IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S270 of 2016**

BETWEEN: **IL**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S AMENDED SUBMISSIONS

Part I: Publication

1. It is certified that these submissions are in a form suitable for internet publication.

Part II: Concise statement of issues

2. Whether subjective foresight of the possibility of death is an element of constructive murder in s18(1) *Crimes Act* 1900 (NSW) for a participant in a joint criminal enterprise who does not perform the act causing death.

3. In the context of a charge of constructive murder, whether the operation of common law principles of constructive malice satisfy the requirement in s18(2)(a) that an act causing death be done maliciously.

4. In the context of a charge of constructive murder, whether the requirement in s18(2)(a) that an act causing death be done maliciously is satisfied by proof of recklessness to the standard described in *R v Coleman* (1990) 19 NSWLR 467, that is, determining to proceed, notwithstanding the realisation that some physical harm might be done.

Part III: Section 78B of the *Judiciary Act*

5. It is certified that this appeal does not raise a constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

Dated: 14 February 2017
Filed on behalf of the Respondent by:
C Hyland
Solicitor for Public Prosecutions
Level 17, 175 Liverpool Street
SYDNEY NSW 2000 DX 11525 SYDNEY DOWNTOWN

Tel: (02) 9285 8681
Fax: (02) 9267 2216
Ref: M Zelinka

Part IV: Statement of contested material facts

6. In addition to the statement of facts in the appellant's written submissions ("AWS" [8]–[9]), the respondent refers to the following additional or corrected factual matters.

7. Emergency services were called to the fire by a neighbour (rather than the appellant).[1] Upon their arrival the appellant attempted to block entry to the house.[2]

10

8. The manufacturing process was set up in the kitchen and bathroom of the house and was an obviously serious commercial venture. The bathroom had been set up with a gas burner, LPG gas bottle and large cooking pot for the purpose of using the bathroom as well as the kitchen to undertake the refining of methylamphetamine. Various quantities of methylamphetamine were found in differing degrees of purity, indicating that the process was ongoing. There were funnels, sieves, buckets, latex gloves, thermometers, a vacuum flask and pump and other equipment which converted the bathroom into an "ad hoc meth lab". There was nothing else in the house suggesting it was being used for any
20 purpose other than the manufacture of methylamphetamine.[3]

9. Three pistols were found at the premises and the appellant was convicted of their possession.[34] Cash in the sum of $328,000 was found in circumstances that indicated it belonged to the deceased.[45] Cash in the sum of $16,900 and 15 grams of methylamphetamine were found in the appellant's locked bedroom in her home in Hurstville.[56] The trial judge found that the appellant was being paid for her involvement in the manufacture and that this cash was part of that payment.[67]

30 10. The process of manufacture undertaken by the appellant involved dissolving a solute (containing methylamphetamine) in a solvent (acetone) over low heat. Acetone is flammable and generates flammable vapours on heating. Once the concentration of vapours reaches an ignitable level it can explode if lit by a source of ignition. A source of ignition can be a spark or an electrical appliance or a naked flame. An ignitable concentration of vapour is likely to be reached more quickly when the act of evaporation is taking place in a confined space. Explosions or fires in clandestine methylamphetamine laboratories are usually caused during the evaporation of a flammable solvent.[78]

40 11. The Crown case on the manufacturing charge was not limited to her ownership of the house, purchase of eight litres of acetone, and presence at the time of police arrival (cf. AWS [12]). The appellant gave evidence that she had taken

---

[1] *R v IL (No 4)* [2014] NSWSC 1801 at [2].
[2] *R v IL* [2016] NSWCCA 51 at [8].
[3] *R v IL (No 4)* at [11]–[12].
[34] *R v IL (No 4)* at [31].
[45] *R v IL (No 4)* at [23].
[56] *R v IL (No 4)* at [15].
[67] *R v IL (No 4)* at [22].
[78] *R v IL (No 2)* [2014] NSWSC 1710 at [58], [66]–[67], [72]; *R v IL (No 4)* at [8]; *R v IL* [2016] at [12].

two gas bottles similar to the ones found in the bathroom to a service station and filled them, and that she had stirred a pot of methylamphetamine in the kitchen during the process of extraction early in the morning of 4 January 2013. The appellant gave evidence that she did not know what it contained, but as the trial judge found, the jury rejected that suggestion.[89]

12. The case at trial and in the Court of Criminal Appeal ("the CCA") was conducted on the basis that the Crown could not establish who lit the burner, not that the deceased lit the burner.

10

Part V: Applicable legislative provisions

13. *Criminal Law Consolidation and Amendment Act* 1883 (NSW) s9
Crimes Act 1900 (NSW) s5 (repealed), s18
Crimes and Other Acts (Amendment) Act 1974 (NSW) s5(a)
Crimes Amendment Act 2007 (NSW) Sch 11, cl 65
Drug Trafficking and Misuse Act 1985 (NSW) s33(3)(a)
Homicide Act 1957 (Eng) s1

20 ## Part VI: Statement of Argument

Summary of the Appellant's Argument

14. The expression of Ground 1 in the Notice of Appeal is directed to the relevance of the fact that the act causing death was performed by the deceased. However the appellant's written submissions are directed to the broader question of her liability for an act she did not physically perform, regardless of whether the victim was a co-venturer or an unrelated third party.[910]

30 15. In support of Ground 1 the appellant argues:

(1) that the CCA misconceived the basis of liability relied upon the Crown (basic joint criminal enterprise) and instead approached the case as if it were one of extended joint criminal enterprise, but without requiring an element of foresight on the part of the appellant as required by established principles of extended joint criminal enterprise: AWS [23], [28], [29], [71](ii), [79]; and

(2) foresight of the possibility of death is or should be a requirement to fix liability in a non-physical participant to constructive murder, because:

40

(i) principles of joint criminal enterprise require "foresight of the commission of an incidental crime (constructive murder)" (AWS [29]); and

(ii) to require anything less by way of mental element fails to properly reflect the desirable principle that there should be a close correlation between moral culpability and legal liability (AWS [65]–[70], [90]).

---

[89] *R v IL (No 4)* at [14], [22].
[910] As the appellant acknowledges at AWS [27] the issues raised in the appeal are equally applicable to a situation where a co-venturer kills someone other than himself.

16. In support of Ground of Appeal 2, the appellant argues that malice is a requirement for liability under s18(2)(a) and that in this case malice was to be proved by establishing recklessness, which requires foresight of the possibility of death (AWS [29]).

