HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

Matter No A14/2022

BENJAMIN JOHN MITCHELL — APPELLANT

AND

THE KING — RESPONDENT

Matter No A15/2022

ALFRED CLAUDE RIGNEY — APPELLANT

AND

THE KING — RESPONDENT

Matter No A16/2022

AARON DONALD CARVER — APPELLANT

AND

THE KING — RESPONDENT

Matter No A17/2022

MATTHEW BERNARD TENHOOPEN — APPLICANT

AND

THE KING — RESPONDENT

Mitchell v The King
Rigney v The King
Carver v The King
Tenhoopen v The King
[2023] HCA 5
Date of Hearing: 6 December 2022
Date of Judgment: 8 March 2023
A14/2022, A15/2022, A16/2022 & A17/2022

ORDER

In Matter Nos A14, A15, and A16 of 2022:

1. *Appeal allowed.*

2. *Order 2 of the orders of the Court of Appeal of the Supreme Court of South Australia, made on 10 August 2021, be set aside and in its place there be orders that:*

    (i) the appeal be allowed;

    (ii) the conviction be quashed; and

    (iii) there be a new trial.

In Matter No A17 of 2022:

1. *Application for special leave to appeal granted.*

2. *Appeal allowed.*

3. *Order 2 of the orders of the Court of Appeal of the Supreme Court of South Australia, made on 10 August 2021, be set aside and in its place there be orders that:*

    (i) the appeal be allowed;

    (ii) the conviction be quashed; and

    (iii) there be a new trial.

On appeal from the Supreme Court of South Australia

Representation

T A Game SC with K G Handshin KC and K J Edwards (did not appear) for the appellant in A16/2022 (instructed by Access to Justice Law Firm)

A L Tokley KC with G N E Aitken for the appellant in A14/2022 (instructed by Noblet & Co)

S G Henchliffe KC with A J Culshaw for the appellant in A15/2022 (instructed by Barbaro Thilthorpe Lawyers)

S A McDonald SC with G Katsaras for the applicant in A17/2022 (instructed by Legal Services Commission of South Australia)

J P Pearce KC with R I Walker for the respondent in each matter (instructed by Office of the Director of Public Prosecutions (SA))

CATCHWORDS

Mitchell v The King
Rigney v The King
Carver v The King
Tenhoopen v The King

Criminal law – Murder – Appeal against conviction – Extended joint criminal enterprise – Murder and constructive murder provided for by ss 11 and 12A of *Criminal Law Consolidation Act 1935* (SA), respectively – Where appellants agreed to commit indictable offence of criminal trespass – Where during commission of offence one or more parties to agreement committed intentional act of violence causing death – Where appellants' agreement did not extend to intentional act of violence causing death – Where s 12A deemed perpetrator of intentional act of violence causing death in course of commission of major indictable offence punishable by ten years' imprisonment or more guilty of murder under s 11 – Whether common law doctrine of extended joint criminal enterprise could operate in combination with s 12A to render appellants guilty of murder based on foresight of possibility of commission by a co-venturer of any intentional act of violence.

Words and phrases – "agreement", "common purpose", "constructive murder", "derivative liability", "extended joint criminal enterprise", "felony murder", "foresight", "intentional act of violence", "joint criminal enterprise", "murder", "pathway to murder", "primary liability", "primary offender", "primary party", "secondary offender", "secondary party".

Criminal Law Consolidation Act 1935 (SA), ss 11, 12A.

1 KIEFEL CJ. The appellants[1] were convicted of the murder of Mr Urim Gjabri after a trial in the Supreme Court of South Australia before a judge and a jury.

2 The prosecution case was that each of the appellants together with Jason Paul Howell, who was tried separately, agreed with each other to steal a substantial amount of cannabis from a house in a suburb of northern Adelaide which was being used to grow cannabis (the "grow-house") for commercial purposes. That is to say, the prosecution case was that they were parties to a joint criminal enterprise. The deceased was living in the grow-house. The appellants and Howell travelled to and broke into the grow-house. The deceased was violently assaulted including by blows to his head, one of which was the cause of his death. The appellants and Howell then took the cannabis.

3 The case was largely circumstantial. There was telephone tower evidence which placed each of Howell and the appellants, except for Mr Tenhoopen, in an area near the grow-house on the night in question. Mr Tenhoopen later made admissions to witnesses of being at the grow-house with the other appellants and taking part in the theft of the cannabis. Shortly before the events which led to the death, five persons appeared on CCTV footage walking in the direction of the grow-house. At least one of them was seen on that footage to be carrying a long object, apparently a branch or bat. It was not possible to identify the person who inflicted the blow which killed the deceased.

4 The offence of murder is stated in s 11 of the *Criminal Law Consolidation Act 1935* (SA) ("the CLC Act"). It provides that a person who commits murder shall be guilty of an offence and shall be imprisoned for life, but does not state what constitutes murder. That definition is supplied by the common law. Murder is generally understood as the unlawful killing of a person with intent to kill or cause serious bodily harm. The common law treated an unintended killing that takes place in the course of, or in connection with, a felony as if it were murder if the felonious conduct involves violence or danger to some person[2]. For South Australia, the law which is based on that common law rule is contained in s 12A of the CLC Act, which came into effect on 1 January 1995. It provides:

> "**12A—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

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1 Mr Tenhoopen is an applicant for special leave to appeal, but it is convenient to refer to the three appellants and Mr Tenhoopen collectively as "the appellants".

2 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [27]; 203 ALR 259 at 266, citing *Ryan v The Queen* (1967) 121 CLR 205 at 240-241.

imprisonment for ten years or more (other than abortion), and thus causes the death of another, is guilty of murder."

5 Section 12A has the same effect as the common law rule upon which it is based. It is a deeming provision and provides for what is called "constructive murder", which distinguishes it from what is generally understood at common law to be murder in fact. For conduct to be deemed to be murder under s 12A, it is necessary only that the death of another be caused by a person committing an intentional act of violence, whilst acting in the course of a major indictable offence[3]. It does not require that the person doing the act intends to kill or cause serious bodily harm.

6 The prosecution case as put to the jury at the conclusion of the trial took both pathways to conviction for the offence of murder under s 11 of the CLC Act: common law murder; or constructive murder as provided by s 12A. For both pathways, the offence in respect of which there was alleged to be a joint criminal enterprise was identified as "Aggravated Serious Criminal Trespass in a Place of Residence with the Intent to Commit Theft", contrary to s 170 of the CLC Act. That offence is punishable by life imprisonment. Both pathways to the offence of murder depended on the application of the principle of extended joint criminal enterprise.

7 That principle depends on the knowledge and foresight of a party to the joint criminal enterprise ("the secondary offender") as to what the person who commits the murder ("the primary offender") might do in the course of the joint criminal enterprise.

8 The prosecution alleged that the appellants were guilty of common law murder by the application of the principle of extended joint criminal enterprise on the basis that they each foresaw the possibility that, in carrying out the agreement to break and enter and steal the cannabis, one of their co-venturers might attack the deceased with an intention to kill or cause grievous bodily harm. The prosecution case respecting the application of the principle to s 12A was that the appellants were each guilty of murder if they contemplated the possibility that in carrying out the enterprise a co-venturer might perpetrate an intentional act of violence which then (in fact) caused the death of the deceased. It is the application of the principle to s 12A which is said to be problematic.

The threshold question and the directions

9 The applications for leave to appeal against conviction brought to the Court of Appeal concerned the directions given respecting extended joint criminal enterprise as applied to constructive murder under s 12A. It was not argued, as it

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3 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [28]; 203 ALR 259 at 266.

is now, that the principle of extended joint criminal enterprise should not be held to apply to s 12A, nor was it argued that the directions concerning common law murder were incorrect.

10 In the latter respect some appellants now seek to contend that the trial judge's directions (that the relevant foresight of the appellants was that a co-venturer might inflict "violence" on a person they came across at the grow-house) tended to elide the distinction in the level of violence required to be foreseen by a co-venturer for common law murder on extended joint criminal enterprise principles and constructive murder on extended joint criminal enterprise principles.

11 The contention is without merit. The trial judge separately emphasised the distinction between the two. His Honour framed the issue of violence, on almost every occasion where that term was used, so as to invite the jury to consider two pathways of analysis. His Honour explained the foresight necessary for extended joint criminal enterprise in relation to common law murder as being whether a co-venturer might inflict violence on a person they came across at the grow-house with the intention of causing that person serious bodily harm; and for constructive murder simply an intentional act of violence. His Honour repeated that direction and followed that format throughout the directions.

12 The focus of these appeals is therefore whether the principle of extended joint criminal enterprise can or should be applied to constructive murder under s 12A, and whether it was correct for the trial judge to direct that any intentional act of violence would be sufficient. In this regard the trial judge gave as an example that an act of violence might include striking the back of a person's leg and that a threat or menace of violence could amount to an act of violence within the meaning of s 12A. Because it is not known how the jury reasoned to conviction and which pathway it took, if the appellants are correct in their submissions concerning s 12A the appeals must be allowed and new trials ordered.

