HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, BELL AND GAGELER JJ

Matter No A30/2012

TUAN KIET DAVID HUYNH — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No A31/2012

CHANSYNA DUONG — APPLICANT

AND

THE QUEEN — RESPONDENT

Matter No A32/2012

ROTHA SEM — APPLICANT

AND

THE QUEEN — RESPONDENT

Huynh v The Queen
Duong v The Queen
Sem v The Queen
[2013] HCA 6
13 March 2013
A30/2012, A31/2012 & A32/2012

ORDER

Matter No A30/2012

Appeal dismissed.

Matter No A31/2012

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter and dismissed.

Matter No A32/2012

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter and dismissed.

On appeal from the Supreme Court of South Australia

Representation

M E Shaw QC with S J Doyle SC for the appellant in A30/2012 (instructed by Caldicott and Co)

J D Edwardson QC with J P Noblet for the applicant in A31/2012 (instructed by Noblet & Co)

M L Abbott QC for the applicant in A32/2012 (instructed by Patsouris & Associates)

A P Kimber SC with E M Wildman and T J Costi for the respondent in all matters (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Huynh v The Queen
Duong v The Queen
Sem v The Queen

Criminal law – Directions to jury – Joint enterprise liability – Participation in joint criminal enterprise – Where participation in enterprise not live issue at trial – Whether necessary for trial judge to direct jury on elements of liability not in issue at trial.

Criminal law – Summing-up – Joint trial – Where almost all evidence at trial admissible against each accused – Where trial judge identified criticisms of evidence and significance of criticisms to each accused's case – Whether trial judge obliged to deal separately with each accused's case when summing-up in joint trial.

1 FRENCH CJ, CRENNAN, KIEFEL, BELL AND GAGELER JJ. Tuan Kiet David Huynh ("Huynh"), Chansyna Duong ("Duong") and Rotha Sem ("Sem") were each convicted of the murder of Thea Kheav at a joint trial in the Supreme Court of South Australia (Kourakis J and a jury). Each is serving a term of life imprisonment subject to a non-parole period of 20 years consequent upon that conviction. Appeals against their convictions were dismissed by the Full Court of the South Australian Supreme Court (Doyle CJ, Vanstone and Peek JJ)[1]. On 7 September 2012, Huynh was granted special leave to appeal on two overlapping grounds. Following the grant of that leave, Duong and Sem applied for special leave to appeal on the same two grounds. Their applications were referred to a Full Court on the basis that they would be argued as on appeal at the same time as the hearing of Huynh's appeal. For the reasons to be given, Duong and Sem should be given special leave to appeal but all three appeals should be dismissed. In the balance of these reasons, Duong and Sem will be referred to as appellants.

2 At the time of his death, Thea Kheav was attending an 18th birthday party held at a family home in suburban Adelaide ("the Vartue Street premises"). He died as the result of a stab wound that was inflicted in the course of an assault carried out by a number of persons. His assailants were part of a larger group that had arrived at the Vartue Street premises following an hostile incident at the party involving Sem.

3 There was some evidence that Duong stabbed the deceased. However, the prosecution did not limit its case to proof that Duong was the principal offender. The prosecution case against each appellant was put alternatively in ways that did not depend upon proving the identity of the principal offender. One of these ways required the prosecution to prove that the appellant was a party to an agreement with others, including the principal offender, to kill or to inflict really serious bodily injury on a person or persons at the Vartue Street premises, and that while that agreement was on foot the principal offender stabbed the deceased intending thereby to kill or to do really serious bodily harm to him. Liability on this case depended on the doctrine variously described as "common purpose", "concert" or "joint criminal enterprise".

4 Another way in which the case was put engaged the doctrine described as "extended common purpose" or "extended joint enterprise". Liability on this basis would be established, notwithstanding that the agreement was to do no

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1 *R v Duong* (2011) 110 SASR 296.

more than to assault a person or persons at the Vartue Street premises, provided that the prosecution proved that the appellant contemplated that, in carrying out the agreement, a party to it might use a knife or similar weapon intending thereby to kill or to inflict really serious bodily harm.

5 Liability on either basis (collectively "joint enterprise liability") required proof that the appellant participated in some way in furtherance of the enterprise.

6 None of the appellants gave evidence at the trial. None disputed that he had been among the persons who had gone to the Vartue Street premises following the earlier incident. The case of each appellant was that he had not been a party to an agreement to kill or to inflict really serious bodily harm and that the stabbing of the deceased was the unforeseen act of another.

