

---

## ABOLITION OF CONSTRUCTIVE MURDER RULE

---

Nyuol Justin Y. Arop, Esq., BA(Winnipeg), MILIR (UNSW), JD (Sydney), Chairperson,  
South Sudan Human Rights Commission

### ABSTRACT:

This paper argues for the abolition of constructive murder rule as conceptualized in the Australian jurisdiction. The paper exposes the idiosyncrasy inherent to the rule of constructive murder as pertaining homicide. And because the formulation of the rule relies on transferring the element of intent for the commission or omission of a foundational offence to the act of killing so as to find culpability for the homicide, this paper argues that such construction of murder obliterates a fundamental pillar of criminal law: the concurrence of a criminal act with a criminal mind. The variance in the formulation of murder as provided for by statute and its formulation within the common law doctrine of 'constructive murder' confuses practitioners and operates unjustly to those individuals accused and exposed to the wrath of the rule of constructive murder. This paper, therefore, asserts that prudence dictates the rule be abandoned for the circumstance that led to its creation, in the first place, have long ceased to exist.

**Keywords:** murder, mens rea, felon(y), homicide

## Introduction

“Constructive Murder” or ‘Felony Murder,’ as called in other