Joint criminal enterprise and extended joint criminal enterprise

13 The principle or doctrine of joint criminal enterprise, or common purpose, establishes the complicity of a secondary party in the commission of a crime. As explained in *McAuliffe v The Queen*[4], it applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal enterprise[5]. Unlike the liability of accessories such as aiders or abettors, which is based on their contribution to the crime, the wrong in a joint criminal enterprise lies in the mutual

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4 *McAuliffe v The Queen* (1995) 183 CLR 108.

5 *McAuliffe v The Queen* (1995) 183 CLR 108 at 113.

embarkation on a crime with the awareness that an incidental crime may be committed in carrying out the agreement[6].

14 Each of the parties to a joint criminal enterprise is equally guilty of the crime that is the object of the enterprise and which is committed, so long as the agreement to commit it (which may be express or inferred) remains on foot. That is so regardless of the part each has played in its commission. Each party is also guilty of any other offence ("the incidental offence") which is committed by a co-venturer that is within the scope of the agreement. The incidental offence will be within the scope of the agreement to commit the first-mentioned crime if the parties contemplate its commission as a possible incident of the execution of their agreement[7].

15 The principle of extended joint criminal enterprise liability arises where a party to a joint criminal enterprise foresees, but does not agree to, the commission of an incidental crime in the course of carrying out the agreement[8]. That is to say, the principle applies where the commission of an incidental offence lies outside the scope of the common purpose[9] but is nevertheless contemplated as a possibility[10]. The parties are each criminally liable for the incidental offence if with foresight of the possibility that it might be committed they nevertheless continue to participate in the enterprise[11] and that is so whether the foresight is that of an individual party or is shared by all parties[12]. Criminal culpability of this kind is consistent with the general principle that a person who assists or encourages the commission of an offence may be convicted as a party to it[13].

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6 *Miller v The Queen* (2016) 259 CLR 380 at 398 [34].

7 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

8 *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

9 *McAuliffe v The Queen* (1995) 183 CLR 108 at 115.

10 *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Miller v The Queen* (2016) 259 CLR 380 at 396-397 [30].

11 *Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17], 444 [20]; 231 ALR 500 at 504-505, 505; *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

12 *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.

13 *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.

16 The example given in *McAuliffe*[14] of the application of this principle is where a party knows that another party to the joint criminal enterprise is carrying a weapon which may be used to kill or inflict grievous bodily harm in carrying out the enterprise. The first-mentioned party may not agree to the use of the weapon, indeed they may reject any agreement for its use, but if they nevertheless continue with the venture they will be liable for the consequences.

17 Proof of an accused's foresight of the possibility of the commission of the incidental offence will usually be by inference from what is proved about the circumstances surrounding the crime and what the accused may be taken to have known or understood. The prosecution must prove that the individual concerned foresaw that the crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind[15].

18 The principle of extended joint criminal enterprise has been criticised. It has been overruled in the United Kingdom[16]. But it remains the policy of the common law as applying in Australia, as *Miller v The Queen*[17] confirms. It is another question whether it is rationally capable of applying to a provision such as s 12A.

Extended joint criminal enterprise and s 12A

19 The principle of joint criminal enterprise has been held to apply to common law felony murder[18] and to constructive murder under s 12A[19]. As to the latter, in *Arulthilakan v The Queen*[20] the application of the principle does not appear to have been doubted. The co-accused of the two appellants stabbed and killed a person in the course of the robbery. Both appellants were aware that he was in possession of the knife which was used. It was observed[21] that the plan was to "roll" the deceased.

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14 *McAuliffe v The Queen* (1995) 183 CLR 108 at 115.

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

16 *R v Jogee* [2017] AC 387.

17 *Miller v The Queen* (2016) 259 CLR 380.

18 *R v Solomon* [1959] Qd R 123 at 126-127.

19 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [28]; 203 ALR 259 at 266. See also *R v R* (1995) 63 SASR 417; *R v CMM* (2002) 81 SASR 300.

20 *Arulthilakan v The Queen* (2003) 78 ALJR 257; 203 ALR 259.

21 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [29]; 203 ALR 259 at 266.

That involved robbery accompanied if necessary by force and the use of force was therefore within the scope of the agreement.

20 No question arises on these appeals concerning the application of that principle to s 12A. It was not the prosecution case that the murder of Mr Gjabri was within the scope of the joint criminal enterprise. It was accepted that the appellants could not be taken to have agreed to what occurred. Rather, reliance was placed upon what they must have foreseen as a possibility in the carrying out of the enterprise.

21 In considering the application of the principle of extended joint criminal enterprise it is important to bear in mind the basis for it and the liability it creates. In *McAuliffe*[22] the Court referred with approval to what Sir Robin Cooke had said in *Chan Wing-Siu v The Queen*[23]. He referred to the principle whereby a secondary party acting in concert with a primary offender is criminally liable for acts done by the primary offender of a type which the secondary party foresees but does not necessarily intend. He explained that the principle turns on contemplation. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. Importantly, he pointed out that the criminal culpability lies in participating in the venture with that foresight.

22 The principle of extended joint criminal enterprise is concerned in the first place with the thinking of the secondary offender to whom it is applied and then with that person's continued participation with the requisite knowledge or foresight that a crime such as murder might be committed. In *McAuliffe*[24], in the example referred to above, the Court spoke of the party who knows that another party to the joint criminal enterprise is carrying a weapon which that other party might use to kill or inflict grievous bodily harm in carrying out the enterprise. The principle applies and that person is also guilty of murder where they continue to participate in the venture with that knowledge.

23 In *Chan*[25], Sir Robin Cooke suggested as a direction to the jury the question whether the accused contemplated that in carrying out a common unlawful purpose one of his partners might use a knife or a loaded gun with the intention of causing grievous bodily harm. And in *R v Hyde*[26], to which reference was also made in

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22 *McAuliffe v The Queen* (1995) 183 CLR 108 at 115-116.

23 *Chan Wing-Siu v The Queen* [1985] AC 168 at 175.

24 *McAuliffe v The Queen* (1995) 183 CLR 108 at 115.

25 *Chan Wing-Siu v The Queen* [1985] AC 168 at 178.

26 *R v Hyde* [1991] 1 QB 134 at 139.

McAuliffe[27], Lord Lane CJ pointed to the mental element necessary to the principle. He explained what had been enunciated in *Chan* as being if B realises (without agreeing) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. B will be liable because he has given encouragement and assistance to A in carrying out an enterprise which B realises may involve murder.

24 The principle of extended joint criminal enterprise is generally considered to have first been discussed in *Chan*, a case which involved murder at common law. It was not applied in the United Kingdom to cases involving constructive murder. No opportunity arose to consider whether that was possible. That offence was abolished before 1984, when *Chan* was decided[28]. This Court was not referred to any decision in the United Kingdom or Australia in which the principle has been applied to a case other than one which concerned murder at common law. In such cases there has been an unlawful killing by the intentional acts of the primary offender. The cases referred to above show that the knowledge or foresight on the part of the secondary offender, necessary for criminal culpability, is of the possibility of acts which may kill or cause serious bodily harm being committed.

25 The question which then arises is what kind of acts a secondary offender may realise might occur in the course of carrying out the enterprise if the principle of extended joint criminal enterprise is applied to s 12A. The answer would seem to depend largely on the meaning to be given to the words "act of violence", having regard to the text and context of the section.

26 If those words are to be understood as limited to an act that is capable of causing death or serious bodily injury, foresight of such an act may be considered sufficient to found criminal culpability for murder consistently with the cases which explain the basis of the principle of extended joint criminal enterprise. It would also follow that the directions given by the trial judge, which gave as examples striking the back of a person's leg or a threat or menace of violence, were incorrect.

27 The construction which the trial judge and the Court of Appeal[29] gave does not import notions of causation of death into the words "act of violence". The section itself treats causation as a separate element. Consistently with this

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27 *McAuliffe v The Queen* (1995) 183 CLR 108 at 116-117.

28 In England and Wales by the *Homicide Act 1957* (UK), s 1; in Northern Ireland by the *Criminal Justice Act (Northern Ireland) 1966* (NI), s 8. It does not seem to have existed in Scotland.

29 *Rigney v The Queen* (2021) 139 SASR 305 at 312 [13], 345 [124].

understanding, the prosecution case for the application of the principle relied on the appellants having contemplated the possibility that in carrying out the enterprise a co-venturer might perpetrate an intentional act of violence which then (in fact) caused the death of the deceased.

