with the principle of legality, that Parliament "*squarely confronted*" what it was doing and accepted the political cost.[83] Put slightly differently, the respondent contends that s 12A's terms are "*irresistibly clear*".[84] The harsh consequences of a provision so-drafted were explored in relation to s 18 of the New South Wales *Crimes Act* by Gageler J in *IL v The Queen*.[85] They are the contemplated possible outcomes of the application of the provision.

73. As a result, to proffer a construction that only certain types of violent offences are captured by the provision, or otherwise to alter the minimum threshold of seriousness, would further narrow the legal category of offences from which the pathway to the offence of murder lead. It would do so without foundation in the text, context or purpose of s 12A, and would be to go further than Parliament specifically chose to go, and, in effect, to legislate.

Constructive murder and complicity* simpliciter - *Mitchell 2.1, Rigney 2.2, Carver 2, Tenhoopen 2

74. The appellants' arguments on this ground [Mitchell 2.1; Rigney 2.2; Carver 2, Tenhoopen 2] challenge the application of the principles of complicity upon the pathway to guilt to the offence of murder provided by s 12A CLCA.

75. As discussed above, the terms of s 12A do not expressly mention, nor expressly or implicitly modify or otherwise impact the operation of the common law principles of complicity.

76. The appellants argue that the fact that this matter involved extended joint criminal enterprise, as opposed to joint criminal enterprise *simpliciter*, provides a point of difference that impacts upon the application of the principles of complicity to s 12A.

77. In order to construe s 12A as displacing the common law principles of complicity - whether that amounts to displacing all forms of complicity, or only extended joint criminal enterprise - a court would need to be satisfied the terms of s 12A do so in a clear and unambiguous way.[86]

78. In relation to accessorial liability, at common law, there is a body of authority

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83 cf *R v Secretary of State for the Home Department; Ex Parte Simms* [2000] 2 AC 115 at 131.
84 *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at [11].
85 *IL v The Queen* (2017) 262 CLR 268 at [92]-[128].
86 See eg *Bropho v Western Australia* (1990) 171 CLR 1 at [13].

establishing that principals in the second degree were guilty of murder when principals in the first degree, contrary to an accessory's expectation, committed acts capable of satisfying the elements of constructive murder.[87] These authorities do not outline any requirement that a principal in the second degree had to have a specific contemplation of an act "causing death", "capable of causing death" or otherwise that death "would" or "may" "result", contrary to the effect of the construction of s 12A now urged by the appellants.

79. The qualifying constructions offered by the appellants would alter the threshold required to establish liability under s 12A for those liable under the principles of complicity, notwithstanding that Parliament specifically turned its mind to the relevant thresholds: both of the seriousness of the foundational offence and of the character of the act required, and did not alter either. Further, the lack of express displacement of the principles of complicity means it is safe to infer that Parliament intended that the common law doctrines would apply.

80. In relation to joint criminal enterprise, it is settled that the doctrine of joint criminal enterprise applies to offences of constructive murder. So much was held by Jordan CJ (with whom Halse Rogers and Maxwell JJ agreed) in *R v Surridge.*[88]

81. By way of comparison, albeit in a different statutory context, s 18 of the *Crimes Act 1900* (NSW) was not held to displace the application of the common law principles of complicity, on the facts of the case being joint criminal enterprise, in *IL v The Queen,*[89] despite the provision's terms that death must be caused by "an act of the accused".

82. There, it was held that s 18, the equivalent provision to s 12A CLCA in New South Wales, along with the doctrine of joint criminal enterprise, could establish liability for constructive murder where the act of one party to the enterprise led to the death of another person and that act was within the scope of the enterprise.[90]

83. Further, it can be accepted that at common law, all parties to a felony (whether aiders and abettors, or actors in concert) were liable to conviction for the offence of murder on the basis of the felony murder rule.

