

Constructive murder

By Richard Herps

A recent decision of the Court of Criminal Appeal has important implications for the doctrine of constructive murder, by making clear that the doctrine may apply more broadly than has sometimes previously been thought.

In *R v IL* [2016] NSWCCA 51, the focus of the court's attention was on the liability of an accused for the unintended consequences of her actions. Having set up a clandestine methylamphetamine laboratory in a suburban home without contemplating the possibility that someone might be injured or killed, she found herself charged with her partner's murder when he died of injuries sustained in the manufacturing process.

The case

On 18 November, 2014 IL was arraigned in the Supreme Court on a six count indictment. The first count charged her with manufacturing a large commercial quantity of methylamphetamine (1 kg or more). The second count charged her with murder and, in the alternative, the manslaughter of Mr Lan. The remaining counts related to weapons and firearms offences.

It was the Crown case that IL and Mr Lan had entered into a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine. The process of manufacture used acetone as the solvent which was heated on an open gas burner in a process referred to as 'crystallisation by refinement.' When the liquid caught fire in the bathroom Mr Lan attempted to smother it with a mattress. He had been badly burned and ultimately died of severe hypoxic brain injury caused by smoke inhalation or burn wounds. IL was charged with his murder.

The Crown did not allege an intention to kill or cause grievous bodily harm or reckless indifference to human life. Rather the Crown alleged that the act causing death, the lighting of the gas burner, was done during the commission of a crime punishable by imprisonment for 25 years or life, namely, the manufacture of a large commercial quantity of methylamphetamine – a basis of liability referred to as felony or constructive murder.

The brief facts

At about 4.40 am on Friday, 4 January 2013, uniformed police and fire brigade personnel attended a residential address in Ryde in response to a reported fire. Upon arrival police saw smoke coming from the open front door. As they approached the open door and announced their office IL rushed towards the front door saying, 'no, no, no,' and attempted to close the

front door before emergency services could enter. Police pushed back against the door to prevent IL from closing it. While IL continued to make attempts to close the door police observed an Asian male crawling across the floor behind IL. Mr Lan had suffered 60% burns to his total body surface.

Police pushed past IL and removed Mr Lan from the premises in order that he might receive medical attention. Meanwhile fire brigade units entered the premises to extinguish the fire and render the premises safe.

During the initial search of the premises a number of containers of chemicals, tubing, portable gas cylinders and a large container in which the residue of a white crystalline substance were found. In addition, numerous empty containers of acetone were found. Ultimately, drug certificates tendered in the Crown case established some 6.7 kg of methylamphetamine in various stages of manufacture located throughout the premises, some in crystalline form drying in various bedrooms, while other trays of liquid were in the fridge and freezer.

The Crown did not allege an intention to kill or cause grievous bodily harm or reckless indifference to human life.

Police also found a Prada brand handbag in a bedroom which contained a number of personal items belonging to IL including her Australian passport, current driver's licence, numerous credit and debit cards, a small brown envelope with a safe deposit box key printed on the front, \$1900 in cash and a Bunnings warehouse receipt dated 1 January 2013 for a number of items including 8 litres of acetone. Found in the middle bedroom was a sum of money in excess of \$330,000.

After being removed from the premises Mr Lan was placed in an ambulance, breathing but unconscious, and conveyed to Royal North Shore Hospital. During the journey he went into asystolic arrest. He was placed into an induced coma and on 13 January 2013 palliative care measures were implemented. On the afternoon of 14 January 2013 Mr Lan died.

The process of manufacture

The Crown called a forensic chemist to establish the process of manufacture. He described a process in which the base material

was placed into a vessel capable of being heated into which a small quantity of water and then acetone would be added. The mixture would then be heated and evaporated off, thereby increasing the purity level of the drug. After the mixture was heated it was allowed to cool and later placed into Tupperware containers which were then placed in the fridge. The process of cooling was advantageous if prolonged because it allowed for larger crystal formation.

The only solvent used in this process of manufacture was acetone. There were 70 litres of used containers of acetone scattered about the premises. Acetone is a highly flammable solvent whose vapours are placed into the air when the evaporation process is taking place. If those vapours can't escape from their container, which was the bathroom in this case, they will ultimately reach a critical density at which time they can combust if there is an ignition source.

