IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

270
NO: S ~~124~~ OF 2016

BETWEEN:

IL
Appellant
and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet Publication

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: Statement of Issues

2. Is subjective foresight of the risk of death required in a charge of constructive murder where the act causing death must be malicious, and malice is to be established by recklessness?
3. Is subjective foresight of the risk of death otherwise required in a charge of constructive murder, where principles of complicity are required to make the accused responsible for the act causing death?
4. Is an act causing death proved to be an act of the accused in a constructive murder charge simply by proof that it is an act for which she is liable in relation to the foundational offence? If not, what is it that must be proved to make her liable for the act?
5. Where an act causing death is to be analysed for dangerousness in an involuntary manslaughter charge, can it be treated as the act of the accused simply by proof that it is an act for which she is liable in relation to a different criminal offence? If not, what is it that must be proved to make her liable for the act?

Part III: Notices under s 78B of the *Judiciary Act*

6. The appellant does not consider that any notice under s 78B of the *Judiciary Act* (Cth) is required to be given.

Part IV: Citation of the Reasons of Primary Judge and Intermediate Court

7. The reasons of the primary judge are unreported[1]. The reasons of the intermediate Court are unreported. The internet citation is *R v IL* [2016] NSWCCA 51.

Part V: The Facts

8. On 4 January 2013 emergency services officers attended residential premises in response to a house fire. The deceased and appellant were treated at the scene for injuries from the fire. Those of the deceased were severe and he died in hospital on 14 January, never regaining

[1] Although the judgment has an internet citation the appellant's initials were not used as they were required to be in the Court below, and now, because of s.111(1)(b) of the *Crimes (Appeal and Review) Act*

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consciousness. The fire was almost exclusively contained within a bathroom, which contained a pot with an amount of liquid in it on a ring burner attached to a gas cylinder. A mattress had been introduced on top of the pot, apparently in an effort to smother the flames (although it would have acted as a huge addition of fuel).

9. Examination of the rest of the house revealed in excess of 6 kg of methylamphetamine in various purities. There was evidence that more than 70 litres of acetone had been present – most of this indicated by empty tins and bottles. There were receptacles and utensils such as metal pots, sieves, funnels, and thermometers. There were substances in the refrigerator.

10. On 18 November 2014 the appellant was arraigned in the Supreme Court of NSW before Hamill J and a jury on one count of manufacturing a large commercial quantity of prohibited drug on 4 January 2013 (count 1), one count of murder (count 2) and in the alternative to 2 one count of unlawfully causing the death of the deceased, and firearms charges.

11. Although the indictment referred to the drug offence occurring on 4 January 2013, it was the Crown case that the drugs located had been manufactured in the days or weeks preceding the fire. In support of its case for count 1 the Crown relied upon principles of joint criminal enterprise. For murder the Crown relied upon the limb of murder known as constructive murder and for manslaughter on the commission of an unlawful and dangerous act. The Crown presented a circumstantial case based on the items found elsewhere in the house to suggest that the same process must have been carried out preceding the fire in the bathroom in the early hours of the morning of the 4th of January (the liquid and other items in the bathroom had not been analysed to provide direct evidence of this). The drugs and items in other rooms showed that the premises had been used for the final stage of the manufacture of methylamphetamine – purification of substance which had been manufactured elsewhere. The product is placed in solvent with water, heat applied until the liquid reaches boiling point to evaporate impurities. This can create a build-up of flammable vapours in the air which upon reaching a certain concentration may catch fire if exposed to flame.

12. In relation to the homicide charges the Crown relied upon the act of lighting the ring burner it said must have occurred in the bathroom as the act causing death. The small and inadequately ventilated room in which it was lit to evaporate acetone was said, objectively, to create an appreciable risk of serious injury. It did not allege when this occurred, and did not allege that the appellant had physically done it. Its case relied on a theory said to be based on joint criminal enterprise in its most basic form – the agreement to commit count 1 made IL liable for all acts done to commit it. So although the deceased may well have performed the act which caused his own death, because the appellant was involved in a joint criminal enterprise with him (count 1) she was responsible for all acts of his done pursuant to that enterprise ('the Crown theory of liability'). The fact that the appellant was a party to the agreement to commit count 1 and her participation in it were proved by the facts that she: was the owner of the premises (her main residential premises being elsewhere); bought 8 litres of acetone from a hardware store on 1 January 2013; and was present at least at the time police arrived. It was the Crown case that anyone who entered the house must have had knowledge that drugs were being manufactured there because of the amount of relevant items. She demonstrated guilty knowledge by trying to close the door on police. She was not alleged to have physically manufactured (refined) any of the large quantity of drugs found in the house, and there was no evidence of her knowledge of the method of refining (such as written or electronic information), other than acetone purchase.

13. At the close of the Crown case on 27 November 2014 there was a defence application for directed verdicts of not guilty on the homicide charges. His Honour heard argument for the remainder of that day and on Friday November 28, then adjourning until Tuesday December 2 at which time he delivered his judgment (references to it hereafter as '*HJ*') indicating that he proposed to so direct the jury. His Honour allowed the Crown an adjournment until the following day on which occasion the jury returned the verdicts as directed by the trial judge. The trial continued and guilty verdicts were returned by the jury to the remaining counts on 9 December 2014. On 11 December 2014 his Honour sentenced the appellant.

Judgment of Hamill J

14. His Honour reviewed the evidence presented by the Crown and relevant legal principles. In the course of reviewing 'Some Relevant Legal Principles' his Honour referred at HJ [16] – [18] to joint criminal enterprise in its most basic form and also to liability for incidental crimes within the scope of the enterprise and / or foreseen as a possibility. His Honour later confirmed that the Crown eschewed reliance on anything but the most basic form: [81].

15. Under the same heading his Honour also considered 'Possible conflict in the authorities as to proofs required in constructive murder' at [36] – [42], referring to the line of authority commencing no later than the judgment of Carruthers J in *R v Sharah* (1992) 30 NSWLR 292 ('*Sharah*') which requires the non-physical perpetrator of the act causing death in constructive murder to have had certain conduct (there, the discharge of a gun) in mind as a contingency: [37]. His Honour referred to other cases which had applied this principle, but also to it having been questioned by NSW Law Reform Commission[2] ('*NSWLRC 129*') and by the Court of Criminal Appeal in *Batcheldor v R* [2014] NSWCCA 252 at [79], [129] (without overruling it). His Honour said at [42] 'Taking the prosecution case at its highest, there is no evidence capable of supporting an inference that the accused in this case contemplated the possibility that somebody might be injured, let alone that they might die, in the course of the manufacturing process.'[3] However, the case was not decided on this basis: [42]. The bases on which his Honour did determine the application appear at HJ [75] – [99].

Crown Appeal and Judgment of the Court of Criminal Appeal ('CCA')

16. The DPP lodged an appeal against the acquittals pursuant to s 107(2) of the *Crimes (Appeal and Review) Act* ('the *Review Act*'). On 26 August 2015 the appeal was heard by the CCA. On 8 April 2016 the Crown appeal was allowed, acquittals quashed and a new trial ordered (Simpson JA, RA Hulme and Bellew JJ agreeing): *R v IL* [2016] NSWCCA 51.

17. The appellant argued in the CCA that if the jurisdiction of the Court had been attracted under s 107(2) of the *Review Act* and there was error there arose a discretion under s 107(5) and (6) as to whether the acquittal would be affirmed anyway[4]. One reason raised on behalf of the appellant was his Honour's finding of no evidence of subjective foresight of risk of injury or death, when discussing the line of authority including *Sharah*. Another reason was related to

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[2] NSW Law Reform Commission *Complicity* (Report 129) (December 2010).