7 The directions given to the jury respecting liability for a joint enterprise to commit murder were favourable to the appellants in that they required the prosecution to prove that the agreement to kill or to inflict really serious bodily harm involved the use of "a knife or similar bladed weapon". However, the directions did not specify proof that the appellant participated in the enterprise as a discrete element of liability. The significance of that omission is the first issue raised by the appeals. Its resolution requires consideration of the real issues in the trial and of the sufficiency of the directions to guide the jury to their decision on those issues. That consideration requires analysis of the separate case of each appellant. The sufficiency of the summing-up to identify fairly each appellant's case is the second issue raised by the appeals. The determination of each issue requires some further reference to the evidence and to the conduct of each case at the trial.

The evidence

8 A detailed summary of the evidence is contained in the reasons of the Full Court[2]. What follows is substantially taken from that account. The deceased, his three brothers and Sem all attended the birthday party as invited guests. Duong, Huynh and a number of their associates also attended the party. After a short time they left and went to Duong's house. Sem remained at the party. The deceased and his brothers appear to have entertained some ill-feeling towards Sem and the others. The deceased asked his hosts why they had been invited to the party. The inquiry led to a confrontation between Sem and the Kheav

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2 *R v Duong* (2011) 110 SASR 296 at 298-301 [3]-[23].

brothers. At some point in the course of the confrontation Sem said words to the effect of "watch your back". Following the confrontation, Sem left the party and drove to Duong's house, where he gave an account of the incident.

9 The evidence of what took place at Duong's house came from Kathleen Francis and Sophie Russo. Kathleen Francis said that Sem might have said "let's go get them". The group left Duong's house and travelled in several cars to the Vartue Street premises. As the group was leaving the house, Kathleen Francis heard someone say "get a knife". The evidence did not establish that Duong or Huynh were present when Sem related his account of the incident at the party, nor did it establish that any of the appellants heard the words "get a knife". Kathleen Francis believed that Sem had already walked out of the house at the time she heard these words.

10 Evidence concerning the events that followed the arrival of the group at the Vartue Street premises came from the hosts, guests and neighbours. There were inconsistencies in the various accounts. Estimates of the number of persons who arrived at the Vartue Street premises varied between 10 and 40. The men in the group were described as having been "armed with bottles, pieces of wood, sticks, blue metal poles, baseball bats, machetes and a fishing knife". The evidence did not establish that Duong or Huynh arrived at the scene armed with any form of weapon. A witness gave an account that Sem had been armed with two bottles when he got out of his car. Relevantly, the appearance of the group was evidently aggressive. In summing-up, the trial judge commented that it was open to find that the group, as it proceeded down Vartue Street, presented "a combined show of force". As the group approached the Vartue Street premises, many of the guests retreated into the garage and closed the roller door. At this point the deceased and a female friend were standing in the driveway at the front of the premises.

11 The assault on the deceased commenced in the driveway near the road. He was hit on the head with a bottle. He fell to the ground and was kicked and punched by several persons as he lay on the road. After this initial assault the deceased was helped to his feet and he made his way to a set of gates, which gave access to the rear of the premises. His face was bleeding. He attempted to climb over the gates but was pulled from the gate by some of his assailants, who renewed their assault on him. In this second phase of the assault, the deceased was kicked and hit by a number of persons and struck with pieces of wood. Rithy Kheav, the deceased's older brother, gave evidence that he had seen Duong stab the deceased.

12 The deceased suffered multiple injuries, some occasioned by a blunt object and others by glass or a sharp object. The fatal injury, a stab wound, penetrated 16cm into the abdomen, cutting a vertebra. It was the only stab wound. The weapon was not recovered.

13 Rithy Kheav's evidence, that he had seen Duong stab the deceased, was open to criticism. Among grounds for that criticism was evidence that shortly before the trial Rithy Kheav had claimed for the first time that Huynh had also stabbed the deceased. Rithy Kheav adhered to this account at the trial. The prosecution disavowed reliance on this part of Rithy Kheav's evidence in its case against Huynh.