28 The broader view of the words "act of violence" and the operation of causation in s 12A gain support from *Arulthilakan*[30]. There it was accepted that the presentation of a knife for the purpose of threatening, intimidating or stabbing the owner of property the subject of the robbery may, as a matter of law, be capable of being regarded as an act of violence. The presentation of the knife may be capable (at law) of being regarded as an act of violence, but it becomes a question of fact as to whether the presentation of the knife caused death[31]. No doubt was cast upon the correctness of these views in argument on these appeals.

29 Given that the words "act of violence" are to be understood more broadly and not by reference to causation of death or serious injury, it follows that the only foresight which a secondary offender might be said to have, if the principle is applied to s 12A, is that almost any act or threat of violence may take place. This cannot be a sufficient mental element for criminal liability for murder according to the principle of extended joint criminal enterprise.

30 The principle of extended joint criminal enterprise cannot apply to s 12A of the CLC Act. This follows largely as a matter of the construction of that provision. It should not be held to apply because constructive crimes should be confined so far as possible in their operation. They should be so limited in view of the development of the law "towards a closer correlation between moral culpability and legal responsibility"[32].

Orders

31 I agree with the orders proposed in the reasons of Gordon, Edelman and Steward JJ.

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30 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 262 [23]; 203 ALR 259 at 264-265.

31 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 262-263 [23]-[26]; 203 ALR 259 at 264-266.

32 *Wilson v The Queen* (1992) 174 CLR 313 at 327.

32 GAGELER, GLEESON AND JAGOT JJ. Extended joint criminal enterprise ("EJCE"), as recognised in *McAuliffe v The Queen*[33], was confirmed by the majority in *Miller v The Queen*[34] to be a doctrine of the common law of Australia pursuant to which criminal liability of a "sui generis nature"[35] is imposed on a secondary party for an offence committed by a primary party.

33 Pursuant to the common law doctrine of EJCE, criminal liability is imposed on a secondary party for an additional offence[36] committed by a primary party where the secondary party has participated with the primary party in the execution of an agreement to commit another offence[37] with foresight of the possibility that the primary party might commit the additional offence as an incident of executing their agreement. The justification for the secondary party being criminally liable for the additional offence committed by the primary party in those circumstances is said to lie in "the mutual embarkation on a crime[38] with the awareness that the incidental crime may be committed in executing their agreement"[39]. The execution of the common purpose and the foreseen attendant risk of an additional crime being committed are said to be a "package deal" in that the secondary party's voluntary assumption of the risk of the additional crime being committed is seen to be implicit in the secondary party's subscription to the agreement which carries that risk[40].

34 The dispositive question in each of these appeals is whether the common law doctrine of EJCE operates in the context of s 12A of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA") to produce the result that a secondary

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33 (1995) 183 CLR 108.

34 (2016) 259 CLR 380.

35 (2016) 259 CLR 380 at 398 [34].

36 Often referred to as the "incidental" offence or crime.

37 Often referred to as the "foundational" offence, crime, or felony, the subject of the joint criminal enterprise.

38 Namely, the commission of the foundational offence, crime, or felony.

39 *Miller v The Queen* (2016) 259 CLR 380 at 398 [34], citing *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [20]; 231 ALR 500 at 505.

40 Simester, "The Mental Element in Complicity" (2006) 122 *Law Quarterly Review* 578 at 599, cited in *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [20]; 231 ALR 500 at 505 and *Miller v The Queen* (2016) 259 CLR 380 at 398 [33]-[34].

party can be guilty of a murder committed by a primary party where the secondary party has participated in the execution of an agreement to commit a major indictable offence punishable by imprisonment for ten years or more with nothing other than foresight of the possibility that the primary party might commit an intentional act of violence as an incident of carrying out that agreement.

35 The answer turns on the capacity of the common law doctrine to operate harmoniously with the relevant statutory structure and statutory purpose.

36 Section 11 of the CLCA provides that any person who commits murder shall be guilty of an offence. Unlike s 12 of the CLCA (which deals with conspiring or soliciting to commit murder), s 12A of the CLCA (which deals with causing death by an intentional act of violence while acting in the course or furtherance of a major indictable offence of the relevant kind) does not create a standalone offence. Section 12A merely specifies one circumstance in which a person is guilty of the offence of murder created by s 11.

37 Before the *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA) ("the Amendment Act"), the circumstances in which a person could be guilty of the offence of murder created by s 11 were left to the common law. As the common law was then understood, an act causing death constituted murder on the part of an accused in two broad categories of case. The first involved circumstances where an act causing death was done with intention on the part of the accused to cause death or really serious bodily harm. The second – known as "felony murder" and sometimes referred to as "constructive murder" – involved circumstances where an act causing death was done in the course of or in furtherance of the commission by the accused of a felony involving violence or danger. In neither category of case did the act causing death in fact need to be done by the accused. It was sufficient for the first category that the act causing death was done by another with the agreement of the accused – as an intended (even if contingently and reluctantly intended) part of a joint criminal enterprise ("JCE") constituted by an agreement between the participants to commit the foundational felony. It was sufficient for the second category that the act causing death was done by any participant in the commission of an agreed foundational felony involving violence or danger, irrespective of the intention or foresight of any of them that the act causing death would or might be done[41]. There was accordingly no logical necessity to prove any JCE to commit the act of violence which caused death, let alone EJCE in respect of that act of violence, in

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41 *R v R* (1995) 63 SASR 417 at 420-421, 424-425; Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (1977) at 15.

order to prove felony or constructive murder as the common law was then understood in South Australia.

38 The Amendment Act made two relevant amendments to the CLCA. First, it inserted s 5D(1). That provision abolished the classification of offences as felonies. As a consequence, the category of felony murder necessarily ceased to exist at common law in South Australia.

39 Second, the Amendment Act simultaneously inserted s 12A into the CLCA as the "statutory replacement" of felony murder[42]. The statutory replacement differed from its common law predecessor in two important respects. One was that the foundational crime, in the course of or furtherance of which the act causing death needed to occur, was limited to a major indictable offence punishable by imprisonment for ten years or more. The other was that the act causing death was limited to "an intentional act of violence".

40 Implicitly accepted in *Arulthilakan v The Queen*[43], and common ground in these appeals, is that the "act of violence" to which s 12A refers need not be an act done in fact by the accused. It is sufficient that the act of violence be done by another with the agreement of the accused as an intended part of a JCE to commit the foundational crime.

41 Plain on the face of the provision and implicit in that same reasoning in *Arulthilakan*, however, is that the intention to which s 12A refers by the words "an intentional act of violence" is the intention of the accused. Unless the act of violence is an act intended by the accused, the pathway provided by s 12A to guilt of the offence of murder under s 11 is unavailable.

42 Because the common law doctrine of EJCE operates to impose liability on a secondary party for an offence on the part of a primary party, and because s 12A does not itself create an offence but operates instead only to provide a statutory pathway to guilt of the offence of murder under s 11, the common law doctrine of EJCE is incapable of application to s 12A alone. The question is whether the doctrine can operate to impose liability on a secondary party for an offence of murder on the part of a primary party in respect of which liability is imposed on that primary party under s 11 through the pathway provided by s 12A.

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42 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 August 1994 at 49.

43 (2003) 78 ALJR 257; 203 ALR 259.

43 For the common law doctrine of EJCE to operate to impose liability on a secondary party in such a circumstance would amount to the creation at common law of liability for the statutorily defined form of murder in s 12A in circumstances which the narrowness of the s 12A pathway to that form of murder is designed to avoid. In particular, it would operate to impose liability for murder on a participant in a foundational major indictable offence as described in s 12A who has nothing other than foresight of the possibility of an intentional commission of an act of violence by another participant. However, the statutory design is to impose liability for murder on a person only if that person has an intention to commit an act of violence.

44 The background of the common law of felony murder was understood to make the liability for murder of every participant in a foundational felony independent of any intention or foresight of any of them that the act which in fact caused death would or might be done. Against this background, the legislative choice made in enacting s 12A as its statutory replacement was to make the criminal liability of each participant for murder by operation of that section depend on the intention of that participant to commit, or agree (contingently, reluctantly, or otherwise) in the commission of, the act of violence. The operation of the common law doctrine of EJCE on s 12A would distort that legislative choice in two respects. It would introduce foresight as a pathway to criminal liability for murder by operation of s 12A, thereby adding a pathway evidently eschewed in the making of the legislative choice. And it would introduce an anomalous distinction between participants in the foundational major indictable offence: the intentional commission of an act of violence being required to render a participant who does the act of violence causing death liable for murder, and mere foresight of the intentional commission of an act of violence causing death being sufficient to render a participant who does not do the act liable for the same offence.

45 Further, the common law doctrine of EJCE cannot be taken to have been so well established as to have been in legislative contemplation at the time of enactment of the Amendment Act. Indeed, recognition of the doctrine occurred only in *McAuliffe*, which was decided some months afterwards. The common law doctrine therefore cannot be taken, and is not suggested, to have any measure of presumptive application. No strain should be placed on the statutory language to attempt to accommodate it.