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87 *R v Betts & Ridley* [1930] 22 CAR 148; *R v Solomon* [1959] Qd R 123; *R v R* (1995) 63 SASR 417 at 420 citing J F Stephen, *A Digest of the Criminal Law* (7th ed, 1926) page 225; *R v Jackson* (1857) 7 Cox's CC 357; *R v Rubens* (1909) 28 Cr App R 163; *R v Murray* [1924] VLR 374; *R v Appleby* (1940) 28 Cr App R 1; *R v Ryan* [1966] VR 553 at 563-567; *R v Grant* (1954) 38 Cr App R 107.

88 (1942) 42 SR 283, 282.

89 (2017) 262 CLR 268.

90 *IL v The Queen* (2017) 262 CLR 268 at [28], [60], [100], [143]-[144].

84. There was no distinction between the bases of complicity - accessories were liable on that basis, as were all offenders who were part of a common purpose. Consistent with the above, it is perhaps unsurprising that directions that s 12A allowed a jury to find multiple accused guilty of murder on the basis of either aiding and abetting or joint enterprise were not held to be erroneous in *Arulthilakan v The Queen*.[91] So much was explicitly noted in the decision of the Court of Criminal Appeal in that case.[92]

85. Further, when aspects of a conviction arising in relation to s 12A were in issue, including the nature of the foundational offence and directions given in relation to the pathway to guilt, there was no complaint as to the application of, or interaction between, principles of complicity on either the basis of aiding and abetting, or joint enterprise, in *R v CMM*.[93]

86. In *CMM*, directions that it was open to convict the appellant on the basis of constructive murder relied upon, in part, the doctrine of extended joint criminal enterprise. There, directions that if the appellant had contemplated as a possibility his co-venturer E producing a knife for the purpose of threatening, intimidating or stabbing another in the course of an attempted robbery to which the appellant was a party, were approved of by Martin J (Doyle CJ and Besanko J agreeing).[94]

87. It is notable that there is no meaningful distinction in relation to the application of the principles of accessorial liability on constructive murder, and the doctrine of joint criminal enterprise on constructive murder.

88. The appellants now seek to add a distinction in the application of the doctrine of extended joint criminal enterprise on constructive murder by way of the construction of s 12A.

89. It is unclear where the basis for differentiation between joint criminal enterprise and accessorial liability as they apply to s 12A, on the one hand, and extended joint criminal enterprise liability as it applies to s 12A, on the other, is located. As outlined

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91 (2003) 78 ALJR 257 at [16].

92 *R v NJA* [2000] SASC 113 at [35].

93 (2002) 81 SASR 300 at [55]. That matter was a separate appeal from the same trial that gave rise to the decision in *Arulthilakan v The Queen* (2003) 78 ALJR 257. Further, at [53], Martin J makes observations about the directions given in relation to murder which indicate that both joint enterprise and extended joint criminal enterprise were live issues in that matter (though the matter of extended joint criminal enterprise is simply discussed as a further aspect of the doctrine of joint criminal enterprise). No point was taken, or argument had, about a potential differentiation of approach to s 12A on each doctrine.

94 (2002) 81 SASR 300 at [27]-[30], [53] (on extended joint criminal enterprise and murder); [58]-[61] (in relation to s 12A).

above, there is no textual foundation for such differentiation. Nor, in the above authorities, has there been a distinction between accessorial or joint enterprise liability in their application to constructive murder.

90. To that extent, the effect of the appellants' arguments on this ground is that this appeal ought be the vehicle for a *sui generis* distinction to be introduced.

91. This distinction would be contrary to the authorities already considered above, including on the issue of attribution, and without foundation in the text, context or purpose of s 12A.

92. The authorities considered above hold, as a settled proposition, that all parties that contemplate an intentional act of violence as a possible incident arising from a foundational offence are liable to murder on the basis of constructive murder. So much appears to have been accepted by the New South Wales Law Reform Commission in that part of their report on the intersection of the law of complicity and felony or constructive murder.[95]

93. The construction advanced by the respondent (that s 12A be afforded its ordinary literal meaning) ensures that all who are criminally liable for a foundational offence, where intentional violence committed in the course or furtherance of that foundational offence has a particularly drastic consequence (the death of another), are also liable for murder, as contemplated and intended by Parliament.