17. Throughout her submissions and in relation to both Grounds of Appeal, the appellant formulates the proposed mental element differently. The proposed element is described variously as "subjective foresight of the risk of death" (AWS [3]); "subjective understanding of a risk of death (or at least injury)" (AWS [29]); "contemplation of the risk of an (unintended) death" (AWS [88]); "contemplation of the risk of death (caused by an voluntary act but without intent to kill or cause GBH)" (AWS [90]) and "foresight of the possibility of death" (AWS [90]). The respondent assumes that these phrases are used by the appellant interchangeably to discuss the one mental element, to which the respondent will refer as "foresight of the possibility of death".

Summary of the Respondent's Argument

18. The CCA held that it would be open to a jury to find the appellant guilty of murder under s18(1) *Crimes Act* 1900 because there was an act of the appellant (the lighting of the burner, which was attributed to her by operation of principles of joint criminal enterprise) that caused the death charged (not contested) and that act was done during or immediately after the commission of a crime punishable by imprisonment for life (not contested).

19. With respect to Ground of Appeal 1, the CCA correctly approached the appellant's liability as that arising pursuant to principles of basic joint criminal enterprise rather than extended joint criminal enterprise, and applied those principles without error. The Court also applied established principles of constructive murder and joint criminal enterprise that recognise that foresight of possibility of death is not a requirement of liability either for the actor who physically commits the act causing death, or for a co-offender in a joint criminal enterprise that encompasses the act causing death.

20. The appellant invites this Court to develop the law to introduce into the operation of s18 the requirement that the offender foresee the possibility of death. The subjective element sought to be introduced by the appellant is not supported by the text of s18 or authority concerning complicity and constructive murder.

21. With respect to Ground of Appeal 2, in the context of constructive murder the requirement of malice in s18(2)(a) is satisfied by proof of the foundational offence. Further, recklessness as proof of malice for s18(2)(a) requires only foresight of some harm, not foresight of the possibility of death.

22. In support of the respondent's argument, the respondent will first address relevant principles concerning murder, manslaughter and complicity and their combined operation by reference to existing authority ([23] to [56]), then address the appellant's grounds of appeal ([57] to [89]).

Felony Murder, Constructive Murder and Statutory Murder

Introduction and history in NSW

23. The constructive murder rule contained in s18(1)(a) *Crimes Act* 1900 (NSW) renders a person who causes the death of another during or immediately after the commission of an offence carrying a penalty of imprisonment for life or 25 years – the "foundational offence" – liable to be convicted of murder even though she otherwise lacks the mental element required for murder.

10

24. Section 18 is a statutory formulation of the ancient "felony murder rule", which in its original formulation provided that any killing in the course of the commission of any unlawful act was murder.[11] The history of the felony murder rule, the breadth of which has differed over time, is detailed in various decisions of this Court.[1012]

25. By the 18th Century, the rule was described as applying in the case of killing in the course of an act with intent to commit a felony.[1113] By the 19th Century the rule was further refined to attribute liability for murder for any unintended killing
20 that occurred in the course of the execution of a felony that involved violence or danger to some person.[1214]

26. The formulation of the rule that eventually became s18(1) *Crimes Act* 1900 (NSW) was first enacted by s9 of the *Criminal Law Consolidation and Amendment Act* 1883 (NSW):

> Whosoever commits the crime of Murder shall be liable to suffer death – And Murder shall be taken to be where the act of the accused, or thing done by him omitted to be done, causing the death charged, was done or omitted with reckless
30 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, of an act obviously dangerous to life, or a crime punishable by death or penal servitude for life.** – Every other punishable homicide shall be taken to be Manslaughter. (Emphasis added.)

27. Section 9 of the 1883 Act was described by Sir Alfred Stephen as a departure from the common law rule, which applied to a felony of any kind, whereas s9 required the felony to be a capital offence or one punishable by penal servitude
40 for life.[1315] Whilst s9 of the 1883 Act incorporated acts *"obviously dangerous to life"*, it was not limited to a foundational offence involving violence or danger to any person, and encompassed any crime punishable by death or penal

---

[11] E Coke *Institutes of the Laws of England concerning High Treason and other pleas of the Crown and criminal causes* (E and R Brook, 1797) Part 3, cap 8, 56.

[1012] *Ryan v The Queen* (1967) 121 CLR 205, *Mraz v The Queen* (1955) 93 CLR 493, *Wilson v The Queen* (1992) 174 CLR 313, *R v Lavender* (2005) 222 CLR 67.

[1113] Foster *Discourse on Homicide* in *Report and Discourses:* 1st ed. (1762) p258, cited in *Wilson* at 322.

[1214] *Ross v The King* (1922) 30 CLR 246; *Ryan* at 240–241 per Windeyer J.

[1315] A Stephen and A Oliver *Criminal Law Manual* (Govt Printer 1883) p201.

servitude for life. The terms of its successor, s18 of the *Crimes Act* 1900 were similarly unrestricted.

28. At the time of its enactment, s9 of the 1883 Act applied to crimes that did not include as an element an act of violence against a person, such as offences of damage to public bridges;[1416] interference with railways;[1517] setting fire to a ship[1618] and exhibiting false signals on a ship.[1719] With the enactment of the *Crimes Act* 1900 (NSW), these and other examples of non-violent offences continued to qualify as foundational offences for constructive murder under s18.[1820]

10

29. In 1974, the words *"of an act obviously dangerous to human life"* were removed from s18(1).[1921] Later, by the *Crimes (Life Sentences) Amendment Act* 1989 (NSW), the class of offences falling within s18(1) was amended to include those which attracted a maximum penalty of imprisonment for 25 years. Currently, s18 applies to foundational offences with maximum penalties of 25 years or life imprisonment and includes a number of offences that are not violent nor obviously dangerous to any person.[2022]

The relevant state of mind for constructive murder

20

30. The operation of constructive murder was first debated in NSW in 1873 in support of cl 8 the *Criminal Law Consolidation and Amendment Bill* 1873.[2124] The construction of the relevant state of mind for murder was described by the Attorney General in the second reading of the Bill:

> There can be little doubt that whenever death is caused, even unintentionally, in the commission of a felony, the crime is murder; the law, so to say, translates the real intent from the felony contemplated by the perpetrator, to the death which accidentally happens in the perpetration of the felony, which alone he intended to
> 30 commit, and makes of the criminal a murderer, when he only possibly intended to be a thief. By a fiction of law, his original unlawful intent (to steal perhaps) is transferred to the capital offence, which is accidental.[2225]

31. As was recognised by the Attorney General, the section operates to construct the relevant intent and in so doing to attach liability for the more serious offence

