HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

CEM BATAK

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1 This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Preliminary Question: Special leave should be revoked

2 The Appellant's argument relies on newly fashioned directions (**AS [28]**) not previously contended for on the special leave application, or in the Court of Criminal Appeal (**CCA**), and accepted as not given at trial: **AR [2], ASS [3]**. Moreover, whoever is correct on the appeal, an order for a new trial is inevitable. The Appellant accepts that the jury were not directed as to knowledge the Respondent was required to have as to the act causing death, and that such a direction was required. Absent a proper direction in accordance with ***Giorgianni*** *v The Queen* (1985) 156 CLR 473 (**Vol 3 Tab 5**) as to this critical element to establish murder, there has been no trial in accordance with law in a substantial respect. Orders 3-5 of the CCA would remain in place.

3 The Appellant (properly) no longer asks this Court to uphold the conviction. The proposed remittal is presumably sought to enable invocation of the proviso on remittal for the first time – the Appellant having previously eschewed it in the CCA: CCA Judgment (**J**) [195] **CAB 232-233**. There is no reason to doubt the correctness of the judgment of the CCA. In any case, there are insufficient prospects of success.

B. Respondent's ground of appeal

ABF liability is not coherent with "second limb" or constructive murder

4 Section 18(1)(a) "second limb" or constructive murder is a pathway to murder that applies to the actor who causes death: *Ryan v The Queen* (1967) 121 CLR 205 at 221, 231, 235, 240-241 (**Vol 3 Tab 14 pp 687, 697, 701, 706-707**); *R v Brown and Brian* [1949] VLR 177 at 181 (**Vol 4 Tab 23 p 943**); ***Mitchell*** *v The King* (2023) 276 CLR 299 at [64] (**Vol 3 Tab 11 p 530**). It can also apply to a person involved in a joint criminal enterprise (**JCE**) as to the foundational offence with the actor, coherently with common law principles, including as to the attribution of acts in a JCE: *Mitchell* at [37], [40], [65], [103] (**Vol 3 Tab 11 pp 521, 522, 530-531, 541**); J [110]-[111] **CAB 199-200**; **RS [25], [31]**.

5 The doctrines of JCE, extended joint criminal enterprise (**EJCE**) and accessorial liability have distinct rationales and requirements: ***Miller*** *v The Queen* (2016) 259 CLR 380 at [33]-[34], [41] (**Vol 3 Tab 10 pp 473-474, 477**); **RS [22]-[26]**. Accessorial liability requires *knowledge* of the acts constituting the intentionally assisted or encouraged crime, not recklessness or foresight of their possibility or probability: *Giorgianni* at 506-507 (**Vol 3**

Tab 5 pp 336-337); **RS [18]-[19]**; J [169]-[170] **CAB 223-224**. It does not incorporate agreement: J [70], [188] **CAB 181-182, 230-231**. It does not countenance contemplation of a possibility as sufficient: J [96], [170] **CAB 192-193, 224**.

6 The text, context and purpose, together with the general tenor or policy, of this pathway to proof of the offence of murder in s 18, underscores its incongruence with ABF liability: **RS [50]-[51]**; J [183], [189]-[196] **CAB 229, 231-233**. The requirement for an ABF to have *knowledge* of the essential facts renders ABF liability ill-adapted for combination with constructive murder, a pathway that was directed to the "accidental" or unintentional taking of life: Stephen and Oliver, *Criminal Law Manual* (1883) at 201 (**Vol 5 Tab 34 p 1174**); *Ryan* at 241 (**Vol 3 Tab 14 p 707**); **RS [30]**; J [168]-[170], [183] **CAB 223-224, 229**. An act causing death need only relate in the proximate sense to a foundational offence, can be spontaneous, unintended and not subjectively contemplated as a possibility: **RS [41]-[43]**; J [145] **CAB 214**. The "second limb" was aimed at such acts. The act causing death is a distinct act of significance creating a different offence to the foundational offence: J [178], [181] **CAB 227, 228**. The distinct act in this case was the act – of either Coskun or the unknown male – of shooting at the deceased: J [41(4)] **CAB 172; ABFM p 11; RS [13]**.