14 In Sem's case, the prosecution tendered a statement made by him to the police on the day after the killing. It contained material that was both inculpatory and exculpatory. In summary, Sem said he had attended the party as an invited guest. He had asked his friend, Duong, to leave because Duong was not an invited guest. Duong and his companions had done so. Later that evening he had been subjected to an unprovoked assault by 15 or so of the guests. He had left the party and gone to Duong's house where he had told Duong of the assault and had asked him to "come back with me to sort it out". Duong and two others had travelled with Sem to the Vartue Street premises. Duong had intended to "have a word to them". On arrival they had walked up the driveway and had been confronted by persons throwing bottles and pieces of timber at them. They had been attacked by these persons. Sem had "punch[ed] back" but there were too many of them and he and his associates had run back to his car and driven away.

15 There was evidence that each appellant had taken part in the assaults upon the deceased and that each had struck the deceased either with a piece of wood or a bottle. This evidence was challenged on grounds including inconsistency with other evidence and in some instances with the witness' prior statements. Doyle CJ, writing the leading judgment in the Full Court, acknowledged that some of the evidence was subject to "legitimate criticisms"[3]. Later, dealing with a ground which asserted that the verdicts were not supported by the evidence, Doyle CJ characterised the evidence respecting the involvement of each appellant in the attack on persons at the Vartue Street premises as "powerful"[4]. A

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3 *R v Duong* (2011) 110 SASR 296 at 301 [24].

4 *R v Duong* (2011) 110 SASR 296 at 331 [190].

summary of the evidence as it relates to each appellant is contained in the reasons of the Full Court[5]. It is unnecessary to repeat that summary in these reasons.

The prosecution case on joint enterprise liability

16 Fundamental to the prosecution case in joint enterprise liability was the contention that it was not reasonably possible that any of the appellants was unaware that others in the group were in possession of weapons. That awareness was the basis for the inference in each case that the appellant had come to an understanding with other members of the group that a knife would be used to kill or to inflict really serious bodily harm on one or more persons at the Vartue Street premises or, at least, that he contemplated that a knife might be used intentionally to inflict injury of that kind. Critical questions for the jury's determination concerned the appearance and conduct of the group. Were any of its members armed on arrival at the scene? If so, with what weapons? Did any of the group produce a machete, fishing knife or other bladed weapon at the scene? Were the bottles, pieces of wood, and poles, with which some members of the group were armed, brandished aggressively in a show of force, or were they objects that had been thrown at the group by the occupants of the Vartue Street premises? The answer to these questions bore on the capacity of the evidence in each case to establish to the criminal standard that the appellant had come to the understanding or arrangement on which the case on joint enterprise liability depended. The determination of what, if anything, the appellant whose case was under consideration did at the scene was relevant to the same issue.

The appellants' cases on joint enterprise liability

17 At this point some reference should be made to the way each appellant answered the joint enterprise case at the trial.

18 Duong relied on evidence that he had been reluctant to go with the group; that he had travelled to the Vartue Street premises with Kathleen Francis and Sophie Russo; and that he was unarmed on arrival. He acknowledged that he had picked up a piece of wood at the scene but he pointed to the evidence that he had backed off when the person he was confronting had demonstrated that he was unarmed. In combination, these features of the evidence were said to raise a doubt that Duong had come to an agreement to do really serious bodily harm to any person.

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5 *R v Duong* (2011) 110 SASR 296 at 300-301 [20]-[23].

19 Sem relied on the account in his statement as raising the reasonable possibility that he had returned to the Vartue Street premises with no understanding other than to "talk or to posture" and that he had done nothing more than defend himself from an attack at the front of the house. It was his case that some of the group had picked up sticks at the scene and that thereafter "things very much spiralled out of control". The stabbing of the deceased in an incident by the gates was suggested to have been the unexpected act of an individual who was "completely out of control".

20 Huynh's case relied on the absence of evidence from which an inference might be drawn that he had knowledge that any of the group had a knife. Huynh's counsel put it this way:

> "It's all well and good, it's one thing members of the jury to go to a fight, maybe chuck a bottle or two, swing a lump of wood, chuck a lump of wood, one thing to do things like that, it's another question altogether to go to a fight knowing that a knife or some kind of a bladed weapon is there and realising, considering actually applying your mind to the possibility that it might be used by some lunatic to go over the top".

The summing-up

21 The directions of law in the summing-up were complex and lengthy. The complexity and length were occasioned in part by the need to address liability in the event the jury found that Duong was the principal offender and in the event that the principal offender was not identified. On either case it was necessary to direct on liability with respect to the alternative verdict of manslaughter. The complexity and length were also occasioned by the perceived need to direct on accessorial liability as an alternative to joint enterprise liability. The accessorial case, in the way it was left, required the jury to determine as a preliminary matter whether the stabbing took place on the road or near the gates.