---

[1416] Section 205 *Criminal Law Amendment Act* 1883 (NSW).
[1517] Section 207 *Criminal Law Amendment Act* 1883 (NSW).
[1618] Section 212 *Criminal Law Amendment Act* 1883 (NSW).
[1719] Section 215 *Criminal Law Amendment Act* 1883 (NSW).
[1820] The offences in the above-cited sections of the 1883 Act appeared in the 1900 Act at ss228, 230, 235 and 240 respectively.
[1921] *Crimes and Other Acts (Amendment) Act 1974 (NSW)* s5(a); see also the discussion in NSW Law Reform Commission *Complicity* Report 129 (December 2010) ("Report 129") at [5.14]–[5.18].
[2022] A full list of qualifying foundational offences is set out at Appendix C to Report 129.
[2124] Clause 8 of the Bill stated *"Whoever shall be convicted of murder, shall be liable to suffer death. Provided that where the act shall not have been premeditated or committed with criminal indifference to life nor have been done with intent to kill or inflict grievous bodily harm upon any person, nor in any attempt by the accused to commit, or during, or immediately after the commission by him of a capital offence, or burglary, or robbery, or some offence obviously dangerous to life, it shall be lawful for the jury to find the accused guilty of manslaughter only."* The bill was not passed in that form, but was in substance (with the addition of the reference to accomplices) later enacted as s9 *Criminal Law Consolidation and Amendment Act* 1883 (NSW).
[2225] *Sydney Morning Herald* (11 January 1877), reproduced in Report 129 at [5.7].

to an offender whose state of mind does not encompass intent or foresight as to the fatal consequences of his act.

32. This Court has consistently confirmed that the state of mind necessary to establish constructive murder in relation to the physical perpetrator of the act causing death is that necessary to prove the foundational offence, together with proof that the act causing death was voluntary (where the act causing death is not an element of the foundational offence).[2326]

10 33. Section 18(1)(a) requires that the act causing death was done during or immediately after the commission of the foundational offence, but there is no requirement that the act causing death is an element of the foundational offence.[27]

34. Subjective foresight of death (or even grievous bodily harm) on the part of the physical perpetrator of the act causing death was not a requirement for felony murder at common law,[2428] nor is it required to establish constructive murder under s18. In *Ryan v The Queen* (1967) 121 CLR 205 it was noted by Barwick CJ (in the context of a case involving the discharge of a firearm during a robbery)
20 that it was not necessary that *"the accused ought to have realised that his act would wound."*[2529] As the Full Court in *The Queen v Van Beelen* (1973) 4 SASR 353 observed, if subjective foresight of death or grievous bodily harm were required *"there would be no content left in the doctrine of felony murder, since an unlawful act committed with foreknowledge that it was likely to cause death or grievous bodily harm would itself amount to murder if death resulted even if no question of the commission of any other felony were involved at all."*[30]

35. The application of these principles to non-physical participants in a joint criminal enterprise felony murder is discussed below at [46]–[50].

30

36. The felony murder rule has been abrogated by statute in most Australian jurisdictions.[2631] In NSW, constructive murder has been the subject of academic criticism and various calls for reform, which to date have not been acted upon.[2732]

[2326] *Ryan, Mraz, Lavender,* also *Sio v The Queen* [2016] HCA 32; (2016) ALR 57; see too *Arulthilikan v The Queen* [2003] HCA 74; (2003) 203 ALR 259 at [28] (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) in the context of statutory murder under s12A *Criminal Law Consolidation Act* 1935 (SA).

[27] *Mraz* at 505; *Johns* [1978] 1 NSWLR 282 at 294–295; *R v Munro* (1981) 4 A Crim R at 69; *Spathis v R; Patsalis v R [2001] NSWCCA 476; (2001) 107 A Crim R 432* at [312].

[2428] *R v Ryan and Walker* [1966] VR 553 at 563–564; *Van Beelen* at 402; *DPP v Perry* [2016] VSCA 152 at [37].

[2529] *Ryan* at 224 per Barwick CJ.

[30] *Van Beelen* at 402 per Bray CJ, Mitchell and Zelling JJ.

[2631] Victoria and South Australia abolished and restated the law in this area: s 3A *Crimes Act* 1958 (VIC), s12A *Criminal Law Consolidation Act* 1935 (SA). The ACT abolished the felony murder rule without restatement in 1990: s12(1) *Crimes Act* 1900 (ACT) inserted by s5 *Crimes (Amendment) Ordinance (No 2)* 1990 (ACT). The relevant Queensland, Western Australian, Tasmanian and Northern Territory code provisions are: s302(1)(b) *Criminal Code Act* 1899 (QLD); s279(1)(c) *Criminal Code Act Compilation Act* 1913 (WA); ss157(1)(d)–(f) and (2) *Criminal Code Act* 1924 (TAS); s161A *Criminal Code Act* 1983 (NT).

[2732] Report 129 Chapter 5; and see for example Prue Bindon *The Case for Felony Murder* (2006) 9 FJLR 149.

37. In Victoria and South Australia an offence of statutory murder has been enacted, the elements of which have been held to be the same as felony murder at common law, the significance of which is discussed below at [69]–[70].

38. In England and Wales, the felony murder rule was abolished without restatement in 1957.[2833] In the United States of America, the rule remains in all but seven jurisdictions. Between the States there are varying formulations as to the mental element required, and there are 28 states in which the mens rea element of felony murder is satisfied by proof of the commission of the foundational offence.[2934] In California the manufacture of methylamphetamine is regarded as a matter of law as a qualifying offence for felony murder.[3035]

Principles of Complicity

39. As this Court recently reaffirmed in *Miller v The Queen; Smith v The Queen; Presley v DPP (SA)* [2016] HCA 30; (2016) 55 ALJR 23, a joint criminal enterprise comes into being when two persons agree to commit a crime. The existence of the agreement need not be express and may be inferred from the parties' conduct. 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.[3136]

40. It was this basic form of joint criminal enterprise that was the basis of the appellant's liability for acts she did not physically perform for the purpose of the drug manufacturing charge. The appellant's liability for the lighting of the burner is uncontentious in these proceedings insofar as it applies to the offence of manufacturing a large commercial quantity of methylamphetamine (AWS [25] and [71]).

41. The doctrine of joint criminal enterprise provides that an accused may be liable not only for the acts within the scope of the originally agreed crime, but also for acts contemplated and agreed to by the accused that may occur as an incident of carrying out the original venture. In *Johns (TS) v The Queen* (1980) 143 CLR 108, this Court approved and adopted the statement of principle of Street CJ, namely, that a secondary party bears liability for an act which was within the contemplation of both himself and the principal as an act which might be done

---

[2833] *Homicide Act* 1957 (Eng) s1(1).