94. Further, the respondent contends that the application of the common law rules of complicity to s 12A, giving s 12A its ordinary meaning, is on all fours with the position in New South Wales, stated by Wood CJ at CL, with whom Sperling and Kirby JJ agreed, in *R v Jacobs*:[96]

> The wording of s 18 did not alter the operation of the common law rules of complicity. It is a general rule of statutory interpretation that a basic common law doctrine is not to be disturbed unless the statute expressly requires that result.
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> ...
>
> There is nothing in [s 18] to disclose any intention to alter the common law principles of complicity. All that the Act did was require a capital felony or one involving punishment by penal servitude for life, and to that extent, but only to that extent, it parted from the common law.
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> ...

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95 NSW Law Reform Committee, *Complicity* Report No 129 (2010), Part 5. In particular, see eg 5.3, 5.31-5.40, 5.70-5.73, 5.77-5.82.

96 (2004) 151 A Crim R 452 at [200]-[205]. The respondent notes that the references to the terms of s 18 can be transposed to the terms of s 12A for the relevant purposes, such that the terms of s 12A require an "intentional act of violence" to cause death, committed "in the course or furtherance of an indictable offence punishable by more than 10 years imprisonment (other than abortion)". This point was cited in noting the settled position that s 18 imports common law rules of complicity: *IL v The Queen* (2017) 262 CLR 268 at [60], [79], [99], [156].

> In this instance it is perfectly clear that the reference to "the accused" when used twice in s 18 is a reference to the accused who is on trial and is not intended to give rise to the consequence that it must be his act, rather than the act of a person acting in concert, which causes death.

95. The basis for introducing a distinction appears to rest on an argument, underpinned by a notion of unfairness or injustice rooted in "remoteness" or moral culpability - that a person who has only considered a possibility of a matter occurring incidental to the scope of the agreed joint criminal enterprise ought not have the harsh consequence of a murder conviction as a result of the pathway provided by constructive murder.[97]

10 96. In negotiating the extant principles, this argument seems to accept that where the pathway provided by constructive murder is embarked upon by an accessory (in the sense of aiding, abetting, counselling or procuring) or is within the scope of the agreed joint criminal enterprise, the harsh consequence, while still more remote than for the "primary" offender, is not sufficiently remote for the effect of the argument to have been established at common law up until now.

97. The respondent contends that the result for which the appellants contend would introduce an unprincipled distinction, call into question the settled authorities outlined above, and further add to the burden of trial judges and juries when these issues arise at trial.

20 ***Content of extended joint criminal enterprise in context of constructive murder - Mitchell 2.2, 2.4, Rigney 2.3, Carver 3, Tenhoopen 3***

98. The appellants argue that the trial judge and Court below erred in their application of the doctrine of extended joint criminal enterprise to s 12A. The arguments focus on what a co-venturer in an extended joint criminal enterprise must contemplate in order to be guilty of constructive murder. There is some variation in how the grounds allege this error, but all encompass a requirement either for specific contemplation of an act that will cause death, or of an act with the capacity to cause death.

99. These grounds would seek to change the threshold of violence required to commit an offence of murder by the pathway provided in s 12A that Parliament has provided.

30 100. Once it is accepted that the principles of complicity, including the doctrine of extended joint criminal enterprise, apply to an offence of murder by way of s 12A

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97 It echoes the argument mounted, unsuccessfully, by the appellant in *R v R; R v G* (1995) 63 SASR 417.

then the relevant question, in line with the settled doctrine of extended joint criminal enterprise, is whether or not a participant in a joint criminal enterprise has contemplated as a possibility that a co-venturer would commit an intentional act of violence while committing the foundational offence. If the participant does, and if that intentional act of violence committed by the co-venturer results in the death of another, then liability under s 11 via s 12A and the extended joint criminal enterprise pathway is established.

101. The appellants' grounds ask this Court to modify the impact of the doctrine of extended joint criminal enterprise in its application to constructive murder as provided by s 12A: that is, a contemplation of a concatenation of facts sufficient to found liability by the pathway provided by s 12A, but the offence remains that of murder. This, in part, relies on an argument that the doctrine requires contemplation of a possibility of the *crime* of murder, and that contemplation of a possibility of "an intentional act of violence while committing a foundational offence" is insufficient.

