IN THE HIGH COURT OF AUSTRALIA **No: A28 of 2015**

ADELAIDE REGISTRY

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

EVERARD JOHN MILLER
Appellant

and

THE QUEEN
Respondent

THE APPELLANT'S SUPPLEMENTARY SUBMISSIONS

Part I: Internet Publication

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

Part II: Statement of Issues

2. Should the doctrine known as "extended joint criminal enterprise" as expressed by this Court in cases such as *McAuliffe v The Queen* (1995) 183 CLR 108, (***McAuliffe***) and *Gillard v The Queen* (2003) 219 CLR 1 (***Gillard***) be reconsidered in light of the recent decision of the United Kingdom Supreme Court in *R v Jogee* [2016] UKSC 8?

Part III: Notices under s.78B *Judiciary Act 1903* (Cth)

3. The appellant considers that a notice under s.78B of the *Judiciary Act 1903* (Cth) is not required to be given to the various Attorney-Generals.

Part IV: Citation for the reasons of the court below

4. The appellant has been granted leave to appeal from the judgment of the Full Court (Court of Criminal Appeal) of the Supreme Court of South Australia in *R v Presley, Miller and Smith* [2015] SASCFC 53.

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Part V: Factual Background and Issues

5. The appellant adopts the factual background set out in his principal submissions filed on 21 December 2015, which sets out the relevant factual background to his appeal.

6. The appellant adds the following by way of assistance.

7. On 18 February 2016, the United Kingdom Supreme Court published its decision in *R v Jogee* [2016] UKSC 8 (***Jogee***). In their judgment, Lord Hughes and Lord Toulson, (with whom Lord Neuberger, Lady Hale and Lord Thomas agreed) differed from what they considered was the view taken by the High Court of Australia {at [76]} as to the principles concerning extended joint criminal enterprise.

8. In light of the lengthy treatment in *Jogee* of the principles concerning secondary liability and their relevance to joint criminal enterprise and extended joint criminal enterprise, a question has arisen whether the view taken by the High Court in *McAuliffe* requires reconsideration.

9. The appellant requires leave of this Honourable Court to amend his Notice of Appeal before he can address the question whether *McAuliffe* requires reconsideration; particularly in view of this court's decision in *Clayton v The Queen* (2006) 81 ALJR 439 at [3] (***Clayton***).

10. Miller has filed an Application for leave to amend his Notice of Appeal[1]. It is believed that the proposed amendment would not be opposed by the respondent and, if it were, that there are good reasons for allowing the proposed amendment.

11. For the reasons set out below and in the Submissions of the Applicant Smith[2], the appellant Miller submits that the three cases of Miller, Smith and Presley present a suitable opportunity, in light of the extensive analysis in *Jogee*, for a reconsideration of the relevant principles.

12. In the case of Miller, his primary ground of appeal remains the question of the impact of his intoxication and the presence of drugs in his blood on his mental state and whether he had the relevant mental state or could have formed the relevant mental state at the time of offending to be found guilty of murder on the basis of joint criminal enterprise or extended joint criminal enterprise.

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[1] Filed on 16 March 2016.

[2] No. A22 of 2015, Smith v R, Applicant's Submissions, filed 23 March 2016 at [21] and [22].

Part VI: Argument – reasons why leave to amend should be given, for reconsidering *McAuliffe* and why the appeal should be allowed

Leave to amend the Notice of Appeal.

13. The appellant seeks leave to amend his Notice of Appeal so as to be able to argue that the principle stated in *McAuliffe* may require reconsideration by this court[3].

14. The appellant did not challenge at trial, or in the court below, the correctness of the principles stated in *McAuliffe*. At the time of his trial, and now, the law in this country was as stated in *McAuliffe* and the trial court was bound to apply the relevant principles as stated in *McAuliffe* and *Gillard*: *Clayton* at [3].

15. However, two of Miller's co-accused, Smith and Presley, have raised for consideration whether the law in this country concerning "extended joint criminal enterprise" should be reconsidered in light of the *Jogee* decision.

16. If the applicants' challenge is correct, then the trial judge gave incorrect directions in his summing up in respect of Miller on the issue of extended joint criminal enterprise (see further below).