[3] See also [74] regarding the fire only being attributable to incompetence or carelessness

[4] In *R v PL* (2009) 199 A Crim R 199 ('*PL (No 1)*') it was held that where the Court was of the view that a conviction at trial would be unreasonable within s.6 of the *Criminal Appeal Act*, this was a reason for exercising the discretion to confirm the acquittal despite error in the identified question of law alone: at [80] – [81], [90] – [93]. The appellant referred to the prospect of Hamill J's determination being right for wrong reasons, or guilt unreasonable.

this finding, but on a basis not addressed by Hamill J: as IL had not adverted to injury or death the act causing death was not 'malicious', such that liability for murder would not be properly established because of s 18(2)(a) of the *Crimes Act.* Section 18 of the *Crimes Act* defines murder. Section 18(1) sets out four situations in which murder will have been committed. Subsection 2(a) provides that 'No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.' Prior to 15 February 2008, the term 'maliciously' had a statutory definition contained in s 5 of the *Crimes Act.* It included, as acts done maliciously, those done 'recklessly'. The section was omitted from the *Crimes Act* from 15 February 2008 as part of a significant restructuring of all other serious criminal offences containing reference to malice (replacing these references with requirements of intention or recklessness). Clause 65 of Schedule 11 to the *Crimes Act* provides that the repeal of section 5 does not affect the operation of any provision of the Act that refers to 'malicious' or 'maliciously' or of any indictment or charge in which malice is by law an ingredient of the crime, and the CCA regarded this as preserving the definition for murder.

18. Simpson J acknowledged at [11] that it was important that the Crown could not prove the respondent lit the ring burner, but proceeded to determine that if she contemplated the possibility of lighting the ring burner it made no difference to the homicide charges that the act causing death was not hers. The Court referred to principles regarding joint criminal enterprise: [20] – [25] but said they had no direct application to the homicide charges: [28].

19. The Court articulated a theory of liability for each of the homicide charges based on asking whether the ignition of the burner was within the scope or ambit of the joint enterprise (count 1) or contemplated by the participants: [39], [40]–[41], [58], [60], [61], [63], [70]. The CCA accepted *Sharah* as binding, but noted that it may be (and has been) questioned: [36][5].

20. The central reason given for upholding the Crown appeal was that the trial judge focused on whether IL had contemplated injury or death, whereas he should have focused on whether she contemplated the possibility of lighting the ring burner: [60]. Although this related to paragraph [42] of the primary judgment (which included the statement that it was not determinative) Simpson J regarded the later parts of the judgment (the reasons for decision) as indicative of this same error of looking for contemplation of injury or death rather than lighting the ring burner: [61] – [63]. Paragraph [80] of Hamill J's judgment was said to suffer from this error of reasoning because the trial judge had applied the test for joint criminal enterprise liability to murder rather than count 1: [61]. The CCA also described the liability of IL as direct because of her participation in count 1: [64].

21. On the issues raised on the discretion the CCA held that the act causing death was readily or clearly described as done recklessly, within the terms of the repealed s.5 and in accordance with the common law requirement of malice (intention or recklessness). It was thus implicitly accepted that the requirement for malice in s 18(2)(a) must be met, additionally to s 18(1), to maintain a charge of murder in NSW. Simpson J said 'In case it is necessary to explain why it would be open to a jury to conclude that that act was done recklessly, reference may be made to some of the circumstances. A plainly dangerous chemical operation was being undertaken, in a confined space, in wholly unsuitable premises, with primitive equipment.': CCA [95]. The Court quoted the test for recklessness derived from *R*

[5] The Crown expressly disclaimed any request to reconsider *Sharah* in this appeal: CCA 28 August 2015 page 48

v Cunningham [1957] 2 QB 396 ('*Cunningham*') and applied in *R v Coleman* (1990) 19 NSWLR 467 at 475 ('*Coleman*') - subjective foresight on the part of the accused that the particular kind of harm in fact done might be done: [93], [98].

22. The appeal was upheld for manslaughter because there was error in stating that the evidence at its highest did not suggest IL and the deceased acted together in lighting the burner, as all the Crown was required to show was her contemplation of it as an incident of count 1: [70].

Part VI: The Argument

23. It is submitted that the Court below failed to address the basis on which the Crown framed its case in the homicide charges at trial, and so misunderstood the meaning of significant parts of Hamill J's judgment. It devised a theory of complicity which is not consistent with current concepts. It failed to recognise that the appellant's complicity in the homicide charges needed to be established if she did not perform the act causing death herself. It failed to recognise the shift it endorsed from the Crown position at trial to something like an extended joint criminal enterprise liability (which the Crown had disavowed) without requiring contemplation of an incidental crime. The theory of liability was applied to manslaughter as well, and was significantly more disadvantageous to the appellant than any theory requiring foresight of an incidental crime, even though the Crown had always disclaimed reliance on such extension of liability. In considering recklessness it referred correctly to the requirement for subjective foresight of consequences, but cannot have applied such a test. Such a test is intractably opposed to the basis on which it upheld the appeal, namely the trial judge's alleged error in considering whether there had been any foresight of injury or death, as well as the undisturbed factual finding made by the trial judge and the Court's own finding that it would be unrealistic on the evidence to frame a Crown case requiring such contemplation.

24. In the prosecution of IL the Crown has conflated two questions: (1) What is the basis of her liability in the drug manufacturing charge for acts of drug manufacturing she did not perform? and (2) What is the basis of her liability in the homicide charges for acts of drug manufacturing she did not perform, where they caused death?

25. The first question is simple but its answer does not resolve the second question. It is uncontentious that if IL was a party to a joint criminal enterprise to manufacture a large commercial quantity of drug, all acts done to manufacture it are attributed to her, whether she did them or not, to establish liability for that drug offence. This is because of joint criminal enterprise in its most basic form. She has what is normally described as direct liability for that crime, co-extensively with any co-offenders, and is liable as a principal. In a case where it matters (as in a situation like *Osland v The Queen* (1998) 197 CLR 316 ('*Osland*')) it can be said that she is responsible for the acts of manufacturing done by others, not their crime. No concept of determining the scope of the enterprise or her contemplation of the myriad acts done to manufacture is relevant. She has agreed to the elements and the prosecution has no need to prove any consideration on her part of the methodology to be used. Sentencing judges work out actual disparity between roles.

26. The Crown at trial did not move beyond the answer to that first question to provide the answer to the second question[6], and Hamill J was right to reject the Crown theory of liability.

[6] For example HJ [78] 'The Crown says that it is as simple as applying principles of common purpose or joint criminal enterprise. In other words if the act of lighting the burner was an act in furtherance of the common purpose,

The appellant submits that this is what his Honour was doing in HJ [77] – [81], [84] – [86]; not looking for evidence of foresight of injury or death as found by the CCA. The Crown did not squarely contend in the court below that his Honour was in error to reject its theory, although some of its submissions assumed the correctness of the Crown theory of liability[7].

27. In addressing the current appeal issues the appellant puts aside the complex questions of whether liability is derivative or direct where the relevant charge is not the crime agreed upon but one contemplated as a possible incident, and whether a deceased person can have criminal responsibility in relation to his own death[8]. Hamill J's finding that the deceased did not commit a crime if he caused his own death has not been the subject of any challenge by Crown, and not disturbed by Court below. The finding that IL could not be guilty of murder if her liability was derivative was not disturbed. The CCA's finding regarding direct liability was based on the theory of liability it derived which is submitted to be wrong, and no deeper issues need to be canvassed in this case. The issues raised on the appeal would apply equally if a third party had been killed by a fire caused by the act of the deceased.

28. The Court below like the Crown conflated the two issues to a significant extent (for example at CCA [38]), although a conceptually different theory of liability was developed which improved on the Crown theory of liability. Although in effect suggesting at times that no theory of complicity in murder was required, the tension between such position and the recourse to discussion of principle in *Johns (T.S.) v The Queen* (1980) 143 CLR 108 ('*Johns*') and *Sharah* points the way to a different and viable theory of complicity – contemplation of incidental crimes. The incidental crime is constructive murder.

29. The lack of subjective appreciation of a risk of death was argued in the Court below as a matter relevant to the discretion not to intervene[9]. However the issue forms the central reason for the CCA's finding of error in the Trial Judge's decision, and so is addressed as squarely relevant to the assertion of error in upholding the Crown appeal as well as a miscarriage of the discretion. The appellant contends that to sustain a murder conviction the Crown *was* required to prove subjective understanding of a risk of death (or at least injury). It is submitted that this arises for two reasons – firstly, the need to establish IL's complicity in the offence of murder if she did not perform the actus reus of the offence, one method of which would require foresight of the commission of an incidental crime (constructive murder); and secondly because of the requirement of malice, here to be proved by recklessness.