102. The respondent contends this does not properly reflect the interaction between s 12A and the doctrine of extended joint criminal enterprise. An accused's liability requires the prosecution to establish that there was a joint criminal enterprise to commit a foundational offence, and that in the course and furtherance of that foundational offence, a participant in the enterprise commits an intentional act of violence that causes the death of another. Provided that the intentional act of violence (which, as a matter of *fact*, causes the death of another) is within the contemplation of the members of the enterprise, the respondent submits, liability is established.

103. In considering the arguments mounted on what the content of extended joint criminal enterprise requires in the context of constructive murder, the decisions of *Gillard* and *Markby* provide assistance. In *Markby* the question for this Court was whether one participant in a joint criminal enterprise to commit acts of violence that caused death could be guilty of manslaughter and another co-venturer guilty of murder. The answer was that they could, the discriminating factor being what was contemplated by the individual participants as falling within the scope of the joint criminal enterprise. Gibbs ACJ, with whom Stephen, Jacobs and Aickin JJ agreed said:[98]

> ...When two persons embark on a common unlawful design, the liability of one for acts done by the other depends on whether what was done was within the scope of the common design. Thus if two men go out to rob another, with the common design of using whatever force is necessary to achieve their object, even if that involves the killing of, or the infliction of grievous bodily harm on, the

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98 *Markby v The Queen* (1978) 140 CLR 108 at 112-113.

> victim, both will be guilty of murder if the victim is killed: *Reg. v. Lovesey*. If, however, two men attack another without any intention to cause death or grievous bodily harm, and during the course of the attack one man forms an intention to kill the victim, and strikes the fatal blow with that intention, he may be convicted of murder while the other participant in the plan may be convicted of manslaughter: *Reg. v. Smith*; *Reg. v. Betty*; *Reg. v. Lovesey*. The reason why the principal assailant is guilty of murder and the other participant only of manslaughter in such a case is that the former had an actual intention to kill whereas the latter never intended that death or grievous bodily harm be caused to the victim, and if there had not been a departure from the common purpose the death of the victim would have rendered the two participants guilty of manslaughter only. In some cases the inactive participant in the common design may escape liability either for murder or manslaughter. If the principal assailant has gone completely beyond the scope of the common design, and for example "has used a weapon and acted in a way which no party to that common design could suspect", the inactive participant is not guilty of either murder or manslaughter: *Reg. v. Anderson*; *Reg. v. Morris*. If however the use of the weapon, even if its existence was unknown to the other party, is rightly regarded as no more than an unexpected incident in carrying out the common design the inactive participant may be convicted of manslaughter: *Varley v. The Queen*.
>
> [footnotes omitted]

104. What is important to note is that the state of mind of the co-venturer is determinative of that party's criminal liability in two ways. First, it determines the content of the common purpose of the joint enterprise. Secondly, it prescribes: [99]

> any restriction on the nature of the act done or omission made which the secondary offender is deemed to have done or made. The restriction may be referrable to the circumstances in which it is done, the result it effected or the state of mind with which the principal offender did it.

105. The same approach applies in relation to the doctrine of extended joint criminal enterprise, hence (as explored above regarding the offence of murder, and attribution) in *McAuliffe* the Court noted that there was no other distinction between liability for what fell within the scope of a common purpose and what was incidental to a common purpose (both are bounded by the co-venturer's state of mind) other than that in the latter case the requisite foresight could not be inferred from the fact of the common purpose.[100]

106. Thus, criminal liability is limited to the crime or offence contemplated. Reference in the authorities to contemplation of the *offence* or contemplation of the *crime* is to be understood as referring to the concatenation of facts sufficient to constitute liability.[101]

107. In the present case the crime was murder and the concatenation of facts giving rise to the co-venturer's liability, if contemplated as an incident of the joint criminal enterprise, was to be drawn from either of the two possible pathways left to the jury. The pathway provided by s 12A attributed liability to the principal if he committed

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99 *R v Barlow* (1997) 188 CLR 1 at 13-14.
100 *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.
101 *R v Barlow* (1997) 188 CLR 1 at 9; *Gillard v The Queen* (2003) 219 CLR 1.

