

IL v THE QUEEN (S270/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2016] NSWCCA 51

Date of judgment: 8 April 2016

Special leave granted: 16 November 2016

On 4 January 2013 Mr Zhi Min Lan suffered severe burns and smoke inhalation in a house fire. IL, who was also in the house, tried to prevent attending police from entering. The apparent source of the fire was an apparatus in the bathroom (where the fire was almost completely contained), comprising a ring burner attached by hose to a gas cylinder. Atop the ring burner was a pot containing a liquid from which methylamphetamine could be extracted.

Mr Lan later died from his injuries. IL was then charged with various offences, including the manufacture of a large commercial quantity of methylamphetamine. She was also charged with the murder, or alternatively the manslaughter, of Mr Lan.

At the trial of IL, the Crown case against her in respect of Mr Lan's death was one of constructive murder or of involuntary manslaughter by an unlawful and dangerous act. Both alternatives were based on IL having taken part in a joint criminal enterprise with Mr Lan, the foundational crime being the manufacture of methylamphetamine. IL was thereby liable, according to the Crown case, for all acts contemplated by the enterprise. This included the ignition of the ring burner, causing a fire which in turn caused the injuries and death, even if that act of ignition had been carried out by Mr Lan.

At the direction of the trial judge, Justice Hamill, the jury returned verdicts of not guilty on the charge of murder and the alternative charge of manslaughter. This was after his Honour had found it likely that Mr Lan had started the fire. Justice Hamill held that, in order for IL to be found guilty of murder, it was necessary that she had contemplated the possibility of Mr Lan intentionally setting a fire that could cause a death (thereby committing murder) within the scope of their criminal enterprise. Since it was not possible for Mr Lan to be convicted of his own murder, IL could not be found guilty on the basis of derivative liability. In relation to both murder and manslaughter, his Honour found causation to be an impediment to a guilty verdict. This was due to a lack of evidence to suggest that IL had acted together with Mr Lan in igniting the ring burner. The jury then found IL guilty of the other offences with which she was charged, whereupon Justice Hamill sentenced her to imprisonment for 11½ years with a non-parole period of 7½ years.

An appeal by the Crown was unanimously allowed by the Court of Criminal Appeal ("the CCA") (Simpson JA, R A Hulme & Bellew JJ). Their Honours held that Justice Hamill had erred by considering the relevant question to be whether IL had contemplated a fire causing fatal injury. Rather, the relevant question was whether IL had contemplated the ignition of the ring burner. The CCA held that IL's liability did not derive from, but was co-extensive with, Mr Lan's and

that her liability was for all acts undertaken by Mr Lan in the drug manufacturing enterprise. It did not matter whether IL had been directly involved in igniting the ring burner with Mr Lan.

The CCA ordered that IL be retried on the charges of murder and manslaughter. This was after rejecting an argument by IL that the element of malice required by s 18(2)(a) of the *Crimes Act 1900* (NSW) (“the Act”) could not be satisfied in relation to the act that had caused Mr Lan’s death. The CCA held that malice could be found by a jury on the basis of recklessness, since the chemical operation undertaken was a primitive one that was plainly dangerous. Acts done recklessly remained “malicious” within the meaning of s 18 despite the repeal in 2007 of s 5 of the Act. This was because the extended definition of “maliciously” prescribed by s 5 was preserved by a saving provision, cl 65 of Sch 11 to the Act (“clause 65”). The CCA further held that even if clause 65 did not have that effect, it was nevertheless open to a jury to find that the ignition of the ring burner was “malicious” in the legal sense of an act done deliberately and with a foresight of potential harm.

The grounds of appeal are:

- The Court below erred in determining, for both the murder and manslaughter charges, that if the deceased physically did the act which caused his death this was irrelevant; and/or in not requiring a sufficient connection between the accused and the act causing death if this was the case.
- The Court below was in error in its definition of recklessness, to find the act of the accused causing death sufficiently malicious to amount to murder, such that its exercise of discretion to quash the acquittal for murder miscarried.