benchtv
a benchmark production

Précis Paper

Joint Criminal Enterprise

A discussion of the recent High Court decision in *IL v The Queen* [2017] HCA 27

Discussion Includes

- Key facts
- High Court decision
- Takeaways for practitioners

Précis Paper

Joint Criminal Enterprise

1. In this edition of BenchTV, Richard Pontello (Barrister, Sydney) and Tim Matthews (Seasonal Academic, Sydney University, Sydney) discuss the recent decision in *IL v The Queen* [2017] HCA 27.

Key facts

2. Back in January 2013, emergency services were called to residential premises in Ryde that had caught fire. Upon arrival, with the premises well-alight, emergency services saw the deceased. The accused, and subsequent appellant, IL, was also on the premises, and initially attempted to prevent emergency services from gaining access to the premises, notwithstanding the smoke that was coming from the door.

3. When police eventually gained entry, and the fire was extinguished, they discovered what was essentially a clandestine laboratory in which methylamphetamine was being manufactured. The premises were largely unfurnished. Basically, the whole house had been set up to manufacture methylamphetamine. As it turns out, the methylamphetamine was *actually* being manufactured in a small bathroom. Other steps in the manufacturing process were taking place in other rooms.

4. IL was taken to hospital to be treated for minor smoke inhalation, but subsequently made a full recovery. IL was charged with participating in the joint criminal enterprise to manufacture not less than the large commercial quantity of methylamphetamine, which ended up being about 6.8 kg. Fully-loaded firearms and a very large sum of cash were also found on the premises.

5. IL was also charged with the cash and the guns on a joint criminal enterprise basis.

6. Given than the deceased had died, IL was also charged with his constructive murder, and in the alternative, his manslaughter.

7. The Crown could not establish whether it was IL or the deceased who lit the gas ring burner that was said to have caused the explosion. This was the fundamental problem in the Crown case.

8. Essentially, the factual issue that gave rise to the directed verdict application at first instance, and indeed on appeal, and on appeal again finally at the High Court - that is, that the relevant act causing death was the lighting of the ring burner in the bathroom - remained the same throughout.

9. Relying upon straightforward joint criminal enterprise, it was the Crown case that it did not matter whether it was IL or the deceased who in fact lit the ring burner, arguing that if it were indeed the deceased's act, it could be attributed to IL, therefore making her liable for his constructive murder.

10. To prove constructive murder, the Crown had to prove that both the deceased and IL were engaged in a joint criminal enterprise to commit a crime that carried a sentence for life or 25 years. In this case, manufacturing not less than the large commercial quantity of the relevant prohibited drug carried life, so the Crown had no difficulty in establishing this.

11. The Crown relied upon joint criminal enterprise - that is, because the pair were engaged in the enterprise to manufacture prohibited drugs, each was liable for the acts of the other, in furtherance of the relevant joint criminal enterprise.

12. IL was charged under the NSW statutory offence of constructive murder, which is distinct from common law felony murder, in that it does not require the underlying act to be an act of violence. All that is required by the NSW legislation is that the crime carry the relevant maximum penalty of life or 25 years.

<u>High Court decision</u>

13. The legal issues as they stood before the High Court included:
    - what the scope of conduct that is attributable between parties to a joint criminal enterprise is, and
    - whether or not, for the purposes of constructive murder as it exists in NSW under the statutory scheme, 'self-murder' or 'self-killing' can qualify as such

14. Everybody proceeded on the basis that the existing law on joint criminal enterprise should not be changed.

15. The High Court referred to its decision in *Osland v The Queen* (1998), in which at [72] reference was made to the general principle stated in *R v Lowery and King [No 2]* by Smith J:

    The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime.

    There was no challenge to this.

16. The Crown's argument was that the parties were engaged in a straightforward joint criminal enterprise, and that therefore it did not matter who did the relevant act causing death (lighting the ring burner) - each was responsible for the act of the other. So whether or not IL lit the ring burner, she was liable for it.

17. The real issue on appeal was whether that was enough to attribute liability to IL for either murder or manslaughter.

18. The plurality proceeded on the basis that there was no need to look at s 18 of *the Crimes Act 1900* (NSW), because s 18 is not engaged in circumstances that involve either an intentional or even unintentional self-killing.

19. The plurality formed the view that historically there were three forms of homicide:
    - self-killing
    - murder
    - manslaughter

20. The plurality took the view that the first category of homicide (self-killing, whether intentional or unintentional) has never been treated as murder. So s 18 is only concerned with the death of another, not the death of oneself, and so it was held that there was no need to look at s 18.