46 Given that application of the common law doctrine of EJCE would be in tension with the statutory scheme, it is the common law doctrine which must yield to ensure coherence. Two overarching and overlapping considerations of legal policy lend support to that conclusion. Expressed normatively in language drawn

from the majority in *Wilson v The Queen*[44], they are that: (1) the judicial development of the criminal law has for the most part been, and should continue to be, towards a closer correlation between moral culpability and legal responsibility; and (2) the scope of constructive crime should be confined to what is truly unavoidable.

47 The answer to the dispositive question is, accordingly, "no".

48 For that reason, we agree with the orders proposed by Gordon, Edelman and Steward JJ. As retrials are to be ordered, we add for completeness that we agree that the statement by their Honours appropriately expresses the liability of primary and secondary participants in a murder based on the pathway to guilt provided by s 12A of the CLCA[45]. In particular, we agree that the liability of an accused as a secondary party on that pathway requires proof beyond reasonable doubt that the accused was party to an agreement to commit a major indictable offence of the required kind and that the agreement included the agreement of the accused to the possible commission of an intentional act of violence of the same general nature as that which caused the death.

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44 (1992) 174 CLR 313 at 327. See also *IL v The Queen* (2017) 262 CLR 268 at 309 [97].

45 See the reasons of Gordon, Edelman and Steward JJ at [108].

GORDON, EDELMAN AND STEWARD JJ.

Introduction

49 The central issue in the appeals by Messrs Mitchell, Rigney and Carver, and the application for special leave to appeal by Mr Tenhoopen which was ordered to be heard concurrently, concerns the interaction between the doctrine of extended joint criminal enterprise and the statutory extension to the offence of murder in s 12A of the *Criminal Law Consolidation Act 1935* (SA) ("the CLC Act"). There is no dispute that the outcome of Mr Tenhoopen's application for special leave should follow the result of the appeals. It is therefore convenient to refer to all the parties as appellants.

50 The four appellants were charged with murder under s 11 of the CLC Act. The murder was alleged to have been committed during the pursuit of their agreement (together with another accomplice, Mr Howell) to break and enter and steal cannabis from a "grow house". The Crown case was that, during that enterprise, one of the five men killed Mr Gjabri and each of the men was criminally responsible for murder on the basis of either (i) the common law doctrine of extended joint criminal enterprise, or (ii) the common law doctrine of extended joint criminal enterprise together with the doctrine of constructive murder in s 12A of the CLC Act.

51 All four appellants were convicted of murder after trials before a judge (Lovell J) and jury in the Supreme Court of South Australia. Their appeals to the Court of Appeal of the Supreme Court of South Australia (Peek A-JA, Kelly P agreeing and Doyle JA agreeing with additional reasons) were dismissed. In this Court, the grounds of appeal were refined and leave was sought, and granted, for the appellants to raise a substantial new ground. They alleged, in summary, that: (1) the doctrine that extends liability for murder to extended joint criminal enterprise could not be combined with the constructive murder doctrine in s 12A of the CLC Act; (2) alternatively, if the doctrine of extended joint criminal enterprise could be combined with constructive murder under s 12A of the CLC Act, then the trial judge had misdirected the jury as to what needed to be foreseen by each appellant in order for constructive murder under s 12A to have been committed; and (3) the trial judge had misdirected the jury in relation to the elements of extended joint criminal enterprise.

52 For the reasons below, grounds (1) and (3) should be upheld. The trial judge erred by permitting the Crown to combine the doctrine of extended joint criminal enterprise with the doctrine of constructive murder to create, in effect, a new doctrine of constructive, constructive murder. No such doctrine has ever existed and there is no basis to conclude that the South Australian Parliament intended to create such a new doctrine when the CLC Act was amended to introduce s 12A.

The trial judge also erred by failing to direct the jury that the appellants could not be responsible for murder by application of the doctrine of extended joint criminal enterprise unless they foresaw the possibility that acts committed in the course of the enterprise might cause really serious bodily injury or death. Consistently with *Miller v The Queen*[46], the appellants were required to have foresight of all elements of the offence committed by the principal offender, including the result.

Common law doctrines of joint criminal enterprise, extended joint criminal enterprise, and constructive murder

53 In order to explain the relevant operation of ss 11 and 12A of the CLC Act, it is necessary to commence with the three common law concepts which those provisions incorporated or adapted. The three concepts are (i) joint criminal enterprise, (ii) extended joint criminal enterprise, and (iii) constructive murder.

(i) Joint criminal enterprise

54 The doctrine of joint criminal enterprise or common enterprise is based on agreement (also expressed as common purpose, design, or enterprise). Whether the agreement is expressed in words or inferred "from the parties' conduct", each party to an agreement to commit a crime will be guilty of the agreed crime and any crime "within the scope of the agreement"[47]. It is therefore essential to identify what acts and omissions the parties agreed upon[48]. The agreement need not be express and may be an inference drawn from the parties' conduct[49], but it must be subjectively appreciated by the accused[50]. The scope of such an agreement has therefore been expressed as involving matters that each party subjectively considered. In this respect, "it is essential to identify what the parties *did* agree upon and what it was that each contemplated might occur"[51], which requires consideration of whether each party contemplated the criminal acts "as a possible incident of the execution

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46 (2016) 259 CLR 380 at 388 [4]. See also at 416 [100].

47 *Miller v The Queen* (2016) 259 CLR 380 at 388 [4]. See also *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Gillard v The Queen* (2003) 219 CLR 1 at 36 [111].

48 *Gillard v The Queen* (2003) 219 CLR 1 at 39 [124].

49 *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

50 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

51 *Gillard v The Queen* (2003) 219 CLR 1 at 39 [124] (emphasis in original).

of their agreement"[52]. But the jury must be satisfied that each party subjectively agreed (authorised or assented) to the conduct, including the criminal act. Hence, the "true position" for nearly two centuries has been that "if one of the [parties to the agreement] goes beyond what has been tacitly agreed as part of the common enterprise, [the other party] is not liable for the consequences of that unauthorised act"[53].

55 Joint criminal enterprise is a principle of primary liability based on a form of agency[54]. The acts of the perpetrator that are within the scope of the agreement, and therefore done with the authority of the other parties, are attributed to the other parties to the agreement. That is, "if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all"[55]. It is in this sense that joint criminal enterprise is a form of primary liability: all parties are liable as principals in the first degree because those persons who do not physically perform the acts are acting in concert and have the relevant mens rea. Accordingly, the liability of each party is not derivative, but primary[56]. Hence, all those things done "in accordance with the continuing understanding or arrangement ... which are necessary to constitute the crime" are attributed to all parties to the agreement and "they are all equally guilty of the crime regardless of the part played by each in its commission"[57].

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52 *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

53 *R v Anderson* [1966] 2 QB 110 at 118-119. See also *R v Collinson* (1831) 4 Car & P 565 at 566 [172 ER 827 at 828]; *Pearce* (1929) 21 Cr App R 79 at 80-81; *R v Lovesey* [1970] 1 QB 352 at 356.

54 *IL v The Queen* (2017) 262 CLR 268 at 282 [29], 311 [103], 323-324 [146]-[149]; *O'Dea v Western Australia* (2022) 96 ALJR 710 at 721 [55]; 403 ALR 200 at 212-213. See also Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 *California Law Review* 323 at 354; Dressler, "Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem" (1985) 37 *Hastings Law Journal* 91 at 110-111.

55 *Macklin, Murphy, and Others' Case* (1838) 2 Lewin 225 at 226 [168 ER 1136 at 1136].

56 *Osland v The Queen* (1998) 197 CLR 316 at 350 [93]. See also at 383 [174], 413 [257]; *IL v The Queen* (2017) 262 CLR 268 at 283 [30], 284-285 [34], 287 [40], 297 [66], 299-300 [74], 311 [103], 323 [146].

57 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

(ii) Extended joint criminal enterprise

56 The doctrine of "extended joint criminal enterprise", as the name suggests, involves an extension, beyond the scope of the agreement, of responsibility for a joint criminal enterprise. In *Miller*[58], the doctrine of extended joint criminal enterprise was expressed to apply where a party to a joint criminal enterprise has not agreed to the commission of a crime but has instead foreseen the commission of that crime in the course of carrying out the agreement and continues to participate in the enterprise. What is to be foreseen is that an incidental *crime* might be committed[59], being all elements of that crime.

57 In *Miller*[60], the joint judgment of five members of this Court described the "paradigm case" of extended joint criminal enterprise as one "where the parties agree to commit a robbery and, in the course of carrying out their plan, one of them kills the intended victim with the requisite intention for murder". The liability of the other parties to the agreement would arise if they "foresaw murder as a possible incident of carrying out the agreed plan". The opening paragraph of the joint judgment in *Miller*[61] made plain what is meant by foresight of the commission of the crime of murder: foresight "that death or really serious bodily injury might be occasioned by a co-venturer" and also foresight that the co-venturer might act with "murderous intention".