[2934] See Paul H Robinson and Tyler Scot Williams *Mapping American Criminal Law: An Exploration of Diversity Among the* States, Forthcoming; "Chapter 5: Felony-Murder Rule", University of Pennsylvania Law School Public Law Research Paper No 17-3 (2 January 2017).

[3035] Because it regarded is as an activity inherently dangerous to human life: *People v James* (1998) 62 Cal App 4th 244, confirmed by the Californian Supreme Court in *People v Robertson* (2004) S118034 and *People v Howard* (2005) S108353. A number of other states that maintain the felony murder rule have legislated to include drug manufacturing as a qualifying offence (see for example Alaska Statutes §11.41.110(a)(3); Arizona Revised Statutes §13-1105(A)(2); Kansas Statutes §21-5402(c)(1)(N); Oklahoma Statutes §21-701.7(B); West Virginia Code §61-2-1). Indiana specifically lists *"manufacturing methamphetamine"* (Indiana Code §35-4-2-1-1(3)(B)).

[3136] *Miller* at [4] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; approving *McAuliffe v The Queen* (1995) 183 CLR 108 at 113–114 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ.

in the course of carrying out the primary criminal intention.[3237] As noted by the plurality in *Miller,* when considering *Johns*, the act is within the scope of the agreed criminal enterprise because it is within the parties' contemplation and foreseen as a possible incident of its execution.[3338] The boundary between this form of complicity and extended joint criminal enterprise is not always easy to draw.[3439]

42. The concept of extended joint criminal enterprise was explained in *McAuliffe v The Queen* (1995) 183 CLR 108, where the accused was party to an agreement to bash a person in a park and the victim was killed. It was held that there was a sufficient intent for murder if the accused contemplated the intentional infliction of grievous bodily harm by one of the group as a possible incident in carrying out their agreement and with that awareness continued to participate in the enterprise.[3540] As was observed in *Miller*, in such circumstances, the accused is as much a party to the incidental crime as he is when its commission was within the agreed common purpose.[3641] This Court has declined to overrule *McAuliffe* in *Clayton v The Queen* [2006] HCA 58; (2006) 231 ALR 500 and more recently in *Miller.*

43. As the appellant notes at AWS [71]–[72], whilst there is a distinction between the *Johns* and *McAuliffe* forms of liability, they are each forms of liability imposed upon an accused for a crime which was not the primary criminal intention of the parties, but which was foreseen as a possible incident of carrying out the original criminal intention.

44. Inherent in the application of principles of joint criminal enterprise is the acceptance that the criminal culpability of a participant in a joint criminal venture for both the agreed crime and any incidental crime lies in her participation in the planned criminal venture, and in the case of an extended joint criminal enterprise, her participation in that venture with the necessary foresight.[42]

45. The law does not characterise the participant who commits a particular physical act in furtherance of that agreement as the principal offender and other parties as secondary offenders; both offenders are regarded as principals who share liability for the physical act as McHugh J held in *Osland v The Queen* (1998) 197 CLR 316:

> [i]t is the acts, and not the crime, of the actual perpetrator which are attributed to the person acting in concert. If the latter person has the relevant *mens rea*, he or she is guilty of the principal offence because the *actus reus* is attributed to him or

---

[3237] *Johns* at 130–131; noting that Johns was charged as an accessory before the fact (to the robbery which resulted in the murder of the intended victim of the robbery).
[3338] *Miller* at [20] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.
[3439] Report 129 at [2.25].
[3540] *McAuliffe* at 113 per Brennan CJ, Dawson, Toohey, Deane and Gummow JJ.
[3641] *Miller* at [29] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.
[42] *McAuliffe* at 118 (per Brennan CJ, Dawson, Toohey, Deane and Gummow JJ); *Gillard v R* [2003] HCA 64; 219 CLR 1 at 37 [112] (per Hayne J); *Miller* at [135] (per Keane J); *Osland v The Queen* (1998) 197 CLR 316 at 329 [27] (per Gaudron and Gummow JJ).

her by reason of the agreement and presence at the scene. It is irrelevant that the actual perpetrator cannot be convicted of that crime.[3743]

Complicity and Constructive Murder

46. In relation to constructive murder, subjective foresight of death has not previously been regarded as a requirement for liability of a non-physical participant to felony murder.

47. In *R v Jacobs; R v Mehajer* (2004) 151 A Crim R 452, Wood CJ at CL rejected the argument that the language of s18 altered the operation of the common law rules of complicity, and referred to a number of cases of constructive murder where the act causing death was that of an accomplice and not the accused.[3844] In relation to the mental element necessary to hold a non-physical participant liable for constructive murder, Wood CJ referred to the decision of *R v Surridge* (1942) 42 SR (NSW) 278, where the prosecution could not establish which of two men had physically inflicted the act causing the death of the victim. In that case, Jordan CJ observed that the liability of the accomplice depended only upon proof of his involvement in a common purpose to do the foundational offence.[3945]

48. Contrary to the appellant's submission at AWS [63], the reasoning in *Surridge* employs principles of complicity that have been subsequently approved in *Johns*, *McAuliffe* and *Miller* and followed and applied in a constructive murder context in *Jacobs*.

49. In *R v R; R v G* (1995) 63 SASR 417; (1995) 79 A Crim R 191, a five judge Full Bench rejected the submission that liability for murder of a participant in a felony who is not the physical perpetrator of the act causing death should be dependent on proof that he agreed or consented or contemplated that fatal violence might be used.[4046] King CJ noted that the common law of felony murder was as expressed by Philip J in *Solomon* [1959] Qd R 123 at 126–27 *"by the common law, if a victim of robbery, which is a felony involving violence, be killed in the course of the robbery all parties to the robbery are guilty of murder. The probability or possibility that homicide that would or would not be done is irrelevant."*[4147] His Honour also observed that such a principle is consonant with the principles for accessorial liability for unintended consequences as explained in *Giorgianni v The Queen* (1985) 156 CLR 473, which require on the part of the accessory only knowledge of the essential facts which made what was done a crime, not an intention or knowledge which encompasses its consequences.[4248] The reasoning in *R v R* is directly applicable to constructive murder under s18 (cf. AWS [64]).