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the accused is criminally responsible for that act'. See also [16], and at [21], noting that he had been taken to no authority in support of the theory. There is some confusion in [16] – [18] of his Honour's judgment regarding the basis of authority but this was immaterial – the essential point that the Crown relied on nothing more expansive of liability than jce in its most basic form was correct. That His Honour correctly stated the Crown theory of liability was not disputed in the Court below: see for example Crown written submissions in CCA at [66], [106]. See further Crown submissions at first instance paragraph 16, and 'Some Further Thoughts' paragraphs 1, 2, 4, 5, 8

[7] Crown CCA submissions [96], [131] – [132], such assumptions causing the Appellant to complain that the Crown's appeal was concerned not even with mixed questions of fact and law, but mixed questions of fact and mixed laws.

[8] The latter point was considered by the United Kingdom Supreme Court in the context of intentional violence in *R v Gnango* [2012] 1 AC 827. There is a considerable body of caselaw and academic literature supporting the proposition that where liability is imposed for a crime foreseen but not the primary agreed crime, liability is derivative. The judgment of Keane J in *Miller v The Queen* [2016] HCA 30; 334 ALR 1 ('*Miller*') is the only one resolving this issue, his Honour finding that it is not derivative

[9] CCA written submissions for IL at [52]-[55], [59] – [131]

30. The appellant will develop these arguments by addressing the following key topics: A) The nature of the crimes of murder and manslaughter; B) Recklessness for malice; C) A theory of complicity is required for constructive murder; D) The Crown theory of liability is wrong; E) The CCA theory of liability is wrong; F) Contemplation of incidental crime and alternatives.

A) The Nature of the Crimes of Murder and Manslaughter

31. Section 18 of the *Crimes Act* is headed 'Murder and Manslaughter defined'. The section defines murder in s 18(1)(a), and provides a negative definition of manslaughter by stating that every other punishable homicide shall be taken to be manslaughter. The *Crimes Act* defines some types of voluntary manslaughter (provocation[10], substantial impairment[11]), but the elements of involuntary manslaughter are defined by the common law[12].

32. As made clear by the plurality in *R v Lavender*[13] the *Crimes Act* is not a Code and does not exclude the common law. It modified or added to the common law in important respects, but assumes the continuing operation of the common law as a source of legal obligations and liabilities[14]. One area where there has been very significant common law development is in the understanding of when an act may be treated as an 'act of the accused' despite the fact that she has not actually performed it. This issue has been exclusively or almost exclusively attended to in the context of murders with intent[15]. Historical concepts such as liability for probable and unusual consequences of the conduct of co-accused have been replaced with a small number of more subjectively focused rules[16].

33. In *Ryan v The Queen* (1967) 121 CLR 205 Windeyer J at 238 quoted Sir Owen Dixon's 1935 article '*The Development of the Law of Homicide*' regarding the movement over eight centuries from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act[17], continuing 'It may be that this process of development is as yet unfinished. But the law of homicide is codified in s 18 of the Crimes Act 1900, and it is by the provisions of that section, not by the common law, that this case must be decided.' The appellant submits that the process is continuing, is not entirely codified, and requires development in the area of complicity for constructive murder and the application of s 18(2)(a).

34. Section 18(1)(a) gathers in one section the only four categories of murder punishable in NSW. These correspond generally with those types of unlawful homicide adjudged at common law as having (either expressly, impliedly or by construction) sufficient malice aforethought to amount to murder (although not including murder where malice was constructed from escape or evasion of law authorities). Additionally, section 18(2)(a) provides that no act or omission which was not malicious shall be within this section. This requirement for actual malice by s 18(2)(a) and the previous extended definition of it in s.5 (which has been repealed but continues to apply to s 18 as noted above) was found in

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[10] *Crimes Act* s.23
[11] *Crimes Act* s.23A
[12] *R v Lavender* (2005) 222 CLR 67 ('*Lavender*') at 76 [21]
[13] *R v Lavender* (2005) 222 CLR 67 ('*Lavender*')
[14] *Lavender* at 76 [20]. See also *Burns v The Queen* (2012) 246 CLR 334 at 339 [6] (French CJ)
[15] See NSWLRC 4.118 (page 98) regarding the conceptual difficulty of applying foresight (for extending joint enterprise liability) to murder by reckless indifference
[16] Set out in detail in *Miller* and *R v Jogee* [2016] 2 WLR 681
[17] Australian Law Journal, vol 9, sup. P. 64.

Lavender to apply only to murder, not manslaughter. Central to this determination was the fact that at common law, the presence or absence of malice was the point of difference between the two forms of unlawful homicide.[18]

35. The offence of murder is thus defined in a statute concerned with criminal liability. It is contained in Part 3 of the *Crimes Act*, which is concerned with 'Offences Against the Person'. It is the crime within that part which is intended to mark the greatest culpability in offending against another person. Its contravention attracts the availability of life imprisonment now, a punishment which has been mandatory at various stages of the Act's operation, and warrants imposition under s 61 depending on assessment of culpability. It carried the death penalty at the time of enactment. It carries a standard non-parole period of 20 years imprisonment[19]. Manslaughter carries a maximum penalty of 25 years imprisonment although a wide sentencing range is recognised because of the great variety of circumstances in which it may be committed. Despite the constant consideration of the seriousness of the taking of a human life, punishment for manslaughter has always allowed for the prosect of nominal punishment (a consideration found in *Lavender* to be consistent with the absence of the need to prove malice for manslaughter). Both offences take their place in a system of criminal justice which otherwise provides for the complete punishment of IL for her culpability in the drug offence, and other purposes of sentencing[20].

36. If the act causing death is committed with the intent or in the circumstances described in section 18(1)(a), then it is murder – provided it is actually malicious. The recent history of the criminal law in NSW[21] is to give sub-section 2(a) no work or meaning. However there is no known history of prosecution of constructive murder in this State where the foundational crime is not one of violence (where the aspect of s.5 malice described as 'intent to injure, in property or otherwise' would be made out). It was made clear at first instance that this case was being pursued by the DPP as a test case, exploring combinations of legal liability and facts not previously prosecuted as murder[22].

37. The appellant took the Court below to extensive material supporting the requirement for actual malice to be proved in relation to the act causing death, and it is implicit in the Court's consideration of the issue that it accepted s 18(2)(a) has such a role.

38. Prior to 1951 s 376 of the *Crimes Act* required an indictment for murder to charge that the accused did feloniously and maliciously murder the deceased. It was repealed as a strict drafting amendment with no intent to alter the law at all: *Lavender* at 80 [31]. At 81 [35] their Honours stated that interpreting s 18 had to be undertaken in the wider context of the whole of the *Crimes Act*, including s 376 and consistently with it if possible.

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[18] *Lavender* plurality at 77 [24]

[19] *Crimes (Sentencing Procedure) Act* Part 4 Division 1A, item 1 of table

[20] *Drug Misuse and Trafficking Act* 1985 s24(2), 33(3) and 33A maximum penalty life imprisonment; standard non-parole period of 15 years provided by the *Crimes (Sentencing Procedure) Act* Part 4 Division 1A, item 17. The applicable purposes of sentencing are set out in s3A of the *Crimes (Sentencing Procedure) Act.*

[21] At least since the decision of the High Court in *Mraz v The Queen* (1955) 93 CLR 493. See notation by Gaudron and Toohey JJ in *Royall v The Queen* (1991) 172 CLR 378 at 428 that the Court was told the prevailing view in NSW was that it had very little work to do.

[22] The novel nature of the prosecution was referred to at HJ [20]. The Crown sought an adjournment / discharge of the jury after Hamill J announced his decision to direct verdicts, and made references in this context to this prosecution being a test case: see judgment *(No 3)* of 3.12.14 at [14] – [15], [26]; Trial transcript 414, 415, 417

39. The appellant accordingly contends that the malice must attach to the act causing death as a conglomerate concept. The malice inheres in the state of mind of the person performing the act causing death, and where the accused is not that person she must have sufficient connection with that mental state for her contribution to be described as malicious as well.