58 As senior counsel for Mr Carver correctly submitted, foresight of the possibility of death naturally follows from foresight of really serious bodily injury (a common paraphrase of grievous bodily harm[62]). This is particularly so since it must also be proved that the accused foresaw the possibility that the perpetrator would act with murderous intent[63] and only acts of the general nature of the

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58 (2016) 259 CLR 380 at 388 [4]. See also at 416 [100].

59 *McAuliffe v The Queen* (1995) 183 CLR 108 at 117-118; *Clayton v The Queen* (2006) 81 ALJR 439 at 444-445 [26]; 231 ALR 500 at 506; *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

60 (2016) 259 CLR 380 at 390 [10].

61 (2016) 259 CLR 380 at 387 [1].

62 See *Chan Wing-Siu v The Queen* [1985] AC 168 at 174.

63 *Miller v The Queen* (2016) 259 CLR 380 at 387 [1]. See also *Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17], 444-445 [26]; 231 ALR 500 at 504-505, 506; *R v Taufahema* (2007) 228 CLR 232 at 238 [7].

attributed act need to be foreseen[64]. Consistently with liability for murder being imposed upon a primary offender who intends only to cause the consequence of grievous bodily harm, the foresight required of the secondary offender is that "death *or* really serious bodily injury might be occasioned" by a co-venturer acting with the intention to cause death or really serious bodily injury[65].

59 For these reasons, in each of *Gillard v The Queen*[66], *Clayton v The Queen*[67], and *Miller*, it would not have made a difference whether the foresight of the possible consequence was described as one of only death or as one of either death or grievous bodily harm. Foresight of the possibility of the latter is treated as involving equivalent culpability as foresight of the possibility of the former, in the same way as intention to cause death is treated as involving equivalent culpability as intention to cause grievous bodily harm. In *Gillard*, the prosecution case of foresight was based on allegations that Mr Preston had been hired to kill the victim and had gone to the victim's workshop with a loaded gun. In *Clayton*, the prosecution case of foresight was that the assault on the victim lasted 30 to 40 minutes and involved the use of metal poles and a large carving knife. In *Miller*, the prosecution case of foresight was based on an assault using weapons including a 332 mm long knife, a baseball bat, and a shovel.

60 If, however, a participant in a joint criminal enterprise foresees only the elements of a lesser crime than the crime for which the primary offender is convicted, then the participant can only be convicted of that lesser crime under the principles of extended joint criminal enterprise. For example, a participant in a joint criminal enterprise of robbery might foresee the possibility that the primary offender would cause very serious bodily harm or death to another person but might not foresee the possibility that the primary offender would do so with murderous intent. In that circumstance, even if the primary offender is convicted of murder, the participant can only be convicted of manslaughter under the principles of extended joint criminal enterprise[68].

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64 Williams, *Criminal Law* (1953) at 216-218; Hartt, "Parties to the Offence of Murder" (1958) 1 *Criminal Law Quarterly* 178 at 181.

65 *Miller v The Queen* (2016) 259 CLR 380 at 387 [1] (emphasis added). See also *McAuliffe v The Queen* (1995) 183 CLR 108 at 118.

66 (2003) 219 CLR 1.

67 (2006) 81 ALJR 439; 231 ALR 500.

68 *Gillard v The Queen* (2003) 219 CLR 1 at 14 [25], 15 [31]-[32], 28-29 [77]-[78], 40 [128]-[129].

61 The rationale for extended joint criminal enterprise must be different from the rationale for joint criminal enterprise since extended joint criminal enterprise may render a participant in a criminal enterprise liable for a crime committed during that criminal enterprise which was foreseen but which fell outside the scope of the agreement[69]. In this way, rather than being a principle of primary liability stemming from the agreement, extended joint criminal enterprise is a principle of derivative (or "secondary"[70]) liability[71]. Rather than being a principle that is dependent upon the scope of the agreement, it is a principle that depends upon whether the accused party to the agreement foresaw that an incidental crime might be committed, that is, a crime which was not "within the common purpose" or agreement[72]. Rather than having a rationale based upon the attribution of the authorised acts of another, its rationale is that a person is to be regarded as "intentionally assisting in the commission of a crime" when that party "continues to participate in the venture without having agreed to, but foreseeing as a possibility, the act causing death"[73] and that act is foreseen as being coupled with the requisite intent[74]. In other words, the liability of the accused is derived from, and dependent upon, the criminal liability of another for the foreseen crime that was not part of the agreement[75]. Unlike joint criminal enterprise simpliciter, in extended joint criminal enterprise there is no attribution of the *acts* in respect of the incidental crime because the secondary participant did not authorise or agree to the commission of the incidental crime.

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69 See *Gillard v The Queen* (2003) 219 CLR 1 at 36 [112]; *Clayton v The Queen* (2006) 81 ALJR 439 at 443 [17]; 231 ALR 500 at 504-505; *Miller v The Queen* (2016) 259 CLR 380 at 388 [4].

70 Simester, "The Mental Element in Complicity" (2006) 122 *Law Quarterly Review* 578, adopted in the joint reasons in *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [20]; 231 ALR 500 at 505. See also *Miller v The Queen* (2016) 259 CLR 380 at 398 [34].

71 See *Osland v The Queen* (1998) 197 CLR 316 at 341-342 [71].

72 *McAuliffe v The Queen* (1995) 183 CLR 108 at 117.

73 *Gillard v The Queen* (2003) 219 CLR 1 at 13-14 [25]. See also at 38 [118]; *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [20]; 231 ALR 500 at 505.

74 *Miller v The Queen* (2016) 259 CLR 380 at 387 [1], 388 [4].

75 *McAuliffe v The Queen* (1995) 183 CLR 108 at 117.

(iii) Constructive murder

62 Prior to the introduction of s 12A of the CLC Act[76] on 1 January 1995, South Australia recognised a common law rule, with lengthy antecedents[77], that "it is murder to cause death in the commission of or in furtherance of the commission of a felony involving violence or danger"[78]. At that time, that common law rule of "constructive murder" required only two elements: (1) the commission of an offence capable of being a foundational offence, and (2) that the act causing the death was done in an attempt to commit, or during or immediately after the commission of, that foundational offence[79]. An offence was capable of being a foundational offence only if it was a felony and if "the felonious conduct involved violence or danger to some person"[80].

63 This "felony murder" rule was commonly described, as it was at trial in these cases, as one of "constructive murder". The label of "constructive murder" illustrates the fiction or deeming of murder: a person was to be treated as though they were a murderer where they caused the death of another, without any intention to cause death or grievous bodily harm, in the course of a foundational offence[81].

64 The constructive murder rule at common law required that the accused "cause[d] death in the commission of or in furtherance of the commission of a

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76 See *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA), s 5.

77 *R v Jackson* (1857) 7 Cox CC 357 at 360-361; *R v Franz* (1861) 2 F & F 580 at 582 [175 ER 1195 at 1196]; *R v Pembliton* (1874) LR 2 CCR 119 at 122; *Rubens* (1909) 2 Cr App R 163 at 167; *R v Murray* [1924] VLR 374 at 377. See also Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877) at 144; Kenny, *Outlines of Criminal Law* (1902) at 136-137.

78 *R v Van Beelen* (1973) 4 SASR 353 at 403; *R v R* (1995) 63 SASR 417 at 420.

79 *IL v The Queen* (2017) 262 CLR 268 at 326 [156].

80 *Ryan v The Queen* (1967) 121 CLR 205 at 241; *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [27]; 203 ALR 259 at 266; *IL v The Queen* (2017) 262 CLR 268 at 309 [94].

81 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 387 [163], referring to Fuller, *Legal Fictions* (1967) at 71.

felony involving violence or danger"[82]. By 1949 it had already been the law consistently for fifty years that "death unintentionally brought about in the commission or furtherance of a felony is only murder *in the actor*, if the felony is one which is dangerous to life and likely in itself to cause death"[83]. But this did not resolve whether actions, during or immediately after the foundational offence, would be treated as those of the accused.

65 As to the question of whether an accused person had committed the act and thus caused the death, the constructive murder rule incorporated the common law rules of attribution of acts embodied in joint criminal enterprise[84]. By those rules, the relevant act causing death was attributed to all parties to an agreement if the act was within the scope of their agreement[85]. Hence, in *R v Ryan and Walker*[86], Mr Walker, one of the participants in a felony, could be convicted of felony murder because he was a "party to the unlawful use of force"[87]. As with joint criminal enterprise generally, difficult questions sometimes arose concerning when an act would be within the scope of the agreement. It was held that the agreement need not extend to the precise manner in which the act was committed. It was sufficient for the scope of the agreement to extend to acts of the general nature of the attributed act. Thus, in the course of upholding a conviction for felony murder of a party to an agreement to rob, it was said not to prevent the conviction of that

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82 *R v Van Beelen* (1973) 4 SASR 353 at 403; *R v R* (1995) 63 SASR 417 at 420. See also Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877) at 146, fn 4.