[3743] *Osland* at 344, [75]; see too *Miller* at [140]–[144] per Keane J.
[3844] *Jacobs* at [200]–[215]; see too *R v Vandine* [1970] 1 NSWLR 252.
[3945] *Surridge* at 222.
[4046] *R v R* at 420.
[4147] King CJ also noted (at 424) that this statement of the common law was supported by A Stephen, *Digest of the Criminal Law* (7th Ed.) p225; *R v Jackson* (1857) 7 Cox's CC 357; *R v Rubens & Rubens* (1909) 2 CrAppR 163; *R v Murray* [1924] VLR 374; *R v Appleby* (1940) 28 CrAppR 1; *R v Ryan & Walker* [1966] VR 553 esp at 563-7; *R v Grant and Gilbert* (1954) 38 CrAppR 107.
[4248] *Giorgianni* at 495 per Mason J; 501–503 per Wilson, Deane and Dawson JJ.

50. A similar approach has been taken in relation to liability for statutory murder for non-physical participants. As the appellant accepts, the charge to the jury in *Arulthilikan* [2003] HCA 74; (2003) 203 ALR 259 involved the direct application of conventional principles of constructive murder to a secondary participant (AWS [64]).[4349]

Complicity and Involuntary Manslaughter

10 51. The elements necessary to establish involuntary manslaughter by unlawful and dangerous act were described in *Wilson* and affirmed in *Lavender*,[4450] namely that the act causing death be (a) unlawful, that is criminally unlawful; and (b) dangerous, in that the act carries with it an appreciable risk of serious injury.

52. The mens rea required for this category of involuntary manslaughter is one of general intent and relates to the unlawful and dangerous act: that act must be willed and not accidental.[4551] The assessment of the dangerousness of the act causing death is an objective test: would a reasonable person in the appellant's position have realised that the act exposed others to an appreciable risk of
20 serious injury?

53. It is uncontroversial that liability for manslaughter arises where death was neither foreseen nor intended. It has been observed that it is the "accident" of death that renders the accused liable for manslaughter, notwithstanding that her culpability is the same as that required for the lesser, unlawful act. As this Court has observed, any "illogicality" to this approach *"is an illogicality which runs throughout the whole of our law, both the common law and the statute law"* and which is accommodated in the flexibility of sentencing for manslaughter.[4652]

30 54. This Court has rejected the submission that principles of accessorial liability (including joint criminal enterprise) fail to properly reflect the culpability of accessories and has observed that a person who has participated in an illegal and dangerous act from which unintended death results should be liable for manslaughter, whether as a result of the application of principles of joint criminal enterprise or as an accessory.[4753]

55. In *R v CLD* [2015] NSWCCA 114, in a virtually identical factual scenario to this case, the CCA held that it would be open to a jury to find the accused guilty of the manslaughter of his co-participant to a joint enterprise to manufacture
40 methylamphetamine who was killed when their clandestine laboratory exploded.[4854]

[4349] *Arulthilikan* at [16] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.
[4450] *Lavender* at 82 [37] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
[4551] *Wilson* at 328 [35] per Mason CJ, Toohey, Gaudron and McHugh JJ.
[4652] *Reg. v. Creamer* (119) (1966) 1 QB 72 at 82, cited in *Giorgianni v The Queen* (1985) 156 CLR 473 at 503, per Wilson, Deane and Dawson JJ; and *Wilson* at 341 per Brennan, Deane and Dawson JJ
[4753] Cf. AWS [42]; see *Giorgianni.*
[4854] Special Leave refused: *CLD v The Queen* [2016] HCASL 102 (12 May 2016).

56. Contrary to the submissions at AWS [78] and [89], the Crown case for manslaughter is that the appellant agreed with the deceased to engage in an unlawful act of manufacturing methylamphetamine, which for the reasons set out by the CCA at [95] was objectively dangerous.

Submission

Ground of Appeal 1

The basis of liability for the act causing death

10

57. The appellant complains that the CCA recast the prosecution case by imposing a form of extended joint criminal enterprise liability upon the accused but without requiring the necessary mental element (AWS [38], [79]). To the contrary, the CCA expressly disavowed such an approach at CCA [38]–[41].

58. At CCA [25] Simpson JA observed that the doctrine of extended joint criminal enterprise did not arise for consideration and that an understanding of the principles stated in *Johns* was sufficient. This observation was correct, as the Crown case was that the act causing death (the lighting of the ring burner) was
20 an act squarely within the ambit of the common design to manufacture methylamphetamine. Whether this is expressed as being "within the scope of the joint enterprise" or being a "contingency within the contemplation of the parties" is unimportant, the point being that there is no allegation that the act causing death was one performed outside the scope of the agreement to manufacture drugs. As Simpson JA noted at CCA [27], application of the conventional principles of basic joint criminal enterprise meant that the act of the deceased in lighting the burner was the appellant's act.[4955] The CCA was correct to hold that the principles of extended joint criminal enterprise liability were not applicable in this case in the manner in which they applied in *McAuliffe*
30 and other intentional murder joint criminal enterprise cases: CCA at [32]–[33], [40], [60]–[63].

59. The CCA at [64] did not develop "a new theory of complicity" – rather, it rejected the trial judge's mischaracterisation of the Crown case as one of accessorial liability instead of one based on liability for her participation in a joint criminal enterprise (cf. AWS [56], [59]).

The law does not require foresight of the possibility of death

40 60. The appellant suggests that Courts of Criminal Appeal have "approximated a requirement" of foresight of the possibility of death or the "contemplation of the 'incidental crime' of murder" (cf. AWS at [68]–[70]). However, the authorities relied upon by the appellant at AWS [69] do not provide doctrinal support for this proposition. Properly analysed, these authorities show that the relevant foresight of the non-physical participant concerns the act causing death as a possible incident of the common design.

[4955] See too *Osland* at 341–346.

61. In *R v Sharah* (1992) 30 NSWLR 292, the foundational offence was armed robbery with wounding of Victim 1, and the act causing death was the shooting of Victim 2. The appellant did not physically perform the act causing death. The Crown case was put as joint criminal enterprise intentional murder and in the alternative, joint criminal enterprise constructive murder. The court held that the elements of constructive murder required in that case included a joint criminal enterprise to carry out an armed robbery with wounding; that the act causing death occurred during the commission of the foundational offence; and that the act causing death (specifically the discharge of a loaded gun) was foreseen by the appellant.