17. The point now raised involves only a question of law: the correct legal principle to be applied and the correct directions to be given at trial. Factual considerations that could have been raised at trial do not arise and do not prevent leave to amend being granted: *Crampton v the Queen* (2000) 206 CLR 161 (***Crampton***).

18. As stated above, the point arises because the Supreme Court in the United Kingdom has cast doubt upon an earlier statement of principle (by the Privy Council in *Chan Wing-Sui v The Queen* [1985] AC 168) that appears to underpin the approach taken by this court in *McAuliffe*.

19. The appellant submits that if the wrong principle has been applied and the wrong trial directions given, he was denied a trial according to law and a miscarriage of justice may have occurred: he thus meets the requirements for leave to be granted referred to in *Crampton* at [156]-[162]; his position can be said to be "*exceptional*".

20. The applicant Smith has filed comprehensive submissions on 23 March 2016 and the applicant Presley has also filed some detailed submissions on the same day. The appellant Miller does not wish to repeat what is stated in those submissions

[3] The appellant filed an application to amend his Notice of Appeal on 16 March 2016.

and would adopt those submissions, where appropriate, with the refinements set out below.

21. Rather, Miller makes the following submissions concerning the principal authorities requiring consideration.

Chan Wing-Sui v The Queen

22. Whether Sir Robin Cooke in *Chan Wing-Sui v The Queen* [1985] AC 168 correctly stated the relevant principle may now be considered to be of academic interest, as the law in this country is that stated by the High Court in *McAuliffe* and *Gillard*: *Clayton* at [3] and it is those cases that require careful consideration.

23. Indeed, it is submitted that it is not clear that the Court in *McAuliffe* adopted the error attributed to Sir Robin Cooke by their Lordships (in *Jogee* at [62]) for the reason that, when the Court in *McAuliffe* commenced referring to the remarks by Sir Robin Cooke, it was in the context of addressing a specific question ("*that* question") posed in *McAuliffe* on page 115, as part of a review of several authorities:

> "[t]he question arises whether both parties are liable if the weapon is used to inflict harm in the course of the common purpose, that action being one which lay outside the scope of the common purpose or agreement, but within the contemplation of the secondary party".

24. As part of that review of cases, at page 117, the court in *McAuliffe* added that, in *Hui Chi-Ming v The Queen*, "their Lordships correctly qualified the passage cited ... from the judgment of Sir Robin in *Chan Wing-Sui* ...". The passage then quoted by the Court contained the phrase, "...to emphasise the fact that mere foresight is not enough ... in order to be guilty". Rather, something more was required, and that something more was continued participation in the enterprise.

25. Thus, it could not reasonably be suggested that the High Court in *McAuliffe* considered that, "*mere foresight*" of the possibility of another crime was sufficient to impose or establish the liability of a secondary party; more was required in the form of continued participation with that foresight.

26. The question then arises as to what is the true *ratio decidendi* of *McAuliffe*.

McAuliffe v The Queen

27. There is sometimes a subtle difference between what a case actually says and what it is subsequently understood to stand for as a legal proposition. Sometimes matters of emphasis mean that a case can be understood in several different ways depending upon the point in issue. *McAuliffe* may be such an example.

28. The particular facts giving rising to the decision in *McAuliffe*, concerned the agreement of three individuals to "rob" or "roll" or "bash" persons when one of the assailants was armed with a hammer and another, a baton or stick. The "common purpose" of their agreement was not in issue in the trial {at p112}. Rather, the attack by the appellants was upon the directions given by the trial judge {at p113}.

29. The Court considered that the relevant directions given by the trial judge conveyed to the jury that:

> "...even if the common purpose of the three youths did not embrace the intentional infliction of grievous bodily harm, there was sufficient intent on the part of either appellant for the purposes of murder if he contemplated the intentional infliction of grievous bodily harm by one of the other participants as a possible incident in the carrying out of their joint enterprise and continued to participate in that enterprise".