83 *Ryan v The Queen* (1967) 121 CLR 205 at 240, quoting *R v Brown and Brian* [1949] VLR 177 at 181 (emphasis added).

84 *R v Solomon* [1959] Qd R 123 at 126-127; *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [28]-[29]; 203 ALR 259 at 266. See also the reasons of Kiefel CJ at [19].

85 *Macklin, Murphy, and Others' Case* (1838) 2 Lewin 225 at 226 [168 ER 1136 at 1136]; *R v Jackson* (1857) 7 Cox CC 357 at 360-361; *R v Murray* [1924] VLR 374 at 377.

86 [1966] VR 553.

87 [1966] VR 553 at 567.

party that the robbery varied "in the manner of execution of [the] agreed plan ... [O]bviously it must have been a plan to rob with some degree of violence"[88].

Sections 11 and 12A of the CLC Act

66 Sections 11, 12, and 12A of the CLC Act provide:

"**11 – Murder**

Any person who commits murder shall be guilty of an offence and shall be imprisoned for life.

12 – Conspiring or soliciting to commit murder

Any person who –

(a) conspires, confederates and agrees with any other person to murder any person, whether he is a subject of Her Majesty or not and whether he is within the Queen's dominions or not;

(b) solicits, encourages, persuades or endeavours to persuade, or proposes to, any person to murder any other person, whether he is a subject of Her Majesty or not and whether he is within the Queen's dominions or not,

shall be guilty of an offence and liable to be imprisoned for life.

12A – 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 ie an offence against section 81(2)."

A "major indictable offence", to which reference is made in s 12A, is defined in ss 4 and 5 of the *Criminal Procedure Act 1921* (SA) as any indictable offence

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88 *Betts* (1930) 22 Cr App R 148 at 155. See also *R v Dowdle* (1900) 26 VLR 637 at 639; *R v Kalinowski* (1930) 31 SR (NSW) 377 at 380; *R v Solomon* [1959] Qd R 123 at 126-127; *IL v The Queen* (2017) 262 CLR 268 at 326-327 [157].

except for "minor indictable offences", which include various categories of offence such as those for which the maximum term of imprisonment does not exceed five years.

67 Section 12A requires "a person" to "commit" an "intentional act of violence" causing the death of another. Thus, the responsibility imposed by s 12A depends upon commission of a particular intentional act of violence by a person. It therefore creates direct or primary liability for murder – its focus is upon the conduct and state of mind of the primary offender, being the person who committed the act and thus caused the death. However, as will be explained, s 12A maintains the common law rules of complicity to the extent that those rules attribute the intentional acts of a primary offender to a secondary offender.

The operation of s 11 prior to the introduction of s 12A

68 Prior to the introduction of s 12A, the offence of murder in s 11 was a statutory offence with elements entirely based upon the common law[89]. There were relevantly three pathways to proof of the offence of murder.

69 First, murder could be proved under s 11 pursuant to the principles of conventional common law murder: that an accused person did an act or omitted to act, with an intention to cause death or grievous bodily harm to another, with the consequence of the death of that other person[90]. This is the most simple application of the principles of murder. In such cases, murder could also be established by attributing to another accused person the acts of murder if that other accused person was a party to a joint criminal enterprise, provided those acts of murder were within the scope of their agreement.

70 Secondly, murder under s 11 could be proved pursuant to the common law principles of constructive murder. Again, the common law principles of constructive murder could be combined with the rules for attribution of acts embodied in common law joint criminal enterprise. Those common law principles of attribution permitted attribution to the accused of the acts involved in the

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89 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 269 [63] fn 39; 203 ALR 259 at 275; *R v B, FG* (2013) 115 SASR 499 at 523 [95]; *R v Willoughby [No 2]* [2017] SASC 191 at [5].

90 Putting to one side cases of reckless indifference: Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877) at 144; Kenny, *Outlines of Criminal Law* (1902) at 135-136; *Pemble v The Queen* (1971) 124 CLR 107 at 119; *La Fontaine v The Queen* (1976) 136 CLR 62 at 75-76; *R v Crabbe* (1985) 156 CLR 464 at 467-470; *Royall v The Queen* (1991) 172 CLR 378 at 416.

foundational offence and the acts causing death provided that the accused was a party to an agreement to commit the foundational offence and that the acts fell within the scope of the agreement.

71 Thirdly, s 11 included the common law rule of extended joint criminal enterprise, which recognised liability for murder by attribution of the liability of a principal offender to the accused, who was party to an agreement, even if the acts of the principal offender were beyond the scope of their agreement[91]. As explained above, extended joint criminal enterprise deems a person to be guilty of murder if the person was a party to a joint criminal enterprise with the principal offender and foresaw, but did not agree to, the possibility that another party to the agreement would kill or cause really serious bodily harm to another with murderous intent in the course of the criminal enterprise.

The effect of s 12A

72 In the second reading speech in the Legislative Council of the Bill that introduced s 12A, the Attorney-General described the felony murder rule in orthodox terms as applying if a person "kills another by an act of violence committed in the course of commission of a felony involving violence"[92]. Although the Attorney-General made no reference to s 12A incorporating the common law rules of attribution of acts causing death, the Attorney-General said that the Bill had adopted the course of "retaining the [common law] rule to a large degree", adding later that "the scope of the statutory rule is somewhat different as it applies only to serious crimes".

73 Section 12A did not create a separate offence. It is, instead, another pathway to establishing the offence of murder under s 11[93]. That is, s 12A adapted the common law "constructive murder" rule to provide a pathway to murder whereby an unlawful killing becomes murder if it results from an intentional act of violence whilst acting in the furtherance of a major indictable offence punishable by imprisonment for ten years or more.

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91 *McAuliffe v The Queen* (1995) 183 CLR 108, adapting *Chan Wing-Siu v The Queen* [1985] AC 168.

92 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 August 1994 at 49.

93 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 263 [27]-[28]; 203 ALR 259 at 266; *IL v The Queen* (2017) 262 CLR 268 at 326 [155].

74 In this respect, s 12A is unlike ss 11 and 12, which respectively created distinct statutory offences of murder and conspiring to commit, or soliciting the commission of, murder. Instead, s 12A effectively amended the scope of s 11, where the elements were otherwise defined by common law, by altering the common law constructive murder rule that would otherwise have applied under s 11.

75 The requirement in s 12A for "a person" to "commit" the "intentional act of violence" causing the death of another focuses upon the *person* who commits the particular intentional act of violence. Section 12A thus recognises a pathway in s 11 to direct, or primary, liability for murder. Its focus is upon the conduct and state of mind of the primary offender, who committed the act and thus caused the death. But, consistently with the common law rules of attribution of acts, a person will "commit" an act under s 12A and be liable for constructive murder where the primary offender's intentional act of violence was within the scope of their agreement, so that the primary offender's act can be attributed to the accused[94].

The prosecution case

76 To establish murder under s 11 of the CLC Act, the prosecution relied upon what were asserted to be the alternative pathways of "common law murder" by extended joint criminal enterprise and "constructive murder" (as defined by s 12A) combined with extended joint criminal enterprise. In opening, the prosecutor asserted that the foundational offences for constructive murder were either robbery[95] or a criminal trespass offence of "Aggravated Serious Criminal Trespass in a Place of Residence with the Intent to Commit Theft"[96]. The trial judge required the prosecutor to elect between these offences as the foundational offence. The prosecutor elected to rely upon the criminal trespass offence. The trial judge rejected a submission by counsel for Mr Rigney that s 12A of the CLC Act required the foundational offence to include an act of violence as a necessary element.

77 As the trial judge directed the jury, the prosecution case, on either common law murder or constructive murder (as defined by s 12A of the CLC Act), had been based on extended joint criminal enterprise. The prosecution alleged a joint criminal enterprise between the appellants and a fifth man who was tried separately

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94 *Arulthilakan v The Queen* (2003) 78 ALJR 257 at 260-261 [16]; 203 ALR 259 at 263; *IL v The Queen* (2017) 262 CLR 268 at 294 [60], 324 [148]-[149], 328 [160].

95 CLC Act, s 137.

96 CLC Act, s 170.

(Mr Howell) to break into a residence and steal a substantial amount of cannabis. The residence was described as a "grow house".