62. Simpson JA queried at CCA [36] whether this further element (foresight of the possibility of the discharge of the gun) additional to the elements of the foundational offence was even required, noting that the same question had been raised previously by the CCA in *Batcheldor v R; Walsh v R* [2014] NSWCCA 252, where Hidden J (with whom Bathurst CJ and R A Hulme J agreed) said:

> In many cases of constructive murder arising from an armed robbery with wounding, the wounding charge is the same act as that which caused the death. This was not the case in *Sharah*. The s98 count was based upon the injury to [Victim 1] when he was struck by the barrel of the gun. The murder count was based upon the shooting of [Victim 2]. It may be for this reason that Carruthers J, in setting out the appropriate directions for constructive murder, included the element that the appellant had in mind the discharge of the weapon as a contingency of the armed robbery. However, it is not apparent that that additional direction was required. **The complicity of the appellant in the s98 offence through his contemplation that someone might be wounded, whoever that person might be, whether it might be one person or more than one, and by whatever means, was sufficient to establish his guilt of murder.**[5056] (Emphasis added.)

63. R A Hulme J also noted in *Batcheldor* at [128] that the suggestion in *Sharah* that the requirement of foresight of the possibility of an act resulting in death is a requirement derived from the law of extended joint criminal enterprise, not felony murder. Moreover, as the Law Reform Commission observed, prior to *Sharah* such a requirement was not part of the common law of felony murder as it applied to secondary participants.[57]

64. *R v Jacobs; R v Mehajer* concerned a similar factual scenario to *Sharah* and a similar direction. The criticisms of *Sharah* noted above also apply to this case. In *Rich v The Queen* [2014] VSCA 126, the test applied to the facts was whether the secondary participant contemplated the act causing death as a possible incident of the foundational crime; not whether he contemplated death or killing.[5158]

65. *Spathis v R; Patsalis v R* [2001] NSWCCA 476; (2001) 107 A Crim R 432 also concerned a joint criminal enterprise murder; the murder being left to the jury on

---

[5056] *Batcheldor* at [79].
[57] Report 129 at [5.37].
[5158] *Rich* at [290]–[291]. The passage at [258]–[260] cited at AWS [69] was not the basis upon which the appeal was determined.

the basis of joint criminal enterprise intentional murder (both basic and extended) and constructive murder where the foundational offence was robbery with wounding. The act causing death was stabbing, which was also an element of the foundational offence. The jury was directed that the accused must be aware that his co-accused was armed with a knife and that there was a substantial risk that during the robbery he might stab the deceased "seriously injuring or killing him" (see AWS [69]). Carruthers AJ (with whom Heydon JA and Smart AJ agreed) held that it was not necessary for the Crown to prove that the non-physical participant was aware that there was a substantial risk that the co-accused might stab and seriously injure or kill the deceased. It was sufficient for the Crown to establish that the stabbing by the co-accused during or after the robbery was a contingency which the non-physical participant had in mind, whether or not the stabbing was intentional and whether or not in furtherance of the common unlawful purpose.[5259]

66. The recent decision of this Court in *Sio v R* [2016] HCA 32; (2016) 334 ALR 57 concerned a constructive murder charge where liability for the foundational offence involved an extended joint criminal enterprise. The Crown case was that Sio (who was involved in planning the offence but remained outside the premises as a "getaway driver") had entered into a joint criminal enterprise to commit armed robbery with foresight of the possibility of a wounding by his co-offender. The correctness of the directions to the jury on the charge of armed robbery with wounding were challenged upon appeal. In a joint judgment, the Court held that the elements required to be proved for a charge of armed robbery with wounding were precisely the same elements required to be proved to make out the charge of constructive murder.[60] The mental element required to be proved was only that which arose by operation of the principle of extended joint criminal enterprise in relation to the foundational offence, namely that he foresaw the possibility that the victim might be wounded. This requirement of foresight was applicable not to the crime of murder but to the foundational offence of armed robbery with wounding.[5361]

67. The authorities cited by the appellant do not require on the part of a non-physical participant a requirement of foresight of the possibility of death. At CCA [40] Simpson JA correctly noted, consistently with the directions approved by this Court in *Sio* and in accordance with established principle, that it was not necessary for the Crown to prove foresight of death because all that was required was foresight of the performance of the act causing death – the act of lighting the burner – as an incident of the agreement to manufacture. Furthermore, these authorities all address concepts arising out of extended joint criminal enterprise, and so do not apply directly to this case.

[5259] *Spathis* at [443].

[60] *Sio* at [27] and [76] per the Court (French CJ, Bell, Gageler, Keane and Gordon JJ).

[5361] As the appellant had been acquitted of murder, and the wounding was also the act causing death, the question of whether the *Sharah* approach was correct did not arise.

The law should not require foresight of the possibility of death

68. The appellant's central contention is that the law should be developed and changed by this Court so as to require that non-physical participants in a constructive murder charge contemplate the possibility of death. Such an argument overlooks the reality that the objective of s18(1)(a) is to construct the relevant mental element necessary for murder in cases where death was unintended.[5462] To the extent that the appellant suggests that the CCA's approach is not consistent with "current concepts" of liability (AWS [23], [65]–[66]), the submission is not correct. The construction by the law of an intent to murder from an intent to commit the foundational offence is not only a longstanding common law mechanism but it is also currently applied in jurisdictions that have abolished the felony murder rule and replaced it with statutory murder provisions.[63] Judicial consideration of such provisions confirms that the only intent required to be liable for murder is the mental element required for the (less serious) foundational offence.

69. In Victoria, the common law rule was abolished and replaced with an offence of statutory murder in 1981. Section 3A(1) of the *Crimes Act* 1958 (VIC) requires that the foundational offence be one *"the necessary elements of which include violence"* and that the act causing death be an *"act of violence"*. In *DPP v Perry* [2016] VSCA 152 the Court confirmed that the elements of statutory murder contained in s3A *Crimes Act* 1958 (VIC) are the same as the elements of the common law felony murder rule.[5564] Intention to kill or cause grievous bodily harm is not an element of statutory murder, which the Court observed, covers the full range of conduct from accidental death to where death is intended.[5665]

70. In South Australia, the common law rule was abolished and replaced with an offence of statutory murder in 1984. Section 12A *Criminal Law Consolidation Act* 1935 (SA) requires that the foundational offence be a major indictable offence carrying a maximum penalty of at least 10 years imprisonment and the act causing death must be *"an intentional act of violence"*. In *Arulthilikan* this Court confirmed the correctness of a charge to the jury for statutory murder which directed that it was not necessary that any of the multiple accused had an intention to cause death or grievous bodily harm or contemplated the intentional infliction of grievous bodily harm.[66] Furthermore, whilst the qualifying "act of violence" was the original presentation of the knife to threaten the victim of the robbery by one accused, this could properly be regarded as an act causing death (when it was a second victim who was fatally stabbed after the first victim had left the scene), for which all accused who were a party to the robbery were liable.[5767]

[5462] *Sydney Morning Herald* (11 January 1877), reproduced in Report 129 at [5.7].
[63] Section 3A *Crimes Act* 1958 (VIC); s12A *Criminal Law Consolidation Act* 1935 (SA).
[5564] *Perry* at [37].
[5665] *Perry* at [47].
[66] *Arulthilikan* at [16], [27] per Gleeson CJ, Gummow, Hayne Callinan and Heydon JJ.
[5767] *Arulthilikan* at [23] and [29].

