

Mitchell v The King: A death in the grow house; limitations on the pathway to constructive murder



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In *Mitchell v The King* [2023] HCA 5 the High Court (Gordon, Edelman and Steward JJ; Kiefel CJ agreeing with separate reasons; Gageler, Gleeson and Jagot JJ also agreeing with separate reasons) upheld appeals by three appellants convicted of the murder of a man who lived at a house where a quantity of cannabis had been commercially cultivated.

The prosecution case was that the appellants had agreed with each other to enter the house and steal the cannabis, in a joint criminal enterprise (JCE). One of their number had carried an item which could have been a branch or a bat. The deceased was violently assaulted and killed in the course of the theft of the cannabis.

The prosecution alleged that the appellants were guilty of murder by the application of the principle of extended

joint criminal enterprise (EJCE) and through constructive murder, relying upon s 12A of the *Criminal Law Consolidation Act 1935* (SA), which states:

A person who commits an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more (other than abortion), and thus causes the death of another, is guilty of murder.

The prosecution used EJCE to prove each appellant's criminal responsibility for the intentional act of violence. As explained by Kiefel CJ at [8]:

The prosecution case respecting the application of EJCE to s 12A was that the appellants were each guilty of murder if they contemplated the possibility that in carrying out the enterprise a co-venturer might perpetrate an intentional act of violence which then (in fact) caused the death of the deceased.

Importantly for criminal proceedings in all Australian jurisdictions where the prosecution relies upon complicity to establish criminal liability, the principles of JCE and EJCE were considered by the court.

JCE

Kiefel CJ (at [13]-[14]) noted that the wrong in

a joint criminal enterprise lies in the mutual embarkation on a crime with the awareness that an incidental crime may be committed in carrying out the agreement. Each party is guilty of the offence, which is the object of the enterprise, if it is committed, and of any other crime within the scope of the agreement, i.e., if the parties contemplate its commission as a possible incident of the execution of their agreement.

Gordon, Edelman and Steward JJ at ([54]) noted that each party to an agreement to commit a crime will be guilty of the agreed crime and any crime within the scope of the agreement. It is essential to identify what the parties did agree upon and what it was that each contemplated might occur.

EJCE

Kiefel CJ stated that EJCE applies where an incidental offence lies outside the scope of a JCE and where a secondary party contemplates but does not agree to its commission as a possible incident of the execution of their agreement (at [15]).

If the secondary party realises (without agreeing) that the primary party may kill or intentionally inflict really serious injury, but nevertheless continues to participate with the primary party, that will amount to a sufficient mental element for the secondary party to be guilty of murder if the primary party,

with the requisite intent, kills in the course of the venture: [23]. The secondary party will be liable because he or she has given encouragement and assistance to the primary party in carrying out an enterprise which the secondary party realises may involve murder.

Kiefel CJ considered that EJCE operated to attribute the acts of the primary party to the secondary party: [21], noting Gordon, Edelman and Steward JJ at [61] who held that the acts were not attributed. Kiefel CJ went on to describe the mental state for murder based on EJCE as foresight of the secondary party of the intent of the primary party to kill or do grievous bodily harm: [23].

Gageler, Gleeson and Jagot JJ described EJCE (at [32]-[33]) as a form of criminal liability of a 'sui generis nature', where the secondary party has participated with the primary party in the execution of an agreement to commit another offence with foresight of the possibility that the primary party might commit the additional offence as an incident of executing their agreement. The justification for the secondary party being criminally liable for the additional offence committed by the primary party in those circumstances is said to lie in 'the mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement' in that the secondary party's voluntary assumption of the risk of the additional crime being committed is seen to be implicit in the secondary party's subscription to the agreement which carries that risk.

Gordon, Edelman and Steward JJ found that EJCE applies where a party to a joint criminal enterprise has not agreed to the commission of a crime but has instead foreseen the commission of that crime in the course of carrying out the agreement and continues to participate in the enterprise. Foresight that an 'incidental crime might be committed, means foresight of *all* elements of that crime. For murder that means foresight that the deceased would be killed or suffer grievous bodily harm which is but a small step from satisfaction that a secondary party had an intent to kill or do grievous bodily harm': [56]-[58], [107].

Moreover, the acts of the primary party are not attributed to the secondary party under EJCE: [61].

Neither Kiefel CJ nor Gageler, Gleeson and Jagot JJ agreed with Gordon, Edelman and Steward JJ concerning the necessity of proof of contemplation of death or grievous bodily harm when EJCE is relied upon in a case of murder.

Constructive murder

Kiefel CJ noted that it was not doubted

that JCE applied to constructive murder at common law and to s 12A: [19]. Her Honour focussed on the term 'act of violence' and held that the application of EJCE to s 12A would result in almost any type of violence being able to be foreseen, which could not be a proper foundation for murder. Thus EJCE could not be applied to s 12A because constructive murder should be constrained in its operation and the development of legal liability for murder should correlate with moral culpability: [29]-[30].

Gageler, Gleeson and Jagot JJ reasoned that whether the common law doctrine of EJCE operates in the context of s 12A of the *CLCA* turned on the capacity of the common law doctrine to operate harmoniously with the relevant statutory structure and statutory purpose: [34]-[35].

Section 11 of the *CLCA* provides, 'Any person who commits murder shall be guilty of an offence and shall be imprisoned for life.' The pathways to guilt were therefore, killing with an intent to do so or to do grievous bodily harm, or constructive murder, which at common law was an act causing death done in the course of or in furtherance of the commission by the accused of a felony involving violence or danger. JCE was applicable to murder by a killing with an intent to do so or to do grievous bodily harm: at [36]-[37].

Section 12A provides another pathway to murder: [42]. Under s 12A, the 'act of violence' may be that of a secondary party through JCE, although the necessary intent, because it is an 'intentional act of violence', must be that of the secondary party: [40]-[41]. EJCE cannot apply to s 12A alone, because it is not an offence, it is a way to guilt: ([42]). The question was whether EJCE can operate on s 12A as a pathway to guilt of murder, noting the difference of approach of Gordon, Edelman and Steward JJ.

To allow EJCE to apply to the intentional act of violence would enlarge an offence established by the legislature with certain parameters that superseded the common law form of constructive murder, particularly the requirement of an intentional act of violence. It would allow foresight to be sufficient for proof of guilt, whereas the section requires proof of intent: [43]-[44].

Gordon, Edelman and Steward JJ held that JCE may be applied to constructive murder through attribution of acts: [64]-[65]. Similarly, JCE could apply to s 12A, because it would allow the intentional act of violence to be attributed to the secondary party: [67], [75] and [108].

However, allowing EJCE to be used with s 12A would create a new form of 'constructive constructive murder', in addition to the

previously described three forms of murder (murder with intent to kill or do grievous bodily harm together with JCE, constructive murder together with JCE and EJCE): [68]-[71], [96], [98]. The text context and purpose of s 12A did not allow for such a conclusion.

New South Wales

Constructive murder is provided in s 18(1) (a) of the *Crimes Act 1900* (NSW) (emphasis added):

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

It has long been held that s 18(1)(a) relevantly imports common law rules of complicity: *IL v The Queen* (2017) 262 CLR 268 at [60] (Bell and Nettle JJ). Thus, an accused may be found guilty of murder even if he or she did not commit the act which caused the death charged provided the act was committed by an accomplice of the accused in the course of carrying out a joint criminal enterprise to which both were parties: *IL* at [60].

It remains to be seen whether *Mitchell* has application to constructive murder should the Crown rely upon EJCE in order to prove an accused responsible for the act that causes death. BN

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