40. Manslaughter by an unlawful and dangerous act requires close consideration of the circumstances of a deliberate or intentional act of the accused to assess whether a reasonable person in her position (the very position she was in, performing the very act she performed) would have realised she was exposing another to an appreciable risk of serious harm[23]. The 'circumstances the accused was in' have been suggested to include the physical features of the situation and of her action[24]. Judicial directions must explain the need for considering the particular position of the accused to apply the objective test – such as the vision the accused had at the time he punched the deceased[25].

41. The majority in *Wilson* explained that the modified *Holzer* test[26] gave 'adequate recognition to the seriousness of manslaughter and to respect for human life' while maintaining a clear distinction between manslaughter and murder[27]. The alternative test of an objective risk of some harm did not reflect the law's development ' towards a closer correlation between moral culpability and legal responsibility'[28]. Their Honours further cited with approval King CJ's statement that the scope of constructive crime 'should be confined to what is truly unavoidable'[29]. 'Battery manslaughter' (causing death by a deliberate blow with intention of more than negligible or trivial harm) was similarly inapt.

42. The unlawful and dangerous act may sometimes be one the accused has not performed – but then would usually require encouragement or agreement. There can be a joint criminal enterprise to do an unlawful and objectively dangerous act[30]. Because the objective standard is applied to an intentional act in particular circumstances, the utilisation of extended joint criminal enterprise is not always appropriate. It would seem best reserved for enterprises to commit some violence where an escalation of violence to a level which poses an appreciable risk of serious injury, but not an intentional killing or infliction of grievous bodily harm, has been contemplated[31]. The test outlined in *Wilson* applies to the contemplated activity[32].

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[23] *Holzer* [1968] VR 481 at 482 ('*Holzer*'), *Wilson v the Queen* (1992) 174 CLR 313 ('*Wilson*') at 325 (where the *Holzer* test is set out), 327, 332-333 per Mason CJ, Toohey, Gaudron and McHugh JJ; *Lavender* at 82-83 [40], *Lane v R* (2013) 241 A Crim R 321 at 336-7 [55] – [57]

[24] *R v Wills* [1983] 2 VR 201 at 212 (Lush J, Murphy and Fullagar JJ agreeing); *R v Besim* (2004) 148 A Crim R 28 at 37-38 (Redlich J Vic SC ruling in trial)

[25] *Cornelissen and Sutton* [2004] NSWCCA 449 at [82] – [84] (James J with whom Hidden and Bell JJ agreed)

[26] It was only modified by the removal of the word 'really' before 'serious injury'

[27] At 333 per Mason CJ, Toohey, Gaudron and McHugh JJ

[28] Wilson 327 (Mason CJ, Toohey, Gaudron and McHugh J)

[29] See also Kirby J in *Lavender* at [105]

[30] This is consistent with the decision in *The Queen v Chai* [2001] HCA 12; 187 ALR 436 on the facts of that case. See also *TWL v R* [2012] NSWCCA 57; (2012) 222 A Crim R 445 at 455 [36]. The conviction appeal was upheld because, where the Crown did not rely on extended joint criminal enterprise, the trial judge had wrongly failed to directed the jury that the Crown was required to prove an agreement that an act would be committed that exposed the victim to an appreciable risk of serious injury (not just an agreement to assault or visit physical violence on him). The manslaughter directions of the trial judge in *Miller* discussed in the intermediate court reflect the type of directions required (although a causation problem may arise in some cases): *R v Presley* [2015] SASCFC 53 at [83]

[31] Acknowledged for example in *Gillard* (2003) 219 CLR 1 ('*Gillard*') ; *R v Nguyen* (2010) 242 CLR 491 at 503 [45] – [46], 505 [49] – [50]; *Nguyen v The Queen* (2013) 298 ALR 649

B) Recklessness for Malice

43. Statutory crimes of malice (undefined) require intention or recklessness as to consequences: *Cunningham*. The CCA found the prior definition of malice in s.5 to be preserved, and recklessness was the aspect it relied upon as viable in this prosecution.

44. Criminal recklessness may attach to circumstances, conduct or consequences. Even though the issue under consideration is not the limb of murder known as reckless indifference, any concept of recklessness used to ensure that murder is malicious must be related to consequences, as the CCA at [93]–[99] seems to accept. Recklessness then describes a state of mind in which a person adverts to the risk that particular conduct may result in particular harm and, with that awareness, engages in that conduct[33]. Recklessness as an actus reus concept is of limited application, where behaviour alone is criminalised[34] and is not here relevant. Recklessness as to circumstances (such as absence of consent) is not relevant either.

45. Prior to its repeal the term 'reckless' in s.5 was given the same definition as explained in *Cunningham* where malice at common law requires recklessness: subjective foresight on the part of the accused that the particular kind of harm in fact done might be done: *Coleman* 475.

46. The relevant consequence of murder is death, and similarly the 'particular kind of harm in fact done' is death. Recklessness is accordingly submitted to require subjective foresight of death. This must be so whether the issue is framed in terms of the act causing death having to be reckless, or the accused recklessly causing the death, or recklessly murdering the deceased (remembering the terms of the repealed s 376).

47. Prior to 2011[35] there was a line of authority which held that where the charge was one of maliciously causing grievous bodily harm pursuant to s 35 of the *Crimes Act* in its previous form, subjective foresight of some physical harm was sufficient foresight of the particular kind of harm so as to be reckless[36]. This accorded with English authority regarding the degree of recklessness required in charges of maliciously wounding or inflicting grievous bodily harm in contravention of s 20 of the *Offences Against the Persons Act* 1861[37]. The English extension to wounding was not followed in NSW prior to the restructuring[38].

48. Whether the line of authority was principled or not[39], it is not known to have ever supported the proposition that where the relevant consequence is death, the particular kind of harm subjectively foreseen needs only to have been 'some physical harm'. The extinction of life is not just a variation by degree of 'some physical harm'. The authorities referred to at CCA [93], [99] and [100] do not support a lesser level of foresight, where an act causing death must have been reckless, than foresight of death.

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[32] *Rees* [2001] NSWCCA 23 at [25] – [35]

[33] *Zaburoni v The Queen* (2016) 256 CLR 482 at 497 [42] (Kiefel, Bell and Hayne JJ)

[34] See AP Simester and G R Sullivan *Criminal Law: Theory and Doctrine*, 3rd ed, Hart, Oxford, 2007 at 138-9

[35] In *Blackwell v R* [2011] NSWCCA 93; (2011) 81 NSWLR 119 the CCA declined to follow aspects of the jurisprudence regarding the content of recklessness, developed in connection with s.5, after its repeal

[36] *R v Stokes and Difford* (1990) 51 A Crim R 25 ('*Stokes & Difford*') at 40 – 41 (Hunt J with whom Wood and McInerney JJ agreed). *Coleman* at 475 applied the same principle to an actual bodily harm case

[37] *Rushworth* (1992) 95 Cr App R 252, *R v Savage; DPP v Parmeter* (1992) 94 Cr. App. R. 193, [1991] 3 WLR 914

[38] *Chen v R* [2013] NSWCCA 116, *CB v DPP (NSW)* [2014] NSWCA 134; 240 A Crim R 451

[39] It has been strongly criticised academically – see for example Simester and Sullivan *Criminal Law Theory and Doctrine* (op. cit.) at 154, noting its limitation to s.20: 'Fortunately, the definition of maliciousness has not suffered from similar judicial creativity when appearing in other offences.'

49. The *Cunningham* test of recklessness (as explained) is the only specific one referred to by the CCA in considering s 5 recklessness or alternatively the common law requirement of recklessness if malice is now undefined in the *Crimes Act*. It was referred to in both instances (directly in [98], but earlier in so far as the *Coleman* test was based upon it, and this was quoted at [93]). No criticism was expressed regarding its connection to s 18(2)(a).

50. In considering the alternative position (malice is undefined) Simpson J firstly referred to the *Cunningham* test as the conventional legal meaning that would apply. However her Honour then proceeded to consider the case of *Safwan* (1986) 8 NSWLR 97 concluding that it demonstrated 'malice' and its counterparts are to be given a broad meaning: [102].