22 Accessorial liability in each case depended upon proof that the appellant knew of the knife and of the principal offender's murderous intention, and that with that knowledge he had intentionally assisted or encouraged the commission of the offence. Joint enterprise liability depended upon proof that the appellant was a party with others, including the principal offender, to an agreement to use a knife or similar bladed weapon to kill or do really serious bodily harm, and that pursuant to the agreement he participated in some way in the enterprise. The evidence that supported the inference of knowledge of the knife on the accessorial case was the same evidence that supported the inference of agreement that a knife would be used (or that its use by a party possessed of the murderous

intention was contemplated) in the joint enterprise case. In neither of the ways the prosecution case was put was it necessary to prove that the appellant had engaged in any conduct other than being present at the Vartue Street premises as one of the group. On the accessorial case, presence in the circumstances supported the inference that the appellant whose case was under consideration was intentionally encouraging the commission of the offence. On the joint enterprise case, presence in the circumstances supported the inference that the appellant whose case was under consideration was a party to an agreement either to murder or to assault.

23 The trial judge directed the jury respecting presence at the scene on the joint enterprise case as follows:

> "[T]he mere presence of the person at or near the scene of a crime being committed by another whatever may be that person's knowledge of or attitude towards the commission of the crime does not without more make him guilty under this principle. To implicate that person *his presence must be by agreement with the other for the purpose of furthering and achieving the commission of the crime.*" (emphasis added)

24 Shortly after retiring, the jury sent a note asking if they could be supplied with a "written description explaining the components of murder, joint enterprise and aiding abetting and manslaughter". The response to that request involved the production of a 17-page typewritten document setting out the elements of murder and manslaughter and explaining how liability might be established for each offence as principal in the first degree, accessory at the fact, aiding and abetting, party to a joint enterprise to commit murder and party to a joint enterprise to assault. The directions also included instruction in the law of self defence.

25 A draft of the directions was circulated to counsel. A number of amendments were made to the draft to take into account counsel's submissions. In the form in which they were distributed, the written directions were approved by all counsel.

The impugned direction

26 The criticism now made of the directions is with respect to those dealing with joint enterprise liability. The same criticism is made in each case. It is sufficient to set out the direction on joint enterprise to commit murder:

"**JOINT ENTERPRISE TO COMMIT MURDER**

The general principle is that if two persons come to an agreement or make an arrangement that together they will commit a crime and then, while that agreement or arrangement is still on foot and has not been called off, in accordance with that agreement or arrangement one of them does, or they do between them, all the things that are necessary to commit the crime they are both guilty of that crime regardless of what part each played in its commission.

In order to prove that the accused or any one or more of them is guilty of murder by reason of involvement in a joint enterprise to murder, the prosecution must prove each of the following elements beyond reasonable doubt:

1. That the accused came to an agreement or made an arrangement with others (the participants) to use a knife or similar bladed weapon to kill or cause really serious bodily harm to a person or persons at [the Vartue Street premises].

2. That pursuant to that agreement or arrangement a participant killed [the deceased] by stabbing him.

3. That the participant who stabbed [the deceased] did so with the intention to kill [the deceased] or to cause him really serious bodily harm.

4. That the killing of [the deceased] was unlawful, not in self defence."

27 The Court reconvened and the written directions were distributed to the jury. The trial judge read through the directions in the jury's presence. His Honour omitted the opening sentence of the direction on joint enterprise to murder, observing that he would "go straight to the steps related to in this case". He proceeded to direct the jury that in order to prove an accused's guilt of murder by reason of his involvement in a joint criminal enterprise to commit murder the prosecution must prove each of the elements in pars (1) to (4) of the written direction.

The Full Court – the first issue

28 The appellants' consolidated grounds of appeal in the Full Court were prepared by new counsel. They included a ground that the trial judge had erred

"in directing the jury that an accused could be found guilty of murder without any act of participation in the joint enterprise on that accused's part". It does not appear to have been contended on the hearing before the Full Court that the trial judge had given any such direction. Doyle CJ treated this ground as contending error by the omission of a requirement that the prosecution prove as a separate element of liability that the accused participated in the joint enterprise[6]. His Honour observed that the written direction closely followed the decision in *McAuliffe v The Queen*[7]. However, he accepted that participation had not been identified as a discrete element requiring proof[8]. His Honour commented that in the circumstances of this case there was "no risk at all that the jury found any one of the [appellants] guilty without finding that that [appellant] participated in the joint enterprise"[9]. That observation is to be understood in the context of his Honour's identification of the real issue in the trial, which he put this way:

> "what the jury made of the conduct of the accused, and whether that conduct established the relevant agreement or arrangement. If it did, it did it by establishing conduct that amounted to participation."[10]

29 In dealing with other of the appellants' grounds of appeal, Doyle CJ rejected the submission that the directions were wrong in law[11].