It is the appellant's submission that what was contemplated by that paragraph was (to employ the phraseology used in *Jogee*) that D2, contemplating that D1 might intentionally inflict grievous bodily harm, nevertheless intended to assist or encourage D1 in carrying out their common purpose and crime B, if the occasion arose. In the circumstances, D2 has the relevant intention for crime B and D2's "continued participation" is evidence of that intention[4].

30. It may be useful to compare, at this point, the above passage with what was said in *Jogee* at [93] and [94] when their Lordships were restating the relevant principles:

> "[93] Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or *common intent* (the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1....."
>
> [94] If the jury is satisfied that there is an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary *conditional intent* that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and *intentional* support. But that will be a question of fact for the jury in all the circumstances." (*italics* added)

31. The appellant submits that the passage from *McAuliffe* and the passages quoted immediately above are ultimately addressing the same point, that is, the inference

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[4] See also *Jogee* at [87].

that can be drawn by the jury as to the *intention* of D2 from the evidence of D2's continued participation in the enterprise.

32. Perhaps, another way of expressing the same point is to say that the concept of "*continued participation*" appears to embrace both the *actus reus* and (the inferred) *mens rea* required for D2 to be found guilty of crime B[5].

33. So, if the passage from *McAuliffe* (quoted in paragraph 29 above) is an accurate reflection of the underlying principle considered in *McAuliffe*, then there would appear to be no relevant difference between the principle relied upon in *McAuliffe* and the principles stated in *Jogee* at [93] and [94]; the difference being only one of expression, rather than principle.

34. To continue: having referred to relevant Privy Council authorities, the Court in *McAuliffe* then considered *Johns* and 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". (at p117)

35. The Court considered that, in that situation the secondary offender is a party to the crime (crime B) and went on to state:

> "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." (at 118).

36. The Court then returned to express a view to the challenge by the appellants in that case to the trial judge's directions and concluded:

> "For these reasons, the trial judge was not in error in directing the jury that if the appellants were engaged in a joint criminal enterprise with Davis, a shared common intention – that is, a common purpose – to inflict grievous bodily harm or an individual contemplation of the intentional infliction of grievous bodily harm as a possible incident of the venture would be *sufficient intention* on the part of either of them for the purpose of murder". (at p118) *(italics added)*

37. Thus, the narrow *ratio decidendi* of *McAuliffe* concerns the directions given by the trial judge. The broader underlying principle of law encompasses a situation in which D2 contemplates or foresees that D1 might, in the course of committing crime A, also commit crime B, and D2, intends to assist D1 to commit crime B or encourage D1 to commit crime B. The jury are entitled to infer from D2's continued participation D2's intention to assist in or encourage the commission of D1 of crime B.

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[5] See also *Jogee* at [78] and [83].

38. The appellant therefore submits that, on a proper reading *McAuliffe* and *Jogee* are not inconsistent with each other as to the requirement of evidence of intention relevant to crime B.

39. If, however, that submission is erroneous and the principle in *McAuliffe* does enable D2 to be convicted of crime B in circumstances where D2 neither intended to assist or encourage D1 to commit crime B, but *merely foresaw* the possibility of crime B occurring, when the occasion arose, then, there would seem be a difficulty in reconciling the principle in *McAuliffe* with the general principles of the criminal law concerning secondary liability for crime: see also *Clayton* at [20]. In that event, the appellant Miller would adopt the submissions of Smith as to why reconsideration of *McAuliffe* is required and how the principles can be reconciled.

Gillard

40. Although this Court stated in *Clayton* at [3] that the law in this country is as stated in *McAuliffe* and *Gillard*, it appears clear that there is no departure from the principles established in *McAuliffe* by *Gillard.*

Jogee

41. An appreciation of *Jogee* must begin with what their Lordships considered to be the principle established by *Chan Wing-Sui*. It was stated as being:

> "... if two people set out to commit an offence (crime A) and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, *whether or not he intended it*." {[2] and see also [62]}. (*italics* added)

42. It is appropriate to state, at the outset, for the reasons given above, that that statement does not appear to reflect the narrow *ratio decidendi* of *McAuliffe* or the underlying principle (see paragraph 37 above). Indeed, if one required further evidence that the Court in *McAuliffe* was not adopting such a principle, it can be found in its approval of the passage from the Privy Council in *Hui Chi-Ming* in which it was stated that "*mere foresight*" is not sufficient (see above at paragraph 24).

