IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY NO: S 270 OF 2016

BETWEEN:

IL
Appellant
and
THE QUEEN
Respondent

APPELLANT'S REPLY

Part I

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

Part II: Reply to the Argument of the Respondent
Complicity - Murder

2. There was never any warrant for considering the scope of the agreement in connection with count 1. Such issue arose only if, in connection with either homicide charge, the Crown based complicity on foresight, in the commission of the drug charge, of these as incidental crimes. However the Crown specifically disavowed this basis of complicity. The theory of complicity Hamill J was required to rule upon (described as 'the Crown theory of liability' in appellant's submission's ('AS') [12], [24]-[26], [71]-[78]) has not been addressed in the respondent's submissions ('RS'). It has not been said that this was not the Crown case, yet it is stated that the issue of the scope of the enterprise or contingencies contemplated as described in *Johns* were properly for consideration, and so correctly discussed by the CCA: RS [58]-[59], [72]. However it is this difference between joint enterprise in its most basic form (described as level i in AS [71]) and liability for contemplated incidental crimes (levels ii and iii) at issue.

3. The Crown based its case on murder only on level i liability (for the drug crime). No question arose as what had been contemplated. The intermingling here of concepts of the most basic joint criminal enterprise (level i) and more extended forms where contemplation of incidental crime is involved was addressed in *Tangye* (1997) 92 A Crim R 545 where at 556-9 Hunt CJ at CL explained that the terminology applicable to 'common purpose' (level ii) should not be used where joint criminal enterprise in its basic form (level i) is involved. Such terms should be reserved for cases where the Crown needs to use the extended concept because the offence charged is not the same as the foundational enterprise. Joint criminal enterprise in its basic form is not concerned with contemplated acts or the scope of the agreement.

4. The Crown at first instance insisted that this was a case of joint criminal enterprise simpliciter, no issue about the contemplation of the accused arose, and that assignment of roles was irrelevant.[1] So long as IL was guilty of count 1, all acts to commit it were hers for the homicide charges. The scope of the enterprise was unmentioned, and 'contemplation' mentioned only to disavow it. The CCA was thus wrong to find error in Hamill J's failure to consider whether IL contemplated the act causing death, and to define complicity as based on guilt of count 1 and such contemplation. These issues had no relevance. The contention that any such complicity required contemplation of death only arises if this basic point is decided adversely to IL.

[1] Crown written submissions headed 'Some Further Thoughts', points 1-6, consistent with oral submissions.

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5. RS [8]-[10] suggests the Crown case was that IL was personally undertaking drug manufacturing; there was nothing else to do at the house. Review of the evidence should not be necessary to decide the points of principle, but any such suggestion is inaccurate.[2]

6. The respondent's position on whether the Crown was required to prove complicity in murder or only the foundational crime is unclear. Complicity in the foundational crime only is suggested in RS [47], [49], [61]-[64]; cf. [71]-[72]. Perhaps *R v Surridge* (1942) 42 SR (NSW) can be interpreted consistently with *Johns (T.S.) v The Queen* (1980) 143 CLR 108 ('*Johns*'), *McAuliffe v The Queen* (1995) 183 CLR 108 ('*McAuliffe*') and *Miller v The Queen* 334 ALR 1 ('*Miller*') (RS [48]) and require complicity not just in connection with the foundational crime, but also the incidental one.[3] If so no issue is taken. But if it stands for the proposition that liability depends only on proof of involvement in common purpose to commit the foundational crime (as RS [47] seems to endorse) then it is contended to be wrong. Wood CJ at CL did not in *R v Jacobs* (2004) 151 A Crim R 452 refer to such a principle as the mental element in constructive murder – the approved directions and the discussion of *R v Sharah* (1992) 30 NSWLR 292 ('*Sharah*') endorses a mental element of complicity in the homicide. *Surridge* is cited to reject the argument that accomplices cannot be guilty of constructive murder.