Error of law?

30 The appellants contend that the acknowledged omission of a direction respecting an element of joint enterprise liability constituted legal error and required the Full Court to set aside their convictions[12]. The Full Court's assessment that the error had not given rise to the risk of wrong conviction was a

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6 *R v Duong* (2011) 110 SASR 296 at 311 [92].

7 (1995) 183 CLR 108; [1995] HCA 37.

8 *R v Duong* (2011) 110 SASR 296 at 312 [97].

9 *R v Duong* (2011) 110 SASR 296 at 312 [98].

10 *R v Duong* (2011) 110 SASR 296 at 313-314 [102].

11 *R v Duong* (2011) 110 SASR 296 at 324 [158], 328 [168].

12 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

consideration going to the application of the proviso[13], but there had been no invitation to apply the proviso and the Full Court had not purported to do so.

31 The contention that it is an error of law for a trial judge to omit to instruct a jury on all of the elements of liability for an offence cannot stand with the many decisions of this Court affirming the statement of the responsibility of the trial judge in *Alford v Magee*[14]. The duty is to decide what the real issues in the case are and to direct the jury on only so much of the law as they need to know to guide them to a decision on those issues. The application of the principle was illustrated in *Alford v Magee* by reference to the trial of an accused for larceny at which the sole issue is proof of the taking away of the thing stolen. In such a case it is neither necessary nor desirable to instruct the jury on the elements of the offence of larceny. Commonly liability does not reduce to a single factual question at the trial and the trial judge's responsibility will not be as readily discharged as in the celebrated illustration of Sir Leo Cussen's "great guiding rule"[15]. Discharge of that responsibility will usually involve instruction respecting the elements of the offence[16] and, where appropriate, the principles governing accessorial or joint enterprise liability. This is not to say that the omission to specify an element of liability that is not in issue in the trial is legal error.

32 Whether the omission to specify the requirement of proof of participation in the directions on joint enterprise liability was an error depends upon whether the Full Court was right to conclude that proof of that fact was not an issue at the trial. Before turning to the Full Court's analysis, it is appropriate to make an observation about the length and complexity of the written and oral directions.

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13 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

14 (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ; [1952] HCA 3; and see *R v Getachew* (2012) 86 ALJR 397 at 404 [29] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 286 ALR 196 at 204; [2012] HCA 10 and the cases set out therein at footnote 30.

15 *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ.

16 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; [2000] HCA 3.

33 *Clayton v The Queen*[17] contains discussion on the approach to summing-up at the trial of multiple accused jointly charged with murder. The majority questioned the need to frame the directions of law according to a pattern determined only by the legal principles upon which the prosecution relied[18]. The point being made was the need to isolate the factual issues for determination and to direct only on the law as it applies to the determination of whether guilt has been proved by reference to those issues[19].

34 As a matter of legal analysis, there were differing paths to fixing the appellants with liability for the act of the principal offender. Liability might be as an accessory at the fact aiding and abetting or as parties to a joint enterprise. In the way joint enterprise to murder was left, each path depended upon proof of knowledge of the knife or similar bladed weapon (or contemplation of the possible use of such a weapon by a person possessed of a murderous intention). The critical question in either of the ways that liability was left turned on the capacity of the evidence in each case to prove that knowledge. There was evidence from which an inference of concert was open. If the jury were not persuaded in each case that the appellant had come to an understanding respecting the intentional infliction of really serious bodily harm with the use of a knife or similar bladed weapon (or, in the case of an understanding that a person or persons would be assaulted, that he contemplated the use of such a weapon by a party having the requisite intention) it is not apparent how, acting reasonably, the jury might have been affirmatively persuaded that the appellant possessed the knowledge necessary for accessorial liability. One way of reducing the length and complexity of the directions on the law would have been to raise with the prosecutor the utility of leaving the accessorial case before the commencement of the addresses.