78 The prosecution alleged that during the night of 8 October 2018, the five men travelled to an area close to the grow house in a white Holden Commodore bought by Mr Rigney and a blue Subaru owned by Mr Mitchell. They then left the cars and walked to the grow house, where they broke in with an intention to steal cannabis. Mr Gjabri was living there and guarding the cannabis. They violently assaulted Mr Gjabri with one or more blows to his head, which caused his death at least 35 minutes later. They then loaded the cannabis into Mr Gjabri's car and drove it to where the other two cars had been parked earlier. All the cars then travelled to a location where the cannabis was then transferred from Mr Gjabri's car to Mr Mitchell's blue Subaru.

79 The prosecution had a very strong circumstantial case establishing a joint criminal enterprise. Earlier on 8 October 2018, Mr Rigney had bought a white Holden Commodore and, at his request, had it registered in the name of an acquaintance. CCTV footage showed a car matching that description driving near the grow house and parking in a backstreet, just before the murder. CCTV footage also recorded a car, matching the description of the blue Subaru owned by Mr Mitchell, parking in the same street.

80 Shortly before the murder, telephone tower data indicated the mobile phones of each of the appellants, except Mr Tenhoopen, converged upon an area near the grow house. At that time, five persons were seen on CCTV footage walking together in the direction of the grow house. One was carrying a long object that was described by the trial judge as resembling a stick or possibly a bat. In this Court, senior counsel for the respondent described it as "a long item, linear, that glistened", and the prosecution in opening referred to it as a "long reflective object". The five people shown on the CCTV footage walked past a building site containing bricks, and police later found similar bricks or parts of bricks at the crime scene.

81 Two of the men in the CCTV footage appeared to be smoking and a light was seen to fall to the ground consistent with one of the men dropping a cigarette. A search of that location revealed a cigarette butt on which DNA was found with an extremely strong probability of a match to Mr Carver. A swab taken from a knife found in the laundry at the grow house contained DNA with an extremely strong probability of a match to Mr Carver. A pair of secateurs found in the grow house contained DNA with a very strong probability of a match to Mr Mitchell. Swabs taken from the steering wheel of Mr Gjabri's car contained DNA with an extremely strong probability of a match to Mr Rigney. And Mr Rigney's partner found Mr Gjabri's phone inside the white Holden Commodore bought by Mr Rigney.

82 The police searched Mr Gjabri's car and found numerous remnants of cannabis in it. Stolen cannabis was found by the police which contained pieces of yellow tape that were indistinguishable on scientific analysis from yellow tape found by the police in cannabis located at Mr Carver's house. The police found a receipt at the grow house for a box of "Raven" nitrile gloves. The police later found a box of Raven nitrile gloves at Mr Carver's house. DNA on the box was found to have an extremely strong probability of a match to Mr Carver, and fingerprints on the box were matched to Mr Carver and Mr Tenhoopen.

83 Three witnesses (Ms Carson, Ms McCormack and Mr Watts) gave evidence that Mr Tenhoopen had made admissions that he was at the grow house with the other appellants and had taken part in the theft of the cannabis. Mr Mitchell gave evidence in his defence in which he made admissions including that he was driving in the vicinity of the grow house at the relevant time with Mr Carver, Mr Tenhoopen and Mr Howell, that he was told to stop, and that the others then left the vehicle for some indeterminate time. When Mr Tenhoopen and Mr Howell returned to the car, he followed the car driven by Mr Carver. The cars later stopped in a residential street where Mr Tenhoopen and Mr Howell put cannabis in the boot of Mr Mitchell's car. Mr Mitchell said that he then drove to Mr Carver's house, helped to unload the cannabis, and left.

84 Mr Carver's partner gave evidence that Mr Howell had told her that he thought he had killed a man and he proposed to leave town. When she spoke to Mr Carver about that conversation, she said that Mr Carver appeared shocked, scared, and worried, and that he cried. She overheard a subsequent conversation between Mr Carver and Mr Howell where Mr Howell told Mr Carver that he, Mr Howell, might have killed a man and spoke about breaking into a house.

The trial judge's directions and the convictions

85 The trial judge directed the jury in relation to both murder and an alternative offence of manslaughter. These appeals are concerned only with the murder offence. The trial judge correctly described the prosecution alternatives as "two different pathways" to the offence of murder and separated those pathways by descriptions of them as common law murder and "constructive murder". The trial judge directed the jury, consistently with the prosecution case, that both pathways relied upon principles of extended joint criminal enterprise.

86 As to the pathway of common law murder by extended joint criminal enterprise, the trial judge correctly directed the jury, on repeated occasions, of the requirements for a primary offender to have committed murder: that the person by a voluntary and deliberate act or acts unlawfully caused the death of another person and did so with the intention either to kill or to cause grievous bodily harm (really serious bodily harm). The trial judge directed the jury that a conclusion of murder

by a primary offender (whomever the person might have been) could extend to any of the accused by extended joint criminal enterprise. The issue for the jury was said to be:

> "[D]id the accused contemplate that in carrying out the joint enterprise to break into the house and steal the cannabis that one or more of the accused, if they came across someone in the house, might inflict violence on that person and inflict violence accompanied with that specific intention of causing death, trying to kill Mr Gjabri, or causing him really serious bodily harm."

A direction to similar effect was repeated numerous times but at no time did the trial judge direct that, in addition to foresight of the possibility of violence with an intention to cause death or really serious bodily harm, the accused must also contemplate the *result* of death or really serious bodily harm.

87 As to the pathway of constructive murder combined with extended joint criminal enterprise, the trial judge again correctly directed the jury of the elements of constructive murder for the primary offender: an intentional act of violence, committed in the course or furtherance of the alleged criminal trespass offence, and which caused the death of Mr Gjabri. The trial judge also directed the jury that a conclusion of murder by this route extended the responsibility of the primary offender to any of the accused by what the trial judge described as "extended joint enterprise in relation to the constructive murder". The question for the jury was said to be:

> "[D]id the accused contemplate that in carrying out the joint enterprise to break into the house and steal the cannabis, if they came across someone in the house, might inflict an intentional act of violence on that person? ... [T]he prosecution do not have to prove that the accused or all of them contemplated that someone, one of their number, might inflict such violence, violence with the intent to cause really serious bodily harm or the intent to kill. For constructive murder, what they have to contemplate is that one of the people in the joint enterprise might inflict an intentional act of violence on Mr Gjabri."

88 The trial judge directed the jury several times in the context of constructive murder that the intentional act of violence contemplated by the accused could be any intentional act of violence at all. The jury were directed that the accused would only have to contemplate that one of their co-accused "might strike Mr Gjabri for example on the back of the leg". The trial judge repeated this example twice when explaining that contemplation of any intentional act of violence would suffice.

89 The jury returned verdicts of guilty for each of the appellants of the offence of murder under s 11 of the CLC Act. The jury were not asked to, and did not, take the unusual course of answering a special question as to the pathway upon which the conviction for murder had been reached. This has the effect that an error in relation to the direction concerning either pathway to guilt for murder requires that the convictions be set aside entirely.

The decision of the Court of Appeal

90 Each of the appellants before this Court appealed to the Court of Appeal on a number of grounds, all of which were dismissed. Two grounds are relevant to these appeals. In broad effect, they were as follows. The first was that the trial judge erred by directing the jury that an accused person could be guilty of murder by reference to s 12A of the CLC Act when the foundational crime did not involve the commission of an intentional act of violence. The second was that the trial judge erred by directing the jury in relation to constructive murder under s 12A by failing to direct the jury that an accused person must have contemplated the death of the victim arising from an intentional act of violence.

91 Peek A-JA, with whom Kelly P and Doyle JA agreed, rejected the first ground on the basis that the constructive murder rule at common law did not require that the foundational offence contain an element of violence, and s 12A had not introduced such a requirement[97]. Doyle JA, in additional reasons, observed that while the common law constructive murder rule required that the commission of the felony involved an act that was violent or dangerous, the felony itself did not need to include a violent or dangerous act[98]. Peek A-JA rejected the second ground on the basis that the contemplation of the death of another was not necessary for constructive murder[99].

The grounds of appeal in this Court

92 One difficulty with the manner in which the appeals were presented in the Court of Appeal was that the grounds of appeal followed the approach of the trial judge, which combined two different doctrines in the second pathway to murder in s 11: extended joint criminal enterprise and constructive murder. In this Court, with a grant of special leave to appeal, the appellants relied upon a ground of appeal to the effect that the principles of extended joint criminal enterprise could

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97 *Rigney v The Queen* (2021) 139 SASR 305 at 337 [95]-[97], 339 [103].

98 (2021) 139 SASR 305 at 311 [6].

99 (2021) 139 SASR 305 at 358 [172].

not be combined with those of constructive murder to create a new pathway to proof of murder. This ground is necessarily anterior to the issue considered by the Court of Appeal concerning the elements of proof of murder based on s 12A and extended joint criminal enterprise.