51. *Safwan* was not concerned with the common law test of malice, did not establish any such 'broad meaning', and did not address recklessness. It was concerned with whether directions to a jury regarding s 5 malice (where the offence also involved intent to cause grievous bodily harm) had watered down the specific intent required for that crime by reference to concepts such as indifference to life, wantonness, and recklessness, in reading out the whole of s 5. The point had not been taken at trial and, although it was held that these terms would have been better left out of the definition provided, no miscarriage of justice was found to have occurred in light of the clear directions regarding the requisite specific intent.

52. Returning to the *Cunningham* test, the appellant submits that there is no warrant for diminishing the requisite foresight of the particular harm done to foresight of 'some physical harm'. In considering this, the nature of the crime needs to be kept steadily in mind.

53. *R v Grant* (2002) 55 NSWLR 80 involved a successful conviction appeal where the judge directed that intoxication was only able to be taken into account on intentional murder (not reckless indifference) in light of a legislative prohibition against considering voluntary intoxication other than in crimes of specific intent (*Crimes Act* s 428C)[40]. Important to the decision of Wood CJ at CL (with whom Spigelman CJ and Kirby J agreed) was the fact that crimes of malice (as murder is) require either intention or recklessness, each of which calls for foresight of consequences[41]. His Honour at 97 [73] relied on the need to avoid arbitrary differentiation between forms of murder. One of the reasons for upholding the appeal, and finding that all types of murder are crimes of specific intent for the purposes of s 428C, was '..the comparable degree of heinousness which attaches to murder however committed..': 104 [97]. Parity between types of murder was also important in the interpretation of reckless indifference in *R v Crabbe*[42] and *Royall v The Queen*[43]. The Canadian Supreme Court in *R v Martineau*[44], empowered by a Charter which allows it to strike down laws contrary to 'fundamental justice', found a statutory form of constructive murder unconstitutional when it did not require proof beyond reasonable doubt of subjective foresight of death.

54. The appellant submits that these principles are relevant in determining whether recklessness should be given a less demanding meaning than foresight of death, where the foundational crime is not a violent one and it is used to fulfil the requirement of malice in s 18(2)(a).

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[40] Because of the subjective nature of reckless murder at common law and in various statutes, intoxication was always previously something relevant to take into account: *Pemble v R.* (1971) 124 CLR. 107 at 120-1 per Barwick CJ, *R v Faure* [1999] 2 VR 537

[41] At [60]

[42] (1985) 156 CLR 464

[43] (1991) 172 CLR 378 at 455-6 (McHugh J)

[44] *R v Martineau* [1990] 2 SCR 633; 1990 CanLII 80 (SCC)

55. However the CCA cannot even have applied a requirement for foresight of injury, as the requirement for foresight of injury or death attributed to the trial judge was the basis on which error was found and the appeal upheld. The Court also found that it would have been unrealistic for the Crown to have sought to prove such issues: see [33], [40] – [41], [61], [63]. The CCA never turned back to these findings when considering malice to explain that this subjective state of mind or contemplation was necessary after all, and that the Crown case was capable of proving it beyond reasonable doubt.

56. The Court did not outline any test of recklessness capable of consistency with its reasons for upholding the substance of the Crown appeal. If a test was to be applied to this prosecution of subjective foresight of consequences (the particular harm done – whether this be described as death or some lesser form of physical injury), then the Court's reasoning at [60] – [61] and [63] was erroneous. It is not clear that paragraph [62] adds anything[45]. Paragraph [64] is based on the new theory of complicity developed by the CCA.

57. The need for a theory of complicity in constructive murder is addressed below. Recklessness will be sought to be integrated with the appropriate theory (if there is one). If no theory of complicity in constructive murder is required, malice needs to be addressed independently.

58. Recklessness has a prickly relationship with other rules of the criminal law[46]. The application of the concept of s 5 malice to secondary participants was considered in *Stokes & Difford.* Where the accused was charged with aiding and abetting the malicious infliction of grievous bodily harm (without intent), he must be aware not only of the physical acts done by the principal offender, but that state of mind of the principal (malice) which must be established by the Crown (or his intention to do the acts with that state of mind), in forming his intention to assist or encourage[47]. There, the accused was required to know or be aware of the principal offender's intention to do the act which caused the grievous bodily harm (but not the fact that it would cause such harm), and that the act would be done by the principal maliciously[48]. This meant Difford had to have knowledge not only of Stokes' conduct, but his intention to cause some physical injury, or of Stokes' proceeding with realisation that some such injury might result (that is, Stokes' recklessness)[49].

59. The argument below considers the viability of various doctrinal bases for the appellant's complicity in the act causing death (in a case such as the present). If the accessorial route is right, *Stokes & Difford* suggests she needs to know of the conduct of the deceased (act and circumstances to be relied on to show recklessness) and knowledge that he was to proceed with such manufacturing realising that death might occur[50]. IL's knowledge of the recklessness of the deceased would in effect show recklessness on her part too (whereas addressing only her recklessness is insufficient). On the other hand see *Prince v R* [2013] NSWCCA 74 regarding a joint criminal enterprise.

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[45] The headnote says *R v Demiran* [1989] VR 97 was distinguished but this did not actually occur

[46] One cannot recklessly be an accessory: *Giorgianni v The Queen* (1985) 156 CLR 473; there are difficulties with accessorial liability for offences with mental elements: *Le Broc* (2000) 2 VR 43 at [53]–[63] (aiding and abetting reckless infliction of serious injury). It has problems with conspiracy: *Rv LK; R v RK* (2010) 241 CLR 177

[47] *Stokes & Difford* at 37 – 38

[48] *Stokes & Difford* at 39, 43

[49] *Stokes & Difford* at 40-42

[50] This is theoretical only, as the appeal would be successful if such a basis of liability was apt

C) A Theory of Complicity in Constructive Murder is Required

60. To make out murder in this case the act causing death needs to have been: (i) The act of the accused; and (ii) done by the accused or an accomplice with her during the commission of a sufficiently serious offence; and (iii) malicious. If the accused was not the actual physical perpetrator of the actus reus of the crime, the fact that it comes within (ii) does not of itself make it an act of the accused. The terms of the section signal that in some instances an act of an accomplice of the accused in the foundational crime will be capable of being regarded as hers, but not when. If the accused was not the physical perpetrator of the actus reus then the common law of complicity is needed as in NSW there is no legislative guidance.

61. It is essential that just limits are placed on functional and coherent theories of liability for those who have not physically committed the crime charged[51]. If IL's complicity in murder is to be based on common law principles, it is fundamental to understand their correct basis.

62. The alternative is that no principle of complicity is required, because of the terms of s.18: it is as simple as determining whether the accused is an accomplice of ('with') the person who performs the act causing death, in the foundational crime. This was not the Crown contention, and is not the decision of CCA. Although the CCA at [38] seems to be close to saying this, the theory of liability outlined would be irrelevant if this was so.

63. The 1942 case of *R v Surridge* (1942) 42 SR (NSW) 278 is supportive of no theory of complicity being required. Jordan CJ at 283 said there only needs to be a common purpose to commit the foundational crime. This case was decided well prior to the considerable refinement of subjective based theories of complicity over the last three or four decades and otherwise significant movement in relation to matching moral culpability with crime, and emphasis on the importance of mental states. The appellant submits that there is no good reason why 'act of the accused' in s 18 should be given a different meaning in relation to constructive murder than the one given in relation to intentional murder. That the section later refers to '.. the commission, by the accused, or some accomplice with him or her...' does not change this: it defines the necessary circumstances for the fourth type of murder.

64. A 1995 South Australian decision regarding the common law of constructive murder also suggests the issue is as simple as complicity in the foundational offence[52]. It was held that *Johns* was of no application. The decision has not been followed in NSW[53]. Usual principles of complicity are applied to the 'intentional act of violence' in the statutory form of constructive murder now existing in that state[54].