7. If *R v R* (1995) 63 SASR 417 is authority for the proposition that all that is required in constructive murder is complicity in the foundational crime then it is not a similar approach to that taken in *Arulthilikan v The Queen* (2003) 203 ALR 259 ('*Arulthilikan*'): cf. RS [50]. The direction in *Arulthilikan* required connection between the secondary party and the homicidal act. The distinction is fine because the intentional act of violence alleged (presentation of knife) was intimately related to the foundational offence (armed robbery). The application of principles of complicity to the crime of murder is not as clear as in cases like *Johns*, *Sharah*, and *Rich v The Queen* [2014] VSCA 126 because the homicidal act was so negligibly different from the elements of the foundational crime. Like some of the NSW cases in the *Sharah* line, it was the conduct element of the crime of murder requiring contemplation.

8. The *Sharah* line of authority is consistent with *Johns* and inconsistent with the proposition that complicity in the foundational crime is all that is required. The respondent's contention that alleged secondary participants in constructive murder charges do not need to contemplate death (for example RS [60]) does not answer the question of whether the basis for complicity in the cases there referred to is the contemplation of the incidental crime of constructive murder. Whether the content of that foreseen crime is the conduct only, or the result, is a secondary question. The nature of the complicity in the foundational crime is not the point (in fact an accomplice of the accused may be, and generally would previously have been, an accessory).

9. Although it is not apparent from the decision of this Court in *Johns*, it was a case prosecuted as constructive as well as intentional murder: see *R v Johns* [1978] 1 NSWLR 282 at 292D. In respect of both limbs the issue was the complicity of Johns in the crime of murder committed by Watson, arising from their joint enterprise to rob, and was described as common purpose.[4] As to constructive murder, the approved directions required the accessories to have had in mind the contingency of the firing of the pistol, and repeated the Crown submission of

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[2] T25.50, 44, 94, 96-7, 201, 317.

[3] It is relevantly consistent with *Johns* regarding intentional murder: *Johns* 129-130. The need to aid with knowledge of likely commission of the more serious offence (282) may have been intended to apply to constructive murder also.

[4] Aspects of the trial judge's direction at 293B and 294C might suggest common purpose was restricted to intentional murder, but when Begg J's judgment is read as a whole it shows the same principle related to both limbs.

necessary contemplation of the possibility that somebody might get killed[5]. The directions regarding common purpose generally referred to the contingency that the weapon might be discharged and kill somebody.[6] The directions specific to constructive murder were relied upon by Carruthers J in *Sharah* at 297G, in formulating the relevant foresight. In *Batcheldor v R* [2014] NSWCCA 252 R A Hulme J at [128] – [129] queried whether the direction in the constructive murder case in *Johns* was to address the foundational crime which required wounding. This does not explain the references to killing, absence of reference to wounding and overlooks the fact that there was extensive evidence led at the trial as to the reconstruction of the struggle that preceded the shooting, which included the deceased being struck heavily a number of times, which did not need to be detailed to consider the relevant questions of law.[7]

10. If complicity in murder is required, the common law alternatives are (in short) participating in a joint enterprise (agreement), intentional encouragement or assistance, or extension of liability because of contemplation of the incidental crime. In constructive murders involving shootings or stabbings, agreement and intentional encouragement / assistance are not viable. In violent robberies the act causing death was unplanned, whereas here the consequences of the act causing death were unplanned, but the planned act an unremarkable one, no doubt done scores of times without incident. Putting aside the derivative liability flaw found by Hamill J, the potential viability of an accessorial route in a case like this was discussed in AS [59]. In a case with sufficient evidence, there is no reason why agreement to light the burner to evaporate acetone, during the course of the foundational crime (incorporating malice as determined) could not also be viable in a case of this nature.[8] Neither of these requires contemplation of death, any more than it is required where assault with intent to cause grievous bodily harm is agreed with or intentionally assisted.

11. It is where complicity in constructive murder depends on contemplation of incidental crime (as it must in the shooting and stabbing cases) that a question arises as to the content of that contemplation. Discussion of extension of liability for foresight of intentional death inevitably blurs the issues and there are inconsistent descriptions. The law is settled that for intentional murder, the intent to kill or cause grievous bodily harm needs to have been contemplated; but the Australian decisions are inconsistent as to whether the act is to be contemplated or the result (although this has normally not been the issue under consideration).[9] The intermediate appellate court in *R v Presley* (2015) 122 SASR 476 did decide this, against the position now advanced.[10] Special leave was refused on this point.[11] The decision in *Miller* describes the crime of murder by result (death or grievous bodily harm) and specific intent.