71. In the context of a sole offender who unintentionally kills in the course of a foundational offence, it is uncontroversial that (assuming proof of the mental element of the foundational offence is established) the only further mental element required is that the act causing death be voluntary.[5868] In the context of a participant in a joint criminal enterprise who does not physically perform the act causing death, the critical question is whether the act causing death was within the contemplation of the secondary participant in her role as a principal of the original criminal enterprise.[5969]

10 72. There is no risk of criminal liability attaching to a person who is "not connected with the aspect of the foundational crime said to be hostile to life" (cf. AWS [65]) – on the contrary, where the act causing death is alleged to arise directly from the performance of the agreement, the scope of that agreement will be a critical consideration. Such an approach does not lead to an "open ended proposition" because it is confined by the scope of the agreement (in the case of basic joint criminal enterprise) or the requirement that it was contemplated by her as a possible incident of the agreement (in the case of extended joint criminal enterprise) (cf. AWS at [73]–[74] and [77]).

20 73. The application of the established principles detailed above does not diminish the importance of the concern that criminal responsibility should reflect the moral culpability of an individual offender, because in the agreed pursuit of a criminal purpose, the moral and criminal responsibility of the participants is the same. Nor does such an approach amount to "extending liability by free-standing responsibility for contemplated acts, as distinct from contemplation of incidental crimes" (cf. AWS [81]). The policy reasons for attributing coextensive liability to co-venturers in a criminal agreement are well understood and operate fairly.[70] As King CJ observed in *R v R*,[6071] if the policy is accepted that the actual perpetrator should be liable for the unintended consequences of his actions in
30 the course of the foundational offence (because in undertaking to commit that offence he must accept responsibility for what occurs during its commission), there is no sound policy reason why other participants in the offence should not also have to accept the same responsibility.

74. As the primary participant who physically does the act need not foresee the possibility of death, there is no principled reason to require the co-participant to foresee the possibility of death, as each co-participant is properly regarded as a principal: *Miller* at [140]. The addition of a requirement of foresight of death as suggested by the appellant would create an arbitrary distinction between persons who are properly regarded as joint principals in the foundational
40 offence.[6172] The appellant's argument at AWS [23] that such a disparity is warranted because the act causing death was not "the act of the accused", if accepted, would subvert the policy rationale repeatedly endorsed by this Court in relation to offences committed pursuant to a joint criminal agreement.

[5868] In *Perry* at [46].
[5969] *Spathis* at [315]; *Batcheldor* at [79].
[70] See the discussion in *Miller* at [147] per Keane J.
[6071] *R v R* at 421, in the context of the common law of felony murder as it applied in South Australia in 1993, which required the foundational offence to be a *"felony involving violence or danger"* (at 420).
[6172] *Miller* at [135]–[140] per Keane J.

75. The appellant's argument does not sufficiently acknowledge the text of s18(1), the legislative history of the provision, nor the basis on which this Court and other courts have explained the common law in respect of constructive murder. Section 18(1) does not and has never required that the offender foresee the possibility of death, or that the act causing death was committed during the commission of an offence of violence or was itself dangerous to life. Indeed, the 1974 amendments removed as a category of foundational offences, *"acts that [are] obviously dangerous to human life"* and this Court would not read back into s18(1) a requirement to that effect.

10

Ground of Appeal 2

An act done 'maliciously'

76. The CCA allowed the appeal on the basis that the Crown had demonstrated errors on questions of law alone as required for s107(2) *Crimes (Appeal and Review) Act* 2001 (NSW) (CCA [60], [64], [70]). In determining whether to exercise its discretion not to direct a retrial, the CCA considered the argument that a retrial should not be ordered as the Crown could not prove that the act
20 causing death was done maliciously as required by s18(2)(a).

77. In relation to the operation of s18(2)(a) to constructive murder, the CCA correctly found that s18(2)(a) is to be read and interpreted as though the extended definition of malice in the former s5 *Crimes Act* 1900 (NSW) had not been repealed. The CCA held that that provision in s5 adopts and extends the "conventional legal sense" of malice, and in addition to conventional common law concepts of malice the section also encompasses, relevantly, acts done recklessly or wantonly (CCA [82]–[88], [92]). Simpson JA applied the definition of recklessness described in *R v Cunningham* [1957] 2 QB 396 and followed in
30 *R v Coleman* (1990) 19 NSWLR 467, that is, the realisation that some physical harm might be done.[73] The CCA held that in this case, it would be open to a jury to find that the appellant was reckless within the meaning of s5 and that the act causing death was malicious for the purpose of s18(2)(a).

78. There was no error in the CCA's analysis. There is also another basis for upholding the CCA decision, quite apart from any consideration of recklessness, which is that an act may be done maliciously within the meaning of s18(2)(a) in a variety of circumstances, including where the act causing death was simply done during or immediately after the commission of the foundational offence.

40

Constructive Malice

79. At common law, malice aforethought (express or implied) was the element that distinguished murder from other forms of felonious killing.[6274] In the context of homicide, malice aforethought was established by proof of (a) an intention to kill; (b) an intention to cause grievous bodily harm to any person; or (c) knowledge that the act which causes death will probably cause death or

---

[73] *Cunningham* at 401.

[6274] *Parker v R* (1963) 111 CLR 610 at 626 (per Dixon CJ), 650–651 (per Windeyer); *James v The Queen* [2014] HCA 6; 253 CLR 475 at 497 (per Gaegler J).

grievous bodily harm to some person accompanied by indifference as to whether death or grievous bodily harm is in fact so caused: see *Crabbe v R* [1985] HCA 22; 156 CLR 464 at 467, citing Stephen *Digest of Criminal Law*.[6375] These are the three states of mind of "specific intent" enumerated in s18(1) *Crimes Act* 1900 (NSW).