65. In considering whether complicity in the murder is required, it is important to consider the purpose or object of the underlying Act, and consistency with the language and purpose of all the provisions of the statute viewed as a whole; and consistency, fairness and total

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[51] Lord Bingham in *R v Rahman* [2009] 1 AC 129 said at 145 'Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.' See also *Darkan v The Queen* (2006) 227 CLR 373 at 397 [76] (Gleeson CJ, Gummow, Heydon and Crennan JJ)

[52] *R v R* (1995) 63 SASR 417

[53] NSWLRC 129 noted at 5.40 (p149) that it had not been a requirement in that state for accomplices to have foresight as here required arising from *Sharah*.

[54] See *Arulthilakan v The Queen* [2003] HCA 74; (2003) 203 ALR 259

context.[55] If there is no need to connect the accused with murder, guilt is made out on proof of participation in a different crime which may not (and did not in this case) have anything to do with direct physical harm to another human being[56]. A construction that prefers the presumption of innocence in the crime of murder, and requires the Crown to prove beyond reasonable doubt all ingredients of such a crime, is to be preferred[57] A construction that preserves the common law presumption that mens rea is required before a person can be held guilty of a grave criminal offence is to be preferred[58]. No good purpose is served if the accused does not need to be connected with the aspect of the foundational crime said to be hostile to life[59]. Further, the 'no theory' theory does not address s 18(2)(a).

10 66. Alongside the developments referred to at [63] there has been since 1992 when *Sharah* was decided a significant protection for secondary offenders in typical quick, highly violent, constructive murder crimes. The type of crimes prosecuted and the existence of this protection have operated to insulate the situations in which constructive murder has been proved; reducing, it would seem, the need for any coherent theory of the basis of culpability to have been articulated[60]. But it is essential to understand this now in a case where the foundational crime is not one of violence. Furthermore, serious drug manufacturing and supply offences are often very long and complex enterprises committed over days or weeks or longer; can involve many people, and thousands of acts in furtherance of them – more like 'joint ventures' where there is a division of labour and the accused will often not even know
20 one another or have any meaningful involvement in understanding steps taken by others[61].

67. The argument that it must be the accused who physically does the act causing death in a s 18 constructive murder charge was rejected in *R v Jacobs.*[62] The judgment in regards to that ground is illustrative of the hybrid of concepts of basic and extended joint enterprise liability[63] representing the common law in NSW. A similar approach was taken in Victoria prior to the introduction there of a statutory regime of complicity: see *Rich v The Queen*[64].

68. The terminology of accessorial liability is often used in this context[65], although not necessarily deliberately. The rationale for the protection provided by the *Sharah* requirement

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[55] *Interpretation Act* (NSW) 1987 s 33, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ, *DPP v Illawarra Cashmart* (2006) 67 NSWLR 402 at 412 [63] per Johnson J, citing *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 141 [115]

[56] Other crimes are also so detached, such as s.203B of causing major economic loss by damage to public facilities such as infrastructure or banking facilities

[57] *Momciolovic v The Queen* (2011) 245 CLR 1 at [44], [53] (French CJ)

[58] *He Kaw Teh v The Queen* (1985) 157 CLR 523 ('*He Kaw Teh*') at 528, 535 (Gibbs CJ, Mason J agreeing), 565-6 (Brennan J), 590-91, 594 (Dawson J)

[59] Cf. *He Kaw Teh* at 530 (Gibbs CJ, Mason J agreeing), 567 (Brennan J), 595 (Dawson J)

[60] The act causing death may be an element of the foundational crime as in *Sio v The Queen* [2016] HCA 32

[61] See for example *R v Clarke and Johnstone* [1986] VR 643 at 652-3 (decided at a relatively early stage of prosecution of drug crimes), and discussion of the same, and differences between acting in concert and joint criminal enterprises, by the intermediate appellate Court in *Likiardopoulos v The Queen* (2010) 30 VR 654 at 666 - 671

[62] [2004] NSWCCA 462; 151 A Crim R 452, 484 – 494 [182] – [227] especially 488 [199] – [200]

[63] This term is used at this stage to cover generally *Johns* and *McAuliffe* extensions.

[64] [2014] VSCA 126 at [256]–[60], [283] – [92]

[65] In *R v Spathis* [2001] NSWCCA 476 at [315]: 'the critical question always must be whether the act causing death was within the contemplation of the accessory in his role as a principal in the original criminal enterprise'

of foresight is not explained in these cases. It is submitted to closely approximate the common law regarding contemplation of incidental offences by secondary parties[66].

69. In *Sharah* the requisite contemplation was of the discharge of a loaded gun[67]. As to the other cases referred to at HJ [38], in *Spathis* the direction given required the accomplice to be aware that his co-accused was armed with a knife and that that there was a substantial risk that he might immediately before, during or after the commission of the robbery stab the deceased, seriously injuring him or killing him[68]. In *R v Jacobs* the direction required contemplation that, during the robbery in company with wounding of the victim of the foundational crime, grievous bodily harm might be inflicted on the deceased[69]. In *Rich*, with an admittedly differently worded constructive murder crime, the consideration was said to depend on the state of knowledge of the secondary participant that killing or infliction of really serious injury was a possible incident of the planned endeavour[70].

70. What those requirements are consistent with, without being explicitly articulated, is a doctrinal basis for liability of secondary parties in constructive murder charges founded on the law of contemplation of incidental crimes. They approximate a requirement for contemplation of the possibility of an 'accidental' death. This remains the common law of NSW although unexplained, and queried.

C) The Crown Theory of Liability is Wrong

71. There are three layers of liability for those who mutually embark on a criminal enterprise[71]:

(i) If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty regardless of the part that each has played in the conduct that constitutes the actus reus[72]. This is why IL was guilty of count 1 although the Crown could not say she ever manufactured anything herself. This principle has never been contentious in these proceedings. This first most basic aspect of joint criminal enterprise requires no contemplation of the individual acts to be done to perform the crime agreed upon. This is the only principle of law the Crown relied on to prove IL's complicity in the homicide charges. The extract from *McAuliffe v The Queen* (1995) 183 CLR 108 (*'McAuliffe'*) quoted at HJ [79] was a reference to this concept of joint criminal enterprise in its simplest form.

(ii) Each party is also guilty of any other crime ('the incidental crime') committed by a co-venturer that is within the scope of the agreement ('joint criminal enterprise

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[66] NSWLRC 129 at 5.38 (p.149) similarly said: 'The historical basis for this direction is unclear. It may be that it was thought appropriate to draw, by analogy, on the approach that had been developed, in relation to joint criminal enterprise liability; or perhaps, that the case was seen as one to which that form of liability applied.'

[67] A similar direction was given in *Smale v R* [2007] NSWCCA 328 see [9]

[68] *R v Spathis* [2002] NSWCCA 476, directions given at [210] (felony murder, co-accused did the stabbing or undecided who did the stabbing), described at [311] as consistent with authority, and at [445] as sufficient.

[69] *R v Jacobs* (2004) 151 A Crimr R 452 at 485 [187]

[70] At[258] – [260]

[71] Apparent from the caselaw generally but recently made clear in paragraph 4 of the plurality judgment in *Miller*

[72] See also *Gillard* at 35 [110] (Hayne J), *Huynh v The Queen* [2013] HCA 6; (2013) 295 ALR 624 at [37]; and as described by the Privy Council in *Brown v The State (Trinidad & Tobago)* [2003] UKPC 10 at [8] and [13], as the 'plain vanilla version' (as quoted by Kirby J in *Keenan v The Queen* (2009) 236 CLR 397 (dissenting as to the orders made) at [3] and Lord Bingham in *Rahman* at 145).

liability')[73]. An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement.' This is the principle applied in *Johns* although as will be submitted below this was confused by the CCA at [20] – [25]. It was never part of the Crown case that it could rely on this more complex attribute of joint criminal enterprise liability. A very significantly weakened version of it has been applied to this case by the Court below.

(iii) A party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ('extended joint criminal enterprise liability')[74].

72. Although the distinction between the second and third is conceptually important, and was the subject of the decisions in *Jogee* and *Miller*; in practical terms the distinction between the second and third on the one hand, and the first on the other, is much wider. Very often the second and third are referred to as though the same.