7 While ABF principles undoubtedly apply to first limb (intentional or culpable) murder, there is no case that determines, accepts, or assumes that ABF principles (as articulated in Stephen's Article 39 as at 1877 (**Vol 5 Tab 35 pp 1180-1181**) or by this Court in *Giorgianni*), as opposed to common purpose principles, apply to the pathway of constructive (or, previously, felony) murder: **RS [31]-[37]**; J [160], [192] **CAB 219, 232**.

8 JCE/common purpose principles, as explained in the constructive murder case of *Johns v The Queen* (1980) 143 CLR 108 (***Johns HC***) (**Vol 3 Tab 7**), are the solution of the common law to liability for "unplanned contingencies": *HKSAR v* ***Chan Kam Shing*** [2017] 1 HKC 245 at [31]-[32] (**Vol 4 Tab 19 p 807**); Simester, 'Accessory liability and common unlawful purposes' (2017) 133 *Law Quarterly Review* 73 at 90 (**Vol 5 Tab 32 p 1148**); **RS [42]-[43]**.

9 The cases relied upon by the Appellant, including the JCE cases in *Miller* at [6]-[16] (**Vol 3 Tab 10 pp 465-468**), are not cases of ABF liability and do not assist: **RS [34], [37]**; see also J [192] **CAB 232**.

The Appellant's approach is incoherent

10 The Appellant's new proposal (**AS [28]**) seeks to weave common purpose into accessorial liability and undo the well-established distinctions between modes of common law complicity: **RS [58]**. This is evident from the appropriation of JCE concepts like "ventures"

RS [59], statements such as "in the event that" it occurred/"should the occasion arise"/"if things came to it" and the concept of "conditional intent" **RS [60]-[63]**. These ideas are derived from JCE notions of agreement and scope. The proposal involves grafting language and concepts from *Johns HC* at 131-132 (**Vol 3 Tab 7 pp 428-429**), *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-117 (**Vol 3 Tab 9 pp 448-452**), and *R v* ***Jogee*** [2017] AC 387 at [92]-[94] (**Vol 4 Tab 26 p 1050**), and subverts *Giorgianni*'s clear requirement for knowledge in favour of the JCE touchstone of agreement: **RS [54], [63]-[64], cf AS [28]**.

11 "Conditional intent", appropriated from JCE cases, was grafted onto accessorial liability by the UK Supreme Court in *Jogee* at [92]-[94] (**Vol 4 Tab 26 p 1050**) in the same breath that
10 it abolished JCE and EJCE. For reasons including those explained in *Chan Kam Shing* at [76], [92]-[96] (**Vol 4 Tab 19 pp 821, 825-827**), it should not be so incorporated here. This Court has already refused to follow *Jogee* in *Miller* (**Vol 3 Tab 10**): **RS [53], [61]**.

12 There is no gap in the law left by the CCA, contrary to the Appellant's claim: **RS [42], [48]**. The Appellant's approach seeks an alteration to the law of complicity and homicide which is not the task of the common law: *Clayton v The Queen* (2006) 81 ALJR 439 at [19] (**Vol 4 Tab 17 p 751**). It is at odds with *Giorgianni*, would work a kind of double deeming, and would extend rather than confine the scope of constructive crime while diluting the correlation between moral culpability and legal responsibility: cf *Mitchell* at [30], [46], [97] (**Vol 3 Tab 11 pp 519, 523, 539**); **RS [44], [46]-[47]**.

20 **D. Orders**

13 If special leave is not revoked (see [2]-[3] above), the appeal should be dismissed: **RS [55], [66]**. Contrary to *Giorgianni* (and even the Appellant's proposed test) the jury were directed that they could convict the Respondent if they were satisfied that he contemplated the possibility that a gun could be discharged during the attempted armed robbery: J [41(5), read in context of (4)] **CAB 172**.

Proposed notice of contention

14 Should this Court accept, contrary to the above, that ABF liability works coherently with constructive murder, the order for a new trial should stand because this Court would accept that there was no direction to the jury in accordance with *Giorgianni*, occasioning a
30 miscarriage of justice, as was argued (and implicitly accepted) below: J [41], [138], [162], [183], [197(3)] **CAB 171-172, 211, 220, 229, 233; RS [68]**. **Dated:** 8 April 2025

Gabrielle Bashir SC **Christopher Parkin** **Julian R Murphy**