80. At common law, malice aforethought for murder could also be established by proof of an intent to commit any felony whatever.[6477] As was observed in *Lavender*, *"Section 18(1) [i]s a statutory re-enactment of the element of malice in the crime of murder."*[6578] In prosecutions for felony murder it was recognised that once the mental element necessary to establish the foundational offence was made out, malice was also established.[6679] As noted by Toohey and Gaudron JJ in *Royall v The Queen* (1990) 172 CLR 378 at 428, *"*Mraz *is authority for the proposition that in the case of the murder-felony rule, the commission of the felony satisfies any requirement of malice."*[6780]

81. The operation of constructive malice in this way does not mean that s18(2)(a) has been given "no work or meaning" in relation to constructive murder (cf. AWS [36]).[6881] Rather, constructive malice will always be satisfied by proof of the intent to commit the foundational offence.

82. Consistently with the statements of principle in *Mraz, Ryan*, *Royall* and *Lavender*, once the CCA was satisfied that it would be open to the jury to find the foundational offence proved, it followed that constructive malice could be established. Accordingly, it is not strictly necessary for this Court to consider recklessness as basis for finding malice. Nonetheless, the CCA was correct in finding that, on the facts, recklessness to the *Coleman* standard would be available to establish malice for the purpose of sections 5 and 18(2)(a) (CCA [95]).

Recklessness as malice

83. The appellant argues that the standard of foresight described in *Cunningham* and *Coleman* is not appropriately applied to homicide and that the authorities referred to by the CCA do not support a lesser level of foresight than foresight of the actual resultant harm (ie death) (AWS [48]). No authority is cited in support of the proposition that in cases where the victim dies, foresight of death is

---

[6375] *Digest of Criminal Law* 1st Ed (1877) (Art 233) p144.
[6477] *Lavender* at [25] per Gleeson CJ, McHugh, Gummow and Hayne JJ, citing Stephen *Digest of Criminal Law* 1st Ed (1877) (Art 233) pp144–145.
[6578] *Lavender* at [26].
[6679] *Mraz* at 505 per Williams, Webb and Taylor JJ; 513 per Fullagher J; *Ryan* at 224 (per Barwick CJ), 230–231 (per Taylor and Owen JJ), 235 (per McKenzie J); *Van Beelen* at 402.
[6780] The correctness of this approach is supported by the language of the statute abolishing felony murder in England in Wales. Section 1(1) *Homicide Act* 1975 (Eng) is titled 'Abolition of "constructive malice"' and provides that *"Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."* See too 'Royal Commission on Capital Punishment 1949–1953: Report presented to Parliament by Command of Her Majesty' (Cmd. 8932) at par. 107, p40.
[6881] It should also be noted that this observation in *Royall* at 428 was merely the repetition of a submission made in the course of argument in that case.

required where recklessness is the relevant category of malice. The appellant recognises that what is proposed is a new limitation of liability for murder under s18, limited in her submission to non-violent foundational offences (AWS [54]).

84. The appellant argues that death is "not just a variation by degree of 'some physical harm'" and that accordingly, the definition of recklessness established in the authorities discussed above do not support a degree of foresight less than foresight of death: AWS [48]. This submission is also unsupported by authority and principle. The *Coleman* test provides that liability attaches by reason of the advertence by the accused to the risk of some harm. It is designed to exclude liability for acts where the infliction of any harm is unforeseen. Once harm is foreseen, recklessness is established. Thus an accused will be held liable for the infliction of grievous bodily harm where she foresaw that her act might cause some physical harm. In such a case, on the appellant's argument, if that victim died of his injuries, the accused would not be held to be liable unless she foresaw the possibility of his death.

85. In *Cunningham*, the appellant pleaded guilty to larceny of a gas meter. In the course of stealing the meter, he caused a gas leak that founded a charge of unlawfully and maliciously causing a person to take a noxious thing so as to endanger life.[6982] The Court held that malice was proven if the appellant foresaw his act might cause injury to someone but nevertheless proceeded.[7083] The offence included as an element the actual endangerment of life or grievous bodily harm, yet malice did not require foresight of either particular result (see CCA [98]).

86. In *Mowatt* [1968] 1 QB 421, the Court of Appeal held that on a charge of malicious wounding with intent to maim or disfigure, the relevant state of mind for malice was foresight of some physical harm to some person, albeit *"of a minor character"*.[84] Again, it was not necessary that the accused foresaw the gravity of harm described in the offence provision.[7185]

87. The CCA stated the correct test for recklessness, namely realisation that some physical harm might be done to a person, and held that it would be open to a jury to conclude that the appellant was reckless (within the meaning of s5) in circumstances which included that a plainly dangerous chemical operation was undertaken in a confined space in wholly unsuitable premises with primitive equipment (CCA [89]–[93], [95]). The assertion at AWS [55] that the CCA did not even apply a requirement for foresight of injury is without foundation.[7286]

[6982] Section 23 *Offences Against the Person Act* 1861 (Eng).
[7083] *Cunningham* at 401.
[84] *Mowatt* at 426; followed in *Coleman* at 475.
[7185] *Mowatt* at 426; see too *Rushworth* (1992) 95 Cr App R 252 at 256 (CCA [99]).
[7286] CCA [33] does not contain a finding of fact but an observation that the Crown case was not one of intentional murder. Similarly, the observations at CCA [60]–[61] and [63] are concerned with the misapplication of the test for constructive murder by the trial judge, not the question of foresight for recklessness.

Conclusion

88. The application of established principles of complicity made the act of lighting the burner in the furtherance of the joint enterprise to manufacture methylamphetamine the act of the appellant for the purpose of ascribing liability to her for the consequences of that act. Error has not been demonstrated in the approach of the CCA to this issue.

89. The lighting of the burner during the commission of an offence punishable by life imprisonment was malicious within the meaning of s18(2)(a) and further could properly be regarded as reckless within the meaning of s5. The CCA was correct to order a retrial on Count 2a.

Part VII: Statement of Contention

90. The respondent will seek leave to rely on a Notice of Contention in the form of the draft that accompanies these submissions.

91. The respondent contends that the judgment ought to be upheld on the ground that the CCA should have decided that the requirement in s18(2)(a) *Crimes Act* 1900 (NSW) that the act causing death be done maliciously could be satisfied by proof that the appellant committed the foundational offence of manufacturing a large commercial quantity of methylamphetamine.

Part VIII: Time estimate

92. It is estimated that 2 hours will be required for presentation of the respondent's oral argument.

Dated: 14 February 2017

Sally Dowling SC
Deputy Senior Crown Prosecutor

Helen Roberts
Crown Prosecutor

Counsel for the Respondent

Telephone: (02) 9285 8681
Facsimile: (02) 9267 2216
Email: mzelinka@odpp.nsw.gov.au