73. On the Crown theory it is as simple as looking at the most basic form of joint criminal enterprise regarding the drug count and determining whether lighting the ring burner is an act for which she is liable, such liability then transported unaltered to the homicide charges. The Crown relied on joint criminal enterprise because it could not prove IL did an act that caused death: HJ [16], his Honour noting at [21] that he had been taken to no authority in support of that proposition[75]. On the Crown case, lighting the ring burner was obviously done as part of the commission of count 1. For count 1, IL was responsible for this act – but she need not have had anything to do with it (nor contemplated it) for this to be so.

74. Hamill J was right at [79] – [80] that basic joint criminal enterprise extends liability in relation to the agreed upon crime. It is a particular common law device used to address an actus reus deficit in relation to *that* crime. The act made hers in relation to the agreed crime is not thereby deemed to be hers for all purposes. It is not an open-ended proposition: HJ [79]. This was part of the reasoning towards the finding at [85] that the combination of principles of common purpose and constructive murder relied on did not work together to make IL liable. The principle of joint enterprise in its most basic form does not say anything at all about the nexus between the drug and homicide charges.

75. The appellant maintains that basic joint criminal enterprise does not create a deeming provision operational outside fixing liability for agreed crime. The result of the application of this theory is the same as not having one (as discussed in the previous section), as IL is liable in connection with count 1 for everything done to commit it. It is in fact unclear why the Crown Prosecutor addressed the jury as set out in HJ [19]. If she was guilty of count 1 and the deceased died because of fire caused by lighting a ring burner to manufacture drugs, she was guilty of murder. The rest is entirely irrelevant.

76. The Crown theory has not been created in accordance with the usual requirements for the development of the common law, where change has to fit within a body of accepted rules and

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[73] See also *McAuliffe* at 114, *Clayton v The Queen* (2006) 231 ALR 500 ('*Clayton*') at 504 [17]
[74] See also *McAuliffe* 115-8
[75] There is some confusion of terminology at HJ [16] – [18] but it is immaterial

principles, logically or analogically related to them[76]. It requires no mental element at all for IL, whereas for the principal the act must have at least been voluntary[77], and malicious; and for secondary participants in very violent crimes there needs to have been foresight of action extremely hostile to life. Careful consideration of the fundamental nature of the substantive offence is required before application of even well established principles expansive of liability[78]. The compounding effect of a deeming provision in relation to an offence with a mental element may be anomalous, suggesting its inapplicability[79]. The Crown theory also allows no basis for distinguishing as to culpability by way of a manslaughter verdict.

77. Coherency in the law is important[80]. However there is nothing incongruous about the lighting of the ring burner being regarded as IL's act for the prosecution of count 1, but not assumed to be hers for homicide charges. An important function is served by the fiction of basic joint criminal enterprise liability – the efficient and just prosecution of crime. The lack of proved connection between IL and the act causing death is important for the crystallisation of issues, but there will be parties to joint criminal enterprises who are more distant still from an act which may turn out to cause death. IL may have been in the house somewhere at the time the ring burner was lit, as she was there at the time of arrival of police. But she need not have been for this act to be treated as hers for count 1. She need not have ever entered the house with equipment in it, ever met the deceased, ever picked up any acetone. This would be entirely irrelevant for fixing her liability for count 1, if she was party to a joint criminal enterprise. But is it not relevant to homicide? Even clear deeming provisions usually allow rebuttal. If she wasn't there, never met the deceased, knew literally nothing of the method of manufacturing can this be raised? Does she bear an evidential burden only, or a legal one?

78. Finally, the reason why the Crown theory of liability is wrong in the context of the manslaughter charge is plain. It was the same drug enterprise (count 1) relied on by the Crown for manslaughter as for murder – there was not a more particular joint criminal enterprise alleged[81]. However the Crown did not need to be tied to count 1 for manslaughter, and could have alleged an enterprise to manufacture that morning by evaporating acetone over a flame in that room. This would have been significantly more onerous for the Crown as to IL's participation, but would have permitted application of the test for manslaughter by an unlawful and dangerous act. It is contrary to principle to move from participation in a general crime to detailed consideration of whether an act in specific circumstances she is not alleged to have agreed to, and need not have had any knowledge of, are dangerous. Extended joint criminal enterprise by way of contemplation of the dangerous activity (those particular circumstances) would be required. However the Crown disclaimed any reliance on such principles.

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[76] *Breen v Williams* (1996) 186 CLR 71 at 115 as quoted by Heydon J in *Momcilovic* at 156 [393], referring also to the judgment of Dawson and Toohey JJ at 99. See also Kirby J in *Gillard* at 25 [65], and quotation from Justice Holmes in "Codes, and the Arrangement of the Law" by majority in *PGA v The Queen* (2012) 245 CLR 355 at [5].

[77] *Ryan v The Queen* (1967) 121 CLR 205 at 231

[78] *Giorgianni* at 491 (Mason J), adapting Dixon J's observations in *Mallan v Lee* (1949) 80 CLR 198 at 216. A more recent instance of analogous disharmony is *Moustafa v R; Kassab v R* (2014) 43 VR 418 especially at 403 [106] – [109]. See also discussion by Kirby J (in dissent) in *Maroney v The Queen* (2003) 216 CLR 31

[79] *He Kaw Teh*, *Momcilovic* per French CJ at 58 [73], Gummow J as below and Hayne agreeing, Crennan and Kiefel JJ at 229 [608] – [609], 230 [611] – [612]; Heydon J contra at 149 [371], cf. Bell J at 252 -3 [692] – [696].

[80] See for example *Miller v Miller* (2011) 242 CLR 446 regarding intersection criminal liability and civil provisions.

[81] CCA [2], [70]; Crown submissions on appeal at [121]

E) The CCA Theory of Liability is Wrong

79. The CCA introduced a new concept of determining the scope of the joint criminal enterprise (count 1) to see whether a particular *act* (the act causing death) was contemplated by the parties. The Court has without expressly saying so applied something like the law of joint enterprise where an incidental crime committed by a co-venturer is contemplated. The CCA test is a very significantly altered version of that however, because it is an individual act said to require contemplation as a possibility, not an incidental crime. This basis of complicity is different to the Crown theory. It is internally inconsistent with the suggestion at [25] that in this case there is no allegation of an offence over and beyond that (drug manufacture) being committed by either of the participants. It is flawed because it does not recognise its connection with the law regarding contemplation of incidental crimes and so has not grappled with the content of the necessary contemplation (or the fact that the Crown disavowed such extension of liability).

80. Determining the scope of the enterprise only arises where the crime charged is not the agreed crime[82], and it is complicity in relation to that incidental crime that needs to be established. The prosecution of serious crime would grind to a halt if every act done to complete drug manufacturing or supply in large joint enterprises had to be contemplated by the participant before attributed to her for basic joint enterprise liability.

81. There is no common law theory of complicity creating liability for crime not agreed to, foreseen, or intentionally assisted. There is no concept of extending liability by free-standing responsibility for contemplated acts, as distinct from contemplation of incidental crimes[83].

82. The principle of common purpose considered in *Johns* is where an *incidental crime* is contemplated and agreed with. The issues decided were whether this principle can apply to accessories before the fact to the original crime (it can) and whether the incidental crime needs to have been considered as a probability as distinct from possibility (it does not). Although the part of the judgment of Barwick CJ as quoted by her Honour at [21] refers to acts[84], it immediately followed the finding that the trial judge's directions (that the parties must have had in mind in carrying out their armed robbery offence the contingency that 'the firearm might be discharged and kill somebody' and 'the possibility of the lethal use of the firearm') reflected the common law. The other judgments all specifically refer to whether the commission of another crime has been contemplated[85]. The criminal responsibility under discussion was not that relating to the original crime the prime object of the criminal venture, but another crime committed during it[86]. Subsequent authority has made clear, over and again, that it is an incidental crime that needs to be contemplated[87]. A more difficult issue arises, when the crime is murder, as to whether a result needs to have been foreseen.

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[82] Or in the 'fundamental departure' cases not here relevant. The CCA did not suggest it was devising its theory on this basis, nor that Sharah relates to this; and the reliance on *Johns* indicates that it was not.