93 As an alternative to the first ground, the appellants (with some variation in formulation) asserted that if the doctrines of extended joint criminal enterprise and constructive murder could be combined, then the trial judge should have directed that the accused must foresee that a co-venturer might, in the course or furtherance of the foundational offence, commit an intentional act of violence that might cause, or was capable of causing, death or really serious bodily harm.

94 The appellants also relied upon a separate ground of appeal that the Court of Appeal erred by holding that common law murder based on extended joint criminal enterprise did not require the prosecution to prove foresight of the possibility of an act causing death or at least an act capable of causing death or really serious bodily harm.

95 Mr Mitchell had an additional ground of appeal that the Court of Appeal erred in considering that it was common knowledge in Australian society that a grow house would likely be guarded and that violence might be necessary to overcome the guard. But during oral argument, senior counsel for Mr Mitchell accepted that this ground was only a "minor point". The ground does not separately establish any legal error and does not assist in resolving the issues of interpretation which are central to these appeals.

The first ground of appeal: s 12A does not permit the combination of constructive murder and extended joint criminal enterprise

96 The effect of the directions of the trial judge was that in addition to the three relevant pathways to murder in s 11 that are set out above[100], a new, fourth pathway was created: constructive, constructive murder. This new pathway to murder would dispense with the requirement for constructive murder that the accused commit an act, or be attributed an act, causing the death of another. It would replace that requirement for an act, actual or attributed, with the mere foresight of the possibility of an intentional act of violence.

97 There is nothing in either the text, context, or purpose of s 12A to suggest that it was intended to create a new pathway to murder that combined the deeming element of constructive murder with the deeming elements of extended joint criminal enterprise. Moreover, at the time of introduction of s 12A on 1 January

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100 Above at [68]-[71].

1995, the doctrine of extended joint criminal enterprise was not recognised in Australia[101].

98 As to the text of s 12A, because extended joint criminal enterprise is a form of derivative (not primary) liability, the primary offender's *acts* are not attributed to a secondary participant. No secondary participant can be "[a] person who commits an intentional act of violence" within the meaning of s 12A. That is because the primary offender's intentional act of violence was not within the scope of the agreement between the parties. Whatever the expression that is used to describe the rules of attribution of acts ("agreement", "common purpose", "joint enterprise"), s 12A does not permit the attribution of an intentional act of violence by a primary offender to a secondary participant where the act was not agreed to, or was not within a common purpose or a common enterprise.

99 Nor does the context or purpose of ss 11 and 12A support the view that s 12A created a new pathway to murder. As explained above, s 12A modified the common law "constructive murder" pathway to murder in s 11. The modifications introduced by the Parliament of South Australia had the effect of amending and restricting the operation of constructive murder. They did not create a new pathway to murder.

100 It would have been a remarkable step for s 12A to have created such a new, expansive pathway. For a long time prior to its abolition in England, the constructive murder rule had itself been deprecated. Sir James Fitzjames Stephen described it as an "astonishing doctrine" and "monstrous"[102]. In this Court, it has been described as a "harsh" rule, "criticised for over 150 years"[103].

101 For s 12A to have created a new, expansive pathway it would, in effect, have expanded constructive murder in the teeth of these criticisms to "constructive, constructive murder". Rather than merely adjusting the operation of the existing common law as the text of s 12A purported to do, s 12A would have created a new pathway of constructive, constructive murder – in effect a new offence[104]. It would be extraordinary if, without any textual mandate to do so, this Court were to

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101 *McAuliffe v The Queen* (1995) 183 CLR 108, decided on 28 June 1995.

102 Stephen, *A History of the Criminal Law of England* (1883), vol 3 at 57, 70-71. See also *Russell on Crime*, 12th ed (1964), vol 1 at 481.

103 *IL v The Queen* (2017) 262 CLR 268 at 323 [143], 326 [155].

104 Compare *Peters v The Queen* (1998) 192 CLR 493 at 515 [53].

interpret s 12A as creating such a new pathway to murder, by combining constructive murder (as modified) with extended joint criminal enterprise.

102 The only authority which the respondent pointed to as an attempt to justify the existence of this new pathway to murder was the decision of the Full Court of the Supreme Court of South Australia in *R v R*[105]. In that case, the trial judge had directed the jury to the effect that a party to an agreement to commit a robbery would be guilty of constructive murder if the scope of the agreement to rob included violence and a danger to life. The trial judge recognised that the attribution would occur because, by agreement, the person "joins in" the "violent and dangerous crime"[106]. In the course of his reasoning dismissing the appeals, however, King CJ (with whom the other Justices agreed) said that the act of the actual perpetrator would be attributed to the other parties to the agreement even if the act was "unintended" by, and not within the "contemplation" of, the other parties to the agreement[107].

103 The statement by King CJ is consistent with the long-standing authority discussed earlier in these reasons if it is taken to mean that an act of violence within the scope of an agreement will be attributed to all parties, even if they could not have foreseen that it would cause death. But if it is taken to mean that at common law a party to an agreement to commit a felony may have an act attributed to them which was not within the scope of their agreement simply on the basis that, no matter how remote the act, a participant must "accept responsibility for what occurs in the course of [the agreed] felony"[108], then the statement is contrary to the long-established principles of common law constructive murder. Indeed, if the statement were read in that way, it would also go further than the double fiction of constructive, constructive murder because it would not even require foresight of the elements of the offence of murder.

104 The appellants' first ground should therefore be upheld. Section 12A does not permit the creation of a new pathway to murder by combining the deeming effects in each of the doctrines of constructive murder and extended joint criminal enterprise. Consequently, it is unnecessary to consider the second ground

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105 (1995) 63 SASR 417.

106 (1995) 63 SASR 417 at 419.

107 (1995) 63 SASR 417 at 421.

108 (1995) 63 SASR 417 at 421.

concerning what the elements of such a wholly new pathway would be, or what directions might have been required to give effect to it.

The third ground: erroneous directions concerning extended joint criminal enterprise

105 This conclusion would be sufficient for the appeals to be allowed. But in circumstances where there must be retrials of the appellants, it is necessary also to address the third ground of appeal by focusing only upon the principle of extended joint criminal enterprise at common law and the proper directions in relation to that principle. That ground should also be upheld. The respondent to these appeals did not allege that these appeals could have been dismissed by application of the common form proviso to criminal appeals[109].

106 The decision of this Court in *Miller*[110] precluded each appellant from being held responsible for murder by application of the doctrine of extended joint criminal enterprise unless the prosecution established beyond reasonable doubt that he foresaw both that a participant in the joint criminal enterprise might act with murderous intention and that acts committed in the course of the enterprise might cause really serious bodily injury or death.

107 The trial judge directed the jury that they could only find that an accused person was guilty of murder under the pathway of common law murder based on extended joint criminal enterprise if the prosecution had proved beyond reasonable doubt that the accused foresaw that a participant to the joint criminal enterprise might inflict violence with an intention of causing death or really serious bodily harm. But the trial judge erred by failing to direct the jury that for common law murder based on extended joint criminal enterprise the accused must also foresee the consequence of death or really serious bodily harm. In many cases, foresight of this consequence might be a very short step from foresight that a participant might act with murderous intention. The direction that the trial judge should have given in relation to extended joint criminal enterprise is one in which it was explained that conviction depended upon proof beyond reasonable doubt that the accused was a party to an agreement to commit a crime and that the accused foresaw that in the commission of that crime there was a possibility that another person, with intent to do so, would cause really serious bodily harm or death.

108 For the reasons explained above in relation to the first ground, any direction should separate that pathway to conviction for common law murder based on

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109 *Criminal Procedure Act 1921* (SA), s 158(2).

110 (2016) 259 CLR 380 at 387 [1]. See also at 416 [100].

extended joint criminal enterprise from any pathway to conviction for common law murder based upon s 12A of the CLC Act. Where an accused is alleged to be the primary offender under s 12A, it would require a jury to be satisfied beyond reasonable doubt that the accused, while acting in the course or furtherance of committing the major indictable offence alleged by the prosecution, caused the death of the victim by an intentional act of violence. Where, in the case of joint criminal enterprise, an accused is alleged under s 12A to be a party to an agreement to commit the major indictable offence alleged by the prosecution, it would require a jury to be satisfied beyond reasonable doubt that the accused was a party to an agreement to commit that major indictable offence and that the agreement included the possible commission of an intentional act of violence of the same general nature as that which caused the death[111].

Conclusion

109 Mr Tenhoopen's application for special leave to appeal should be granted and his appeal allowed. Each other appeal should also be allowed. In each appeal, including that of Mr Tenhoopen, there should be orders that: order 2 of the orders of the Court of Appeal of the Supreme Court of South Australia, made on 10 August 2021, be set aside and in its place there be orders that (i) the appeal be allowed, (ii) the conviction be quashed, and (iii) there be a new trial.

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111 See also the reasons of Kiefel CJ at [19].