It was the Crown case that a pot containing the base material and acetone was being evaporated off on the burner in the bathroom and that at some point either the mixture had been disturbed or the vapours had reached critical density and ignited. The ignition source was said to be the open burner itself which was directly underneath the pot containing the acetone mixture.

It was the experience of the expert that explosions or fires in clandestine methylamphetamine laboratories are usually caused during the evaporation process of the flammable solvent.

The Crown case

It was the Crown case that IL was engaged with Mr Lan in a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine, a crime punishable by life imprisonment under section 33(3) (a) of the *Drugs Misuse and Trafficking Act 1985* (NSW) and as such became the 'foundation crime' for felony or constructive murder.

The Crown case drew attention to the fact that IL:

- owned the premises;
- was at the premises at the time of the fire;
- had attempted to keep the police out when the house was on fire and Mr Lan had been badly burned;
- had clothes in the wardrobe of the main bedroom, though it was not her primary address; and
- had in her handbag a recent receipt for 8 litres of acetone, the solvent used in the manufacture process.

More particularly, as they were engaged in a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine, which process involved the heating of acetone, a highly flammable solvent, each was responsible for igniting the burner no matter who actually lit it. As this act was done in the course of the commission of the felony or foundation crime, IL was guilty of the murder of Mr Lan.

Application for a directed verdict

At the close of the Crown case the defence made an application for a directed verdict on both the murder and manslaughter charges. In upholding the defence application his Honour held at [42] that there was no evidence capable of supporting the inference that IL contemplated the possibility that someone might be injured or killed in the manufacturing process.

While that was not of itself said to be determinative, his Honour went on to indicate that:

- there was nothing to indicate that the fire was deliberately set [74];
- this was not a case of 'extended common purpose' and the Crown had specifically eschewed reliance upon that doctrine [81];
- the liability of IL was derivative. IL was, if anything, a principal in the second degree [82].

Ultimately His Honour concluded at [85] by saying:

I do not accept that the combination of principles of common purpose and constructive murder work together to make [IL] liable to conviction for murder in the circumstances of the present case.

The 107 appeal

The Crown appealed pursuant to section 107 of the *Crimes (Appeal and Review) Act 2001* against the directed verdict of acquittal. An appeal under section 107 must involve a question of law alone. Hence, a question of law alone does not permit an appeal on a mixed question of fact and law.

The Crown argued, among other things, that IL was a principal in the first degree and that she had done all those things necessary to constitute the crime of murder. More specifically, since the purpose of the joint criminal enterprise was to manufacture a large commercial quantity of methylamphetamine, the act of lighting the burner was within the scope of that enterprise.

The public policy considerations surrounding the availability of felony/murder are that those who embark on the foundation crime should be liable for the unintended consequences of their actions.

The outcome of the appeal

The court held that the trial judge had erred in the reasoning process. More particularly, the relevant question was not whether IL had contemplated injury to or the death of Lan but rather whether IL had contemplated the possibility that the ring burner would be ignited. If it was, it mattered not who lit the burner if it was within the scope of that enterprise. Hence, the principles of joint criminal enterprise were applicable to the foundation crime of drug manufacture. As the ignition of the ring burner was within its scope, both parties were responsible for it and liable for its consequences.

Accordingly, the acquittals were quashed and a new trial on the charges of murder and manslaughter was ordered.

Public policy

The usual scenario surrounding the preferment of felony/murder charges concerns the armed robbery of a convenience

store or petrol station late at night when, during or immediately after the armed robbery, the store attendant is shot and killed.

The public policy considerations surrounding the availability of felony/murder are that those who embark on the foundation crime should be liable for the unintended consequences of their actions.

While Victoria limits the availability of constructive murder to cases where the foundation offence involves an act of violence (s3A(1) of the Crimes Act), New South Wales remains unfettered by such considerations. The only condition precedent is that the foundation crime must carry a maximum penalty of 25 years or more.

In an age where the Commonwealth Government has declared both a war on drugs and the existence of an ice epidemic, those who have chosen to mix up explosive combinations of chemicals in city flats or suburban homes should clearly understand in what peril they place themselves and others.