[83] NSWLRC at 4.144 considered the situation where the contemplated crime is one of strict liability

[84] *Johns* at 113 (Barwick CJ)

[85] Stephen J at 118, Mason, Murphy and Wilson JJ at 124

[86] *Johns* at 118 per Stephen J

[87] Culminating most recently in *Miller* at [4], [10], [21], [37] (plurality) [43] (Gageler J), [132], [135], [137], [141], 143] (Keane J). The majority at [1] referred to the content of such 'crime' as 'death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention'. The precise content of the 'crime' was not the subject of the appeal, although the intermediate appellate court had dismissed a ground contending foresight of the result was necessary.

83. There is a lone NSW unreported decision of *Bikic v R* [2002] NSWCCA 227 in which it was held that the possibility which must be contemplated by the non-primary offender is not the crime of murder, but the principal's acts. On appeal it was argued that the trial judge failed to adequately convey to the jury that it could only convict the appellant if the shooting with intent to kill or cause grievous bodily harm he contemplated as a possible incident of the common purpose to assault was one otherwise than in self defence. The CCA (Giles JA with whom Sully and Levine JJ agreed) found no error in such omission: [91], [113] – [139].

84. His Honour in particular purported to draw upon McHugh J's distinction in *Osland* between primary and derivative liability to reason that as the guilt of the accused did not depend on the guilt of the stabber, the direction was not required. However this aspect of *Osland* had no application to the issue of the mens rea of the non-principal offender. The relevant portion of McHugh J's judgment refers repeatedly to the requirement that the relevant mens rea be proved, and it was not in issue in that case. *Osland* had nothing to do with a joint enterprise extended by the doctrine of common purpose, and does not touch on the requisite mental element of the accused under consideration. The flaw in Giles JA's reasons is apparent at paragraphs [136] – [138]. The decision has never been overruled, but subsequent developments confirm that it is not right. It is inconsistent with *Clayton*, *Gillard* and *Miller*.

85. *Johns* was not a constructive murder case, and of course subsequent cases have made clear that the incidental crime which needs to have been contemplated in a situation like *Johns* is a killing with intent (to kill or cause grievous bodily harm), such that the trial judge's directions should really have said this as well. As described by the plurality in *Miller* at [10], *Johns* represents a paradigm case of joint enterprise liability where the secondary party is equally liable if the parties foresaw murder as a possible incident of carrying out the agreed plan[88].

86. The Court below was incorrect to state at [24] that the second quoted paragraph of *McAuliffe* described the doctrine of extended joint criminal enterprise (as distinct from *Johns* liability). It didn't, it expressed the doctrine considered in *Johns*, making clear that the consideration is whether the additional crime was within the scope of the common purpose[89]. What has happened is that the requirements of the second level of liability referred to above at [71] were thought to be the third, so a significantly watered down concept of *Johns* was applied and described as not relating to an incidental crime. An incomplete application of *Johns* has resulted in failure to acknowledge the movement away from the Crown adherence to only basic joint criminal enterprise, and failure to consider the content of the crime needing contemplation. There is error apparent at CCA [24]-[25], [27], [32]-[33], [36], [38]–[41].

87. The test proposed although subjective is likely to be more expansive of liability than an objective test of responsibility for probable consequences of agreed crime, which has long ago been replaced with responsibility for subjectively foreseen incidental offences. It is a meaningless test incapable of application in any logical way that is different from proof of knowledge of the act and the circumstances in which it occurred. It provides no meaningful protection, and masks the stark wrongfulness of the Crown's position. 'Contemplation of incidental crimes' can risk hindsight based assessment, but assessment is sensible. In *Johns*

[88] At [37] it was explained that *McAuliffe* builds on *Johns* – in *Johns* the contemplated incidental offence was within the enterprise because agreed with, one whether the contemplated incidental offence outside it.

[89] The extended joint criminal aspect of *McAuliffe* is dealt with through later parts of the judgment from 115-118.

Stephen J quoted Glanville Williams: 'it seems that a common intent to threaten violence is equivalent to a common intent to use violence, for the one so easily lead to the other.'[90] The use of a particular method to manufacture drugs is not in the same logical plane of reasoning.

88. The CCA theory was at least deficient in that it did not incorporate foresight of the mental element with which the principal must have performed the act. The appellant would go further and submit that contemplation of the risk of an (unintended) death is required.

89. The CCA theory of liability is plainly wrong in connection with manslaughter. IL's liability was plainly co-extensive for the drug charge. But what was the basis of her co-extensive liability for manslaughter? If the test had required contemplation of more than lighting of ring burner - also all the attendant circumstances said to make it dangerous - there would have been legally an arguable instance of extended joint criminal enterprise manslaughter.

F) Alternatives and Conclusion

90. As explained above the *Sharah* line of cases equate closely with foresight of the possibility of death. Foresight of the possibility of lighting a standard ring burner is not equivalent. There is not sufficient opportunity to address in writing the complex issue of whether the result of death should be contemplated for extended liability in relation to intentional murder. The appellant submits there are strong reasons why this is or should be the case. But certainly so far as constructive crime is concerned, a coherent and just theory of complicity requires contemplation by the secondary party of the risk of death (caused by a voluntary act but without intent to kill or cause grievous bodily harm). Contemplation of lighting a ring burner simply does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility[91].

91. If the risk of death should not need to be contemplated because of the principles of complicity involved, then an accessorial basis of responsibility works more coherently than extensions of liability for foreseen crime. She would have to intentionally assist with knowledge as described in [59].

Part VII: Applicable Statutory Provisions: See Annexure

Part VIII: Orders: (i)The appeal is allowed. (ii) The orders of the Court of Criminal Appeal of New South Wales of 8 April 2016 are set aside. (iii)The acquittals of the appellant of murder and manslaughter are confirmed.

Part IX: Oral Argument:

92. The appellant estimates that the presentation of her oral argument will take 2 hours

Dated: 21 December 2016

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[90] *Johns* at 119, citing Glanville Williams *Criminal Law, the General Part* 2nd ed. (1961) pages 397-8
[91] *Wilson* at 334

Annexure - Applicable Statutory Provisions

The following provisions are still in force, in the form attached, at the date of making the submissions:

- *Crimes Act* 1900 (NSW) s 18
- *Crimes Act* 1900 (NSW) Schedule 11, Clause 65
- *Crimes (Appeal and Review) Act* 2001 (NSW) s 107

The following provision has been repealed:

- *Crimes Act* 1900 (NSW) s 5

It was omitted from the *Crimes Act* from 15 February 2008: see *Crimes Amendment Act* (2007), Schedule 1 [2]. The relevant transitional provision is *Crimes Act* 1900 (NSW) Schedule 11, Clause 65, referred to above

Crimes Act 1900 No 40

Historical version for 24 November 2015 to 15 May 2016 (accessed 21 December 2016 at 13:51) Current version

18 Murder and manslaughter defined

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

Part 24 Crimes Amendment Act 2007

65 Repeal of definition of "Maliciously"

The repeal of section 5 of this Act by the *Crimes Amendment Act 2007* does not affect the operation of any provision of this Act (including a repealed provision) that refers to "malicious" or "maliciously" or of any indictment or charge in which malice is by law an ingredient of the crime.

Crimes (Appeal and Review) Act 2001 No 120

Current version for 28 November 2014 to date (accessed 21 December 2016 at 14:10)

107 Directed jury acquittals or acquittals in trials without juries

(1) This section applies to the acquittal of a person:

(a) by a jury at the direction of the trial Judge, or

(b) by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence tried by the Judge without a jury, or

(c) by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.

(2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.

(3) An appeal may be made within 28 days after the acquittal or, with the leave of the Court of Criminal Appeal, may be made after that period.

(4) The accused person is entitled to be present and heard at the appeal. However, the appeal can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(5) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.

(6) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court may (subject to the *Bail Act 2013*) order the detention or return to custody of the accused person in connection with the new trial.

(7) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.

(8) This section does not apply to a person who was acquitted before the commencement of this section.

Note.
See section 5C of the *Criminal Appeal Act 1912* for appeals against the quashing of an indictment.

Crimes Act 1900 No 40

Historical version for 15 November 2007 to 6 December 2007 (accessed 21 December 2016 at 13:43)Current version

5 Maliciously

Maliciously: Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.