12. In the United Kingdom, it was confirmed in *Neary* [2002] EWCA Crim 1736 that foresight of intentional infliction of grievous bodily harm is sufficient – foresight of death was

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[5] *Johns 1* at 294G-295B (Begg J). See 294C to F regarding intentional murder. It was wrongly suggested at AS [85] that *Johns* was not a constructive murder case.

[6] *Johns* 111, *Johns 1* 296C.

[7] *Johns 1* 285D (Street CJ), 293F (Begg J).

[8] Again putting aside the issue of whether any problem is caused if the deceased caused his own death.

[9] *Johns* 111-2; *McAuliffe* 112, 113, 119; *Clayton v R* (2006) 231 ALR 500 at 503 [11], 504 [17], 506-7 [26], [28] (majority), 514 [61], 528 [115] (Kirby J). The majority also described it differently at 503 [11], 504 [17], 506 [20]; *Gillard v The Queen* (2003) 219 CLR 1at 11 [19] and 14 [25]; *R v Nguyen* (2010) 242 CLR 491 at 501 [37], 502 [42]; *R v Taufahema* (2007) 228 CLR 232 at 238 [8], 252 [46].

[10] At [74] – [79] in Presley's appeal. The reasons consider other issues as well.

[11] [2016] HCA Trans 017 (French CJ and Kiefel J as her Honour then was).

not required. However in the Supreme Court decision of *R v Gnango* [2012] 1 AC 827 reference at [14] to the requirement of foresight of death contributed to the statement in the 14th edition of *Smith and Hogan's Criminal Law* that there was uncertainty in this area.[12]

13. Murder in NSW relevantly requires the commission of an act causing death. The actus reus is the conduct and the result. The appellant contends that where contemplation of incidental crime is the device used to extend liability, it is an act causing death that needs to be contemplated (done in the requisite circumstances for constructive murder), not the act that was in fact the cause of death. Requiring foresight of result over a specific act avoids the convoluted issue of the fundamental difference cases, accords with the emphasis given in *Miller* to foresight of the crime of murder and the distancing from a requirement for agreement / intention for the charged crime, is capable of clearer and stronger direction to juries, and is harmonious with the Code states (the difference between subjective contemplation of the possible crime and objective probability of the offence remaining).[13]

14. In constructive murders this would create some disparity between secondary and principal offender (where recklessness is not relied on to prove malice). However given the basis of the criminal law on concepts of autonomy and free will, this is the more natural way for disparity to occur. s 18 is clear that, so long as she has acted with malice, the principal is guilty if she has done the act causing death. She will have acted voluntarily.[14] Complicity is a common law device and, where the principal is already arguably too distant in culpability from others dealt with under s 18, should be used to keep the secondary party closer in, not further out. The *Sharah* cases approximate the disparity already. The check is more appropriate still in IL's case, where the act causing death was not only voluntary, but considered.

15. If the Court determines that for constructive murder based on foresight it is the conduct element not result that needs to have been foreseen, then it is submitted that such device for extending liability cannot work justly in a case such as the present, would not be applied, and accessorial or direct agreement routes would be required. There is no proper basis for relying

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[12] Ormerod and Laird, *Smith and Hogan's Criminal Law*, 14th ed (2015) at p244. The authors defined the requisite foresight as the possibility that the principal ('P') might commit crime 'B' with the relevant mens rea, and that P did commit it in a not fundamentally different manner from that which the accused foresaw. Despite the uncertainty referred to above it was said safe to state that foresight of the principal's acts (not result) was required, or in the case of murder, to have foreseen that the principal might intentionally cause grievous bodily harm: p238, 245. The focus on foresight of acts, and the requirement for commission in a 'not fundamentally different manner' gave rise to a convoluted body of case law in England: see AP Simester and G R Sullivan *Criminal Law: Theory and Doctrine*, 3nd ed, Hart, Oxford, 2007 pages 223-227, Ormerod and Laird as above at 247-253, UK Law Ref Report *Participating in Crime* Law Com No 305 (2007) at 2.81 – 2.96 (pages 44-47), *R v Jogee* [2016] UKSC 8; 2 WLR 681[58]-[59], [98]; *Mahana Makarini Edmonds v The Queen* [2011] NZSC 159 where 'knowledge of the weapon' cases from England and Wales are contrasted with the position in New Zealand, Australia and Canada: [28]-[29], [41]-[43].