43. Early in the reasons in *Jogee*, their Lordships refer to the requirements for "accessory liability" {at [7]-[12]}. It can be seen, particularly, in paragraph [10] that the discussion of the mental element for D2 is often in terms of the intention to commit the offence (without separately identifying the intention to assist D1 to

act with the intention to commit crime B). It is submitted that that consideration applies to the statement by the High Court in *McAuliffe* quoted in paragraph 35 above.

44. In *Jogee*, their Lordships then reviewed a number of cases that demonstrated that the principle stated by Sir Robin Cooke in *Chan Wing-Sui* was a departure from previous authority {at [62], see also [83]}. However, their Lordships also considered that *Chan Wing-Sui* was followed in *McAuliffe* {at [60] and see also [76]}. For the reasons stated above, the appellant submits that, that may be an incorrect interpretation of the underlying principle *McAuliffe* and it may just be an example of the situation addressed in paragraph [78] in *Jogee*.

45. The restatement of the law in *Jogee* at [88]-[99] appears to be consistent with the underlying principle in *McAuliffe* and are a statement of its application in some circumstances.

The Summing up for Miller

46. The relevant part of the trial judge's directions in relation to the appellant on joint criminal enterprise and extended joint criminal enterprise is as follows:

> "In order to find Mr Miller guilty of murder you must be satisfied beyond reasonable doubt that Mr Miller went to Grant street in company with others, ... as part of an agreement or understanding with them to inflict really serious bodily harm ... or and this is the second way – that if the agreement ... was to commit some lesser crime, and Mr Miller contemplated the possibility that one of those who accompanied him would inflict really serious harm with the intention of doing so, and he nonetheless went ahead; and that in either case Mr Miller took some part in the implementation of the agreement or understanding and Mr Betts murdered Mr Hall while the agreement or understanding was still on foot". SU p229

47. Those directions concerning extended joint criminal enterprise do not, with respect, reflect the underlying principle (as described above) namely, the fact that in order to find Miller guilty of murder on the basis of extended joint criminal enterprise, the jury are required to infer that Miller contemplated that Betts had the intention to inflict really serious harm and that Miller had the intention to assist or encourage Betts to do so.

48. The subsequent statements by the trial judge concerning the inference to be drawn about Miller's state of mind focus upon the inference that may be drawn from the presence of and the nature of the weapons known {SU 230-231} but stop short of requiring that the jury must find that Miller, with the relevant foresight, continued

to participate in crime A intending that he would assist or encourage Betts to commit crime B, if the occasion arose.

49. For the reasons given above and in the appellant's principal submissions, the appeal should be allowed.

Part VII: Applicable Statutory Provisions

50. These have been dealt with in the Appellant's principal submissions filed on 21 December 2015.

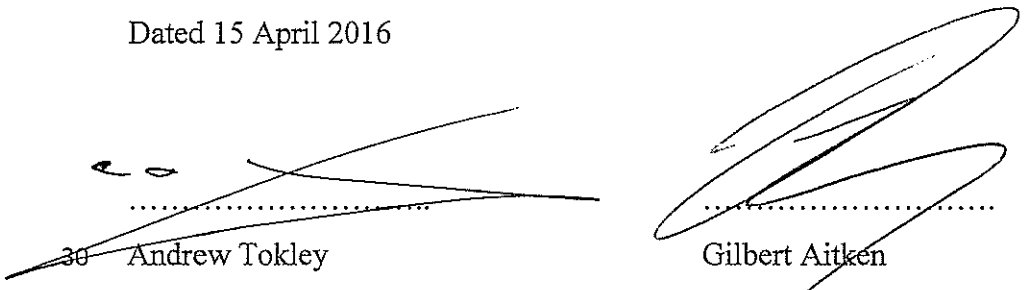
Part VIII: Orders

51. These have been set out in the Appellant's principal submissions filed on 21 December 2015.

Part IX: Oral Argument

52. The appellant estimates that the presentation of the oral argument on his supplementary submissions may take 30 mins to 1 hour.

Dated 15 April 2016



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