21. Bell and Nettle JJ disagreed with this in their joint judgment, saying that s 18 was engaged, but the important point is that it is the *acts* which are attributed from one person to another in a joint criminal enterprise, not the *liability*, or the *actus reus* of some notional crime without a mental element.

22. Thus joint criminal enterprise liability is limited to participation in acts constituting the *actus reus* of a crime. Bell and Nettle JJ held that IL would have in fact been liable for the act of the deceased if it was he who lit the ring burner, however, in the circumstances of this case, the lighting of the ring burner did not constitute the *actus reus* of either murder or manslaughter, so IL could not be guilty of either of these crimes.

23. Gageler & Gordon JJ dissented.

24. It is difficult to imagine how the distinction that is drawn by the plurality and Bell and Nettle JJ between attributing any act, and attributing only an act which forms the *actus reus* of a criminal offence, could often enough prove truly meaningful in real life, because most of

the time the acts, and the acts which form part of the *actus reus* of a criminal offence, will be the same.

25. In other words, it would be quite a rare case in which the act that one is trying to attribute from one party to another in a joint criminal enterprise will meet the description of an act, but not an act which forms part of the *actus reus*.

26. But what with the increasing number of cases involving fires in clandestine laboratories and the like, perhaps the hypothetical examples provided for by the justices who did not form part of the plurality will prove in the future to be not so far-fetched after all.

27. The justices in this case also provided useful clarification on an aspect of the decision in *Osland*, that is, that liability pursuant to a straightforward joint criminal enterprise is primary or direct liability, as opposed to derivative liability , the consequence of which, in a practical sense, is that where A and B agree to commit a crime, but one party has some lawful excuse, the liability of the other party is not necessarily affected, because the purpose of the attribution is for direct liability to be given in respect of another's acts.

<u>Takeaways for practitioners</u>

28. What this case underscores is that there is no mathematical or scientific answer to these difficult questions.

29. Joint criminal enterprise is one of those areas in the law that provides rather a fruitful ground for appeals. It is complex to explain to a jury.

30. In the recent decision of the NSW Court of Criminal Appeal in *Moussa v R* [2017] NSWCCA 237, the decision in *IL v The Queen* [2017] was applied to facts that were very similar.

31. Justice Fagan in this case made it clear that there is no ratio, or rule of law, to be taken from the decision in *IL v The Queen*, because the majority of five who allowed the appeal did so for different reasons.

32. But it seems accurate enough to say from this decision that in circumstances where two or more people embark upon a joint criminal enterprise to commit an offence, and during the course of the commission of that offence, one of the participants to the joint criminal enterprise kills him or herself, the surviving participant(s) to the joint criminal enterprise cannot be guilty of either murder or manslaughter.

33. The second thing that seems to emerge clearly enough out of this decision is that liability is direct (in such circumstances as can be said to involve a co-party to a joint criminal enterprise who has a lawful excuse).

34. Calls for reform in relation to the way in which the law deals with complicity have had limited success.

35. Richard thinks that the law relating to constructive murder in NSW should be reformed - if not abolished entirely (as it was in England in 1957), which would bring the law in NSW in line with the law in the other states (QLD, SA, Tasmania, Victoria and WA).

BIOGRAPHY

Richard Pontello

Barrister, Sydney

A barrister since 1999, Richard Pontello specialises in the conduct of criminal trials in the District and Supreme Courts. In those courts he has represented persons charged with a broad range of serious indictable offences, including murder. He has a particular interest in DNA evidence and has presented a paper on that topic. In 2008 he appeared in one of the longest running trials in NSW history involving persons charged under Federal terrorism legislation.

Tim Matthews

Sessional Academic, Sydney University, Sydney

Tim Matthews is a sessional academic at the University of Sydney Law School, and a Teaching Fellow at the Faculty of Law, University of New South Wales and Macquarie University. He primarily researches and teaches in criminal law and the law of evidence. Tim was previously employed as a legal officer at the Royal Commission into Institutional Responses to Child Sexual Abuse.

BIBLIOGRAPHY

Focus Case

IL v The Queen [2017] HCA 27

Benchmark Link

IL v The Queen [2017] HCA 27

Judgment Link

IL v The Queen [2017] HCA 27

Cases

Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75

R v Lowery and King [No 2] [1972] VR 560 at [560]

Moussa v R [2017] NSWCCA 237

Legislation

Crimes Act 1900 (NSW)