[13] *Keenan v The Queen* (2009) 236 CLR 397 at 428 [102], 436-7 [133]. *Keenan* was not a murder case, but in s8 murder trials in Queensland juries are directed that killing the deceased with the requisite intent is that which has to have been a probable consequence of the prosecution of the unlawful purpose: eg. *R v Crothers* [2010] QCA 334 at [84]-[86], [99] – [105]. Similarly in Western Australia juries are directed that it is the causation of death with the requisite intent: see for example *Taylor v Western Australia* [2016] WASCA 210 at [91] – [103], [115], [118].

[14] The United Kingdom Law Commission in *Inchoate Liability for Assisting and Encouraging Crime* Law Com No 300, (2006) recommended two inchoate offences of encouraging or assisting an offence. In requiring the accused to have knowledge of circumstance or consequence elements of the intended crime, where the principal need not because the offence is a constructive or strict liability offence, disparity was recognised: 'However as a general rule, P is in a better position to appreciate the nature of the risk that he is taking in committing the conduct element.': 5.109-5.118. An 'uncompromisingly narrow' fault element was required because of the level of removal.

on such a tool of complicity as compared to these routes. There is no justification for a prosecution which cannot prove that IL knew that the ring burner was to be lit (to evaporate acetone in that room over a flame) seeking to prove that she contemplated it. Further, the need to address recklessness requires knowledge of the act and circumstances giving rise to the risk.

Complicity - Manslaughter

16. Although complicity in manslaughter is addressed at RS [51]-[56] the issue is not returned to in the submissions on ground 1. It is only by focusing on complicity in the crime charged that liability can be properly addressed. For manslaughter by an unlawful and dangerous act, the Crown needs to prove that the accused did the act or was party to a joint enterprise to do something unlawful in an objectively dangerous way, or that with knowledge of the essential attributes making the act unlawful and dangerous, she intentionally assisted or encouraged its commission. None of these requires knowledge of death. The nature of this crime requires caution before complicity would be established by virtue of its contemplation as an incident of agreed crime. This would require foresight, as an incident of drug manufacturing, that such might be done by lighting a ring burner to evaporate acetone over a flame in a small and poorly ventilated room. Had the Crown advanced such a case the proper response would have been that this extension does not correspond with the fundamental nature of the crime. Methodology of drug manufacturing is something that one knows or does not – it is not 'contemplated' like an escalation of violence. There is no justification in a case of this nature for alleging complicity this way, rather than direct joint enterprise or accessorial liability. But the Crown never suggested liability on such basis, and the theory devised by the CCA requires less connection still. By focusing on liability in count 1 the theory of complicity has become disconnected from the crime charged and produced injustice.

17. The difference between *R v CLD* [2015] NSWCCA 114 ('*CLD*') and this case is that the Crown in *CLD* sought to prove a joint enterprise to manufacture pseudoephedrine in a small, poorly ventilated shed: *CLD* [5]; and / or that the accused was personally engaged in the act of manufacturing pseudoephedrine by the evaporation of toluene in a small unventilated shed with multiple ignition sources: *CLD* [7]. Ground 1 is concerned with the absence of need for such connection with the allegedly dangerous activity. Hamill J's judgment was specifically distinguished in *CLD*, in part because his Honour found no evidence that IL either lit the ring burner or was criminally responsible for it because it was in furtherance of a joint criminal enterprise [specific to manslaughter]: *CLD* [37]. *CLD* is an orthodox example of complicity as recommended in AS [42] and above. There is error in treating agreement as to unlawful activity simpliciter as sufficient, if IL contemplated the act causing death (not even the circumstances rendering it dangerous).

Recklessness:

18. Part of the submissions for IL in the CCA on the issue the subject of the draft Notice of Contention have been included in the Appeal Book (AB 57-74). The appellant will reply further if leave is granted.

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