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 caused the death of another.[102] The consequence of the intentional act of violence - death - was not a physical element to which any mental element attached under s 12A (nor, necessarily, common law murder).

108. To limit secondary liability to where the co-venturer contemplates the commission of 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), but excluding proof of foresight that death might be the consequence of such intentional act, maintains the link with the liability of the principal and accords with the general principle of the criminal law that a person who intentionally embarks upon a criminal enterprise is liable for what they foresee as the possible crimes committed in the course of that venture that ultimately come about.[103]

109. This approach recognises, and gives effect to, the qualitative assessments made by Parliament with respect to the relative seriousness of both the foundational offence (being a major indictable offence punishable by at least 10 years imprisonment, other than abortion) and the relevant causative act (an intentional act of violence). Arguments that urge a different qualitative threshold, or seek to alter the type or nature of the causative act when applying the doctrine of extended joint criminal enterprise, without altering the content of the threshold or type or nature of the act in respect of accessories or when there is a joint criminal enterprise, again seek to do so on the basis of a complaint of a disconnect between moral and legal culpability.[104] Such complaints again seek to modify the qualitative assessments made by Parliament, and echo the criticisms that were raised and dismissed in *R v R*.[105] They are grounded in policy, disengaged from text, context and purpose.

110. Similarly, the third submission advanced by Tenhoopen in relation to this ground[106] seeks to give a specific content to the phrase "and thus causes the death of another" in s 12A when the doctrine of extended joint criminal enterprise is applied. That submission seeks to import a degree of familiarity on the part of the co-venturer with the specific type and mode of violence employed by the accused who intentionally

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102 *Criminal Law Consolidation Act 1935* (SA) s 12A.
103 *Clayton v The Queen* (2006) 89 ALJR 439 at [20]; *Miller v The Queen* (2016) 259 CLR 380 at [34].
104 Eg Tenhoopen submissions [78]-[82], Rigney submissions [86]ff, Carver submissions [78]-[79].
105 *R v R; R v G* (1995) 63 SASR 417 at 421 - albeit in the context of the felony murder rule in force for the purposes of that matter.
106 Tenhoopen submissions [73]-[77].

inflicts violence on the deceased. This construction not only seeks to provide a substantial expansion of the meaning of the adverb "thus" in the provision, it also conflicts with the statements of principle that there is no need for proof of contemplation of the specific mode of infliction of violence to establish complicity more broadly as a matter of law.[107]

111. There is a coherence between the policy underlying extended joint criminal enterprise, accessorial liability and liability under s 12A: secondary parties are held responsible for the acts of the principal for their participation in the criminal enterprise.[108] There is nothing in either the doctrine of extended joint criminal enterprise or the text of s 12A that justifies modifying either's content when they arise on the evidence.

Sharah *and contemplation of a "contingency"*

112. A line of authority in New South Wales, beginning with the decision of *R v Sharah*[109] appears to have imported a limited fault element for constructive murder, along the lines agitated for by the appellants. In *Sharah* it was held that in order to establish constructive murder for an accomplice to an armed robbery, the prosecution needed to prove that the accused had in mind the "contingency" that his co-venturer would discharge the weapon during or immediately after the armed robbery, whether or not it was fired intentionally or in furtherance of the joint enterprise.[110]

113. That "contingency" has been questioned subsequently as introducing a further requirement in establishing liability on the basis of constructive murder in virtue of an offender's complicity with others.[111]

114. The respondent submits that it is unnecessary to consider the correctness of *Sharah* to dispose of these appeals given the differences in the legislation involved. However, to the extent that *Sharah* is prayed in aid as indicative of a construction of s 12A that this Court might draw upon, it should not be followed. In this regard, the

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107 See eg *Huynh v The Queen* (2013) 214 CLR 1; *R v Bosworth* (2007) 97 SASR 502 at [82]; *R v O'Flaherty* [2004] Crim LR 751 at [52]-[56].

