Extended joint criminal enterprise

Lucy McGovern reports on *Miller v The Queen; Smith v The Queen; Presley v Director of Public Prosecutions (SA)* [2016] HCA 30.

Introduction

In *Miller v The Queen; Smith v The Queen; Presley v Director of Public Prosecutions (SA)* [2016] HCA 30 (*Miller*), the High Court held, by majority, that the principle of 'extended joint criminal enterprise' liability remains part of the common law in Australia.[1]

The principle

The principle is enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108 (*McAuliffe*) and, as French CJ, Kiefel, Bell, Nettle and Gordon JJ stated in their joint judgment, although of general application, is commonly applied to render a secondary offender guilty of murder.[2] In those circumstances, the offender must be a party to an agreement to commit a crime, must foresee that death or 'really serious bodily injury' might be intentionally occasioned by a co-offender and, with that awareness, continues to participate in the agreed criminal enterprise.[3] It is only necessary for the party to foresee the possible commission of the incidental crime and continue to participate in the enterprise. The party need not agree to or intend its commission.

The principle has attracted criticism, amongst other reasons, for 'over-criminalising' in that it attaches criminal liability where moral culpability does not justify that liability.[4] In *Clayton v The Queen* (2006) 81 ALJR 439 (*Clayton*), the High Court, by majority, previously declined to reopen *McAullife*, noting that the principle formed part of the common law in other countries.[5] However, following the decision of the Supreme Court of the United Kingdom and the Privy Council in *R v Jogee; Ruddock v The Queen*[6] (*Jogee*), which held that that there was no place for joint criminal enterprise liability, the opportunity arose for the High Court to reconsider the principle in the present case.[7] In *Jogee*, it was held that foresight was not sufficient; the proper fault element of liability was intention.[8] That is, the secondary party must intend by participating in the enterprise to assist the principal to commit the incidental offence.

Facts and procedural history

Four men, Miller, Smith, Presley and Betts had been convicted of murder after a trial in the Supreme Court of South Australia.[9] Before the altercation in which Betts fatally stabbed the deceased, the men had been drinking.

At trial, the jury was left to consider the liability for the murder on the basis of joint criminal enterprise or extended joint criminal enterprise.[10] Miller, Smith, Presley and Betts unsuccessfully appealed to the South Australian Court of Criminal Appeal.[11] Miller, Smith and Presley argued the verdicts were unreasonable and could not be supported by the evidence having regard to their states of intoxication.[12]

Miller sought, and was granted special leave, to appeal on the ground that the Court of Criminal Appeal erred in holding the convictions were capable of being supported by the evidence.[13] Smith and Presley's applications for special leave were referred, with a view to being heard with Miller's application.[14] Following the decision in *Jogee*, Miller, Smith and Presley sought, and were granted leave, to amend their grounds of appeal to contend the trial miscarried as the result of the issue of liability for the murder of the deceased being left for the jury's consideration on the basis of extended joint criminal enterprise principles.[15]

Joint judgment

French CJ, Kiefel, Bell, Nettle and Gordon JJ set out in detail the history of the principle and held that it was not appropriate for the High Court to abandon the concept of extended joint criminal enterprise liability and require proof of intention in line with *Jogee*.[16]

Their Honours stated that none of the submissions before the High Court had identified decided cases in which the principle had occasioned injustice.[17] The joint judgment referred to *Clayton*, in which the High Court had found that the principle had not made criminal trials unduly complex, and said that no change should occur without examining the whole of the law with respect to secondary liability for crime.[18] Tracking through legislative developments, the majority noted that Victoria had since abolished the common law of complicity and recommendations had been made to amend the law of complicity in New South Wales.[19]

Further, their Honours rejected the submission that *McAuliffe* occasioned public misunderstanding by allowing a form of 'guilt by association' or 'guilt by simple presence without more'.[20] In the instance of murder, the principle requires that the accused participates in the agreed criminal enterprise knowing that a party to it may commit murder. It is not simply 'foresight…that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm'.[21] Their Honours accepted that there may be cases, albeit few, in which an accused contemplates the incidental offence, but dismisses it as a fanciful possibility. In those circumstances, the secondary party would not possess the requisite foresight.[22]

French CJ, Kiefel, Bell, Nettle and Gordon JJ held that the Court of Criminal Appeal did not review the sufficiency of the evidence to sustain the verdict in relation to the issue of intoxication. They allowed the appeal on that basis and remitted

each case to the Court of Criminal Appeal for determination on that ground.

Keane J concurred with the joint judgment and the reasons for maintaining the extended joint criminal enterprise doctrine, making some additional observations on the principle and policy underlining the reason for departing from the approach in *Jogee*.[23]

Gageler J

Gageler J dissented as to whether the doctrine of extended joint criminal enterprise should be maintained. His Honour considered that the doctrine was anomalous and unjust and that *McAuliffe* should be reopened and overruled.[24] In his Honour's view, the doctrine had resulted in over-criminalisation.[25]

Gageler J identified two predominate and, in his Honour's view, 'unanswerable' criticisms of the doctrine.[26] First, that there was a disconnect between criminal liability and moral culpability where a party is liable for a crime that the party foresaw but did not intend. Secondly, there was an anomaly in making criminal liability of the secondary party turn on mere foresight when the principal party's criminal liability turns on intention.[27]

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In his Honour view, despite the 'troubling' outcome that overruling the doctrine would result in a legitimate sense of injustice in persons convicted on that ground, his Honour stated that it was better for the High Court to be 'ultimately right' than 'persistently wrong'.[28]

Conclusion

Gageler J stated that application of the doctrine may seem acceptable where the group consists of three men, the weapon is a gun and the plan is to take co-ordinated action to rob a bank. However, the application becomes more troubling where the group consists of an indeterminate number of youths, the weapon is a knife or baseball bat and the plan is an evolving tacit agreement to assault or to engage in affray.[29] One of the group may be prone to violence and may end up stabbing or hitting with intention to kill or cause grievous harm with the result that someone dies. Following *Miller*, it appears that courts will maintain that even if the other members of the group did not did not agree to that result, and did not intend it, each will be liable for murder if he or she foresaw the possibility that a participant would go beyond the agreed plan and would stab or hit with intent to kill or cause grievous harm.[30]

Endnotes

1. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [2]; Keane J concurring at [131]; Gageler J dissenting at [129].
2. *Miller* at [1].
3. *Miller* at [1].
4. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [2].
5. (2006) 81 ALJR 439 at 443 [18] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.
6. [2016] UKPC 7; UKSC 8; [2016] 2 WLR 681.
7. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [2].
8. *Jogee* at 702 [73] per Lord Hughes and Lord Toulson (Lord Neuberger, Lady Hale and Lord Thomas agreeing).
9. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [46].
10. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [46].
11. *R v Presley* (2015) 122 SASR 476 per Gray, Sulan and Blue JJ; Miller per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [48].
12. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [48].
13. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [49].
14. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [49].
15. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [50].
16. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [43].
17. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [39].
18. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [40].
19. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [42].
20. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [45].
21. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [45].
22. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [44].
23. *Miller* per Keane J at [131].
24. *Miller* per Gageler J at [129].
25. *Miller* per Gageler J at [128].
26. *Miller* per Gageler J at [111] – [112].
27. *Miller* per Gageler J at [111].
28. *Miller* per Gageler J at [128].
29. *Miller* per Gageler J at [92].
30. *Miller* per Gageler J at [92].