35 The Full Court identified the real issue in each case as whether the jury were satisfied that the prosecution had proved the agreement specified in par (1)

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17 (2006) 81 ALJR 439; 231 ALR 500; [2006] HCA 58.

18 *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [23] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; 231 ALR 500 at 506.

19 *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [24] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; 231 ALR 500 at 506.

of the direction[20]. Proof of such an agreement relied on drawing an inference from the appellant's conduct. If the conduct proved the agreement, it necessarily proved the appellant's participation in that agreement[21]. Provided that the Full Court's analysis of the real issue at the trial was correct, it was right to reject the challenge to the correctness of the directions on joint enterprise liability.

Participation in a joint criminal enterprise

36 The appellants submitted that proof of their participation in any joint criminal enterprise had been an issue at the trial. Their submissions were apt to suggest that it had been incumbent on the prosecution to prove an act of "participation" beyond presence at the scene pursuant to the agreement. The submissions in this respect require consideration of proof of participation in a joint criminal enterprise of the kind alleged here. So, too, does one submission made by the respondent.

37 The respondent's written submissions acknowledged that joint enterprise liability requires proof of the agreement and of the accused's participation in the enterprise. However, on the hearing of the appeals the respondent resiled from that submission in favour of the contention that "one plays a part at its most simple by joining into the agreement". That contention conflated the making of the agreement (whether tacit or express) with participation in its execution and confused liability for conspiracy with liability for the offence that is the subject of the conspiracy. Under the common law the agreement of two or more persons to commit a crime is, without more, a conspiracy[22]. Parties to a conspiracy are liable to conviction for that offence regardless of whether the crime that is the subject of their agreement is committed. The doctrine of joint criminal enterprise provides the means of attaching liability for the agreed crime on all the parties to the agreement regardless of the part played by each in its execution[23]. Of course there will usually be no occasion to have recourse to the doctrine in the case of a

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20 *R v Duong* (2011) 110 SASR 296 at 313-314 [102].

21 *R v Duong* (2011) 110 SASR 296 at 313-314 [102].

22 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 327, 330 per Brennan J, 334 per Deane J; [1984] HCA 8; *Truong v The Queen* (2004) 223 CLR 122 at 143-144 [35] per Gleeson CJ, McHugh and Heydon JJ; [2004] HCA 10.

23 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Gillard v The Queen* (2003) 219 CLR 1 at 35-36 [110] per Hayne J; [2003] HCA 64.

party who does some or all of the acts constituting the actus reus. The work done by the doctrine is in making other parties liable for those acts. The principles are as explained by McHugh J in *Osland v The Queen*[24]. Liability attaches to all the parties to the agreement who participate in some way in furthering its execution.

38 A person participates in a joint criminal enterprise by being present when the crime is committed pursuant to the agreement[25]. The unchallenged evidence was that each appellant was one of a larger number of persons who had travelled from Duong's house to the Vartue Street premises. No nice question arises in these appeals of the sufficiency of the evidence to prove participation in the enterprise. If, at any time prior to the stabbing, the appellant whose case was under consideration was found to have come to an understanding or arrangement with others, including the principal offender, that a knife or similar bladed weapon would be used to kill or to inflict really serious bodily harm on a person or persons at the Vartue Street premises, his presence as one of the hostile group amounted to participation in furtherance of the agreement.

39 Proof that the appellant whose case was under consideration assaulted a person or persons at the Vartue Street premises was material to the determination of the existence and nature of any agreement to which he was a party. However, proof that an appellant was a party to the agreement specified in par (1) of the direction (or to an agreement to assault a person or persons having the requisite foresight) did not depend upon proof that he had engaged in any particular conduct at the scene.

Participation an issue at the trial?

40 The appellants submitted that the Full Court was wrong to reason that the existence of the agreement was an inference from participation because the prosecution case "encompassed scenarios in which agreement might be inferred from evidence separate from, and earlier in time than, any participation of the accused in the brawls". It was open to the jury to infer in each case that the appellant had come to the agreement at Duong's house. Such a conclusion was

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24 (1998) 197 CLR 316 at 342-350 [72]-[94]; [1998] HCA 75. See also Simester, "The Mental Element in Complicity", (2006) 122 *Law Quarterly Review* 578 at 598-600.