108 See *R v R; R v G* (1995) 63 SASR 417 at 421.

109 *R v Sharah* (1992) 30 NSWLR 292. See also, eg, *R v Spathis* [2001] NSWCCA 476; *R v Jacobs* (2004) 151 A Crim R 452.

110 *R v Sharah* (1992) 30 NSWLR 292 at 297-298.

111 See, eg, *Batcheldor v The Queen* (2014) 249 A Crim R 461 at [79]-[80], [128]-[132]; NSW Law Reform Commission, *Complicity*, Report No 129 (December 2010), [5.35]-[5.38]; *IL v The Queen* (2017) 262 CLR 268 at [89], [102], [156]; A Dyer, "*IL v The Queen*: Joint Criminal Enterprise and the Constructive Murder Rule: Is This Where Their 'Logic Leads You'?' (2017) 39(2) *Sydney Law Review* 245.

respondent embraces the reasoning of Gordon J in *IL v The Queen*.[112]

115. What falls from the above is that to establish liability for murder by way of the pathway provided by s 12A (and in line with how the trial judge directed the jury[113] in this matter) the prosecution must prove beyond reasonable doubt that:

a. there was a joint criminal enterprise to commit a foundational offence (a major indictable offence punishable by imprisonment for ten years or more);

b. in the course or furtherance of the commission of that foundational offence, a participant commits an intentional act of violence;

c. the intentional act of violence causes the death of the victim;

d. the accused contemplated that, in carrying out the enterprise to commit the foundational offence, it was possible that a co-venturer might inflict an intentional act of violence on another.

Grow houses - Mitchell 2.3

116. Mitchell's ground 2.3 alleges that Peek AJA erred in making the comment that it was common knowledge in Australian society that a cannabis grow house would likely be guarded and that violence might well be necessary to overcome the guard.

117. Irrespective of the correctness or otherwise of the comment as forming part of the common life experience of the jury, it could not have given rise to a perceptible risk of a miscarriage of justice.

118. The likelihood that the co-venturers would meet resistance was inherent in the joint criminal enterprise to commit a serious criminal trespass into a property (where a car was parked in the driveway) by force, and evidently contemplated by them, hence they attended in numbers in the early hours of the morning, and some were armed.

Conclusion

119. This Court should refuse the invitation to reopen and overrule *McAuliffe*, and to revisit the doctrine of extended joint criminal enterprise more broadly. The content of the doctrine of extended joint criminal enterprise in relation to murder is well-settled. There is no requirement that an accused must contemplate an act "causing death" or

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112 *IL v The Queen* (2017) 262 CLR 268 at [166]ff.

113 JCAB 61-69, 274-278 (Summing Up 53-61, 266-270).

"capable of causing death" to be guilty of murder under the doctrine of extended joint criminal enterprise.

120. The appellants' arguments in relation to constructive murder and extended joint criminal enterprise falter when the text, context and purpose of s 12A are properly considered.

121. In particular, the arguments advanced in relation to the construction of s 12A do not recognise the mischief to which it was directed, nor the specific thresholds Parliament chose to impose in relation to establishing liability for the offence of murder it provides. Nor do they reflect the settled positions relating to accessorial and joint criminal enterprise liability that can be established in relation to constructive murder.

122. The appeals and application for special leave to appeal should be dismissed.

Part VI: NOTICE OF CONTENTION OR CROSS APPEAL

123. Not applicable.

Part VII: TIME ESTIMATE

124. The respondent estimates that one and a half hours will be required for the presentation of its oral argument.

Dated 23 September 2022

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ANNEXURE: LIST OF RELEVANT STATUTORY PROVISIONS

1. *Criminal Law Consolidation Act 1935* (SA) ss 11, 12A, 170 (as in force on 9 October 2018)
2. *Criminal Procedure Act 1921* (SA) s 5 (as in force on 9 October 2018)
3. *Legislation Interpretation Act 2021* (SA) ss 3, 4, 14 and 16 (as currently in force)
4. *Termination of Pregnancy Act 2021* (SA) (as currently in force)
5. *Crimes Act 1958* (Vic) s 3A (as currently in force)
6. *Crimes Act 1900* (NSW) s 18 (as currently in force)