25 *Osland v The Queen* (1998) 197 CLR 316 at 329 [27] per Gaudron and Gummow JJ, 343 [73] per McHugh J citing *R v Tangye* (1997) 92 A Crim R 545 at 556-557; *Hui Chi-Ming v The Queen* [1992] 1 AC 34 at 45, 53.

an inference from the events at Duong's house and from each appellant's conduct in accompanying others from Duong's house to the Vartue Street premises. In any event, whether the agreement was made at Duong's house or at a later time was irrelevant to liability in each case. None of the appellants put in issue his presence as one of the persons who travelled from Duong's house to the Vartue Street premises.

41 Counsel's addresses at the trial are eloquent of a forensic decision in each case to fight the trial on the capacity of the evidence to prove the agreement. Lengthy consideration was given by trial counsel to the sufficiency of the written directions. No counsel requested that the jury be directed on participation in the joint enterprise as a discrete element of liability. This was not neglect on their part. It reflects the reality of the trial, at which proof of the agreement and not participation in it was the issue. The point is readily tested. Assume the written direction included as par (1A) a requirement for the prosecution to prove "that the accused participated in the joint enterprise to murder". Also assume that the jury asked the trial judge what was required to prove participation in the enterprise. A correct answer to the question would have been "presence at the Vartue Street premises pursuant to the agreement in par (1)".

42 Sem's case differed from those of Duong and Huynh in that Sem's account of the relevant events formed part of the evidence in his case. Sem submitted that the oral evidence that identified him as present during the second phase of the assault (when it was probable that the fatal wound was inflicted) was of doubtful reliability. In the circumstances, Sem contended that it had been necessary to direct the jury of the necessity to find that he had been participating in the enterprise at the time of the stabbing. Sem's "continuing participation" was said to have been the main issue at the trial. The account in Sem's statement was capable of raising a doubt that Sem was a party to any agreement to kill or to inflict really serious bodily harm with the use of a knife at the Vartue Street premises (or that he contemplated the use of a knife by those who accompanied him to those premises). Sem's submission overlooks that the jury could not have reasoned to his guilt as a party to a joint enterprise without being satisfied beyond reasonable doubt that he had come to the agreement or arrangement specified in par (1) (or that he was a party to an agreement to assault a person or persons and that he contemplated that one of his confederates might use a knife thereby intending to kill or to do grievous bodily harm). In the event that the jury were satisfied that Sem had come to such an agreement, his presence at the Vartue Street premises pursuant to the agreement amounted to participation in furtherance of it. It was not necessary to prove that he was present near the gates at the time of the stabbing. Sem would still be guilty of murder if the jury were satisfied of each of the matters in pars (1), (2) and (3) of the direction on joint

enterprise to murder. (The requirement stated in par (4) was otiose – there was no suggestion that the killing of the deceased was done in self defence or that it was not unlawful.) In the event that the jury were satisfied of the matters in pars (1), (2) and (3), Sem would only absolve himself from liability for the act of the stabber if the jury considered it reasonably possible that Sem had withdrawn from the enterprise before the stabbing.

43 The trial judge directed the jury that Sem's presence in the vicinity of the gates at the time of the stabbing was not essential for proof of his guilt as a party to a joint criminal enterprise. In addressing the possibility that Sem had abandoned the enterprise at the time of the stabbing his Honour reminded the jury that there was no evidence that Sem had attempted to call off the attackers, or tell the others that he was "out of it"[26]. Sem's appeal does not provide the occasion to consider what may be required to withdraw from an enterprise involving group violence[27]. Sem's case, like those of Duong and Huynh, was that the evidence did not establish that he had come to an agreement of the kind specified in par (1) or that he contemplated the use of a knife by a confederate who intended thereby to kill or to inflict really serious bodily harm.

44 The Full Court was right to dismiss the appellants' challenge to the direction on joint enterprise liability.

The second issue – the summing-up of the appellants' cases

45 The second issue raised by the appellants' overlapping grounds of appeal concerns the structure of the summing-up. The trial judge instructed the jury on the law governing proof of liability in each of the ways the prosecution case was advanced. He then discussed the application of the principles of accessorial liability in the context of a narrative review of the evidence. He then discussed the application of the principles of joint enterprise liability in the same way. In the course of the narrative review of the evidence, his Honour drew attention to the criticisms made by each appellant of those parts of the evidence that were relevant to the case against him. What his Honour did not do was to deal separately with the case of each appellant, instructing on how liability might arise in each of the ways the case was put and reminding the jury of the evidence as it applied to each appellant's case. At the completion of the narrative review of the evidence, his Honour reminded the jury of the submissions of counsel.

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26 *R v Duong* (2011) 110 SASR 296 at 317 [119].

27 *White v Ridley* (1978) 140 CLR 342 at 348-351 per Gibbs J; [1978] HCA 38.

46 The reasons of the Full Court contain a detailed analysis of the summing-up[28]. There is no need to repeat that analysis in these reasons. Doyle CJ said that the trial judge's approach to summing-up the case in this respect was not "the usual approach"[29] but that despite that circumstance it was adequate[30]. In this Court, the appellants submit that the Full Court erred in so concluding. The failure to sum up the cases separately was said to be contrary to a requirement of the fair trial of multiple accused. The authority on which the appellants relied for this proposition was *R v Towle*[31]. Street CJ, giving the judgment of the New South Wales Court of Criminal Appeal, said that, save for unusual cases, where two or more persons are being tried together[32]:

> "it is the clear duty of the trial judge to separate for the jury's consideration the evidence properly relevant and material in the case of each, and to present the case made against each of the accused separately."

47 That statement was made in the context of a trial at which the evidence against each accused differed. This was not such a trial. With the exception of Sem's statement, all of the evidence at the trial was admissible against each appellant. There is no template for summing-up a case involving multiple accused any more than for a trial of a single accused. Doyle CJ was right to reject the submission that it was an error for the trial judge to depart from structuring his summing-up in "the usual way"[33].

48 Doyle CJ considered that to have summed up the case for each appellant separately on each of the alternative bases of liability would have added considerably to the length and complexity of the charge[34]. Huynh was critical of this aspect of his Honour's reasons. He submitted that the task of separately

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28 *R v Duong* (2011) 110 SASR 296 at 325-328 [162]-[167].

29 *R v Duong* (2011) 110 SASR 296 at 328 [170].

30 *R v Duong* (2011) 110 SASR 296 at 328 [171]-[172].

31 (1954) 72 WN (NSW) 338.

32 *R v Towle* (1954) 72 WN (NSW) 338 at 340.

33 *R v Duong* (2011) 110 SASR 296 at 328 [174].

34 *R v Duong* (2011) 110 SASR 296 at 328-329 [174].

distilling the evidence against him would have added little time. The submission wrongly assumed that the evidence relevant to consideration of whether Huynh's liability had been established (whether as an aider and abettor, a party to a joint enterprise to murder or a party to an agreement to assault with the necessary foresight) was that of the witnesses who gave an account of the things Huynh did at the scene. The whole of the evidence (save for Sem's statement) was relevant to the consideration of Huynh's liability in each of the ways the case was left.

49 It was the responsibility of the trial judge to structure the summing-up in a way that he assessed would most effectively distil the issues for determination in each case and, to the extent that it was necessary to do so, to remind the jury of the evidence bearing on the determination of those issues. Given that the whole of the oral evidence was common to the three cases, and that many of the factual issues were common to liability in each case, the approach that his Honour adopted was one which avoided a deal of needless repetition. Critical to the appellants' separate cases were the suggested weaknesses in the evidence that implicated each as engaged in the assault on the deceased and in other acts of violence at the scene. The trial judge drew attention to these criticisms of the evidence and to their significance to the case against each appellant in the course of reviewing the evidence.

50 On the hearing of the appeals in this Court, the only matter raised on behalf of any of the appellants as material to his case and which was not addressed in the summing-up concerned Duong. This was the failure to refer to the evidence of Kathleen Francis and Sophie Russo of the short interval during which Duong was absent from the car following their arrival in Vartue Street. His Honour reminded the jury of other aspects of the evidence of these two witnesses which were favourable to Duong's case including Kathleen Francis' account that Duong had initially been reluctant to leave his house, that neither had seen any weapons, and that neither had seen any blood on Duong.

51 Trial counsel made no complaint that his client's case had not been fairly put and none invited his Honour to supplement the summing-up by further reminder of any matter touching his client's case. The challenge to the sufficiency of the summing-up to fairly put the case of each appellant cannot be sustained.

Orders

52 Orders should be made as follows:

Tuan Kiet David Huynh v The Queen No A30 of 2012

Dismiss the appeal.

Chansyna Duong v The Queen No A31 of 2012

Special leave to appeal granted, the appeal be treated as instituted and heard instanter and dismissed.

Rotha Sem v The Queen No A32 of 2012

Special leave to appeal granted, the appeal be treated as instituted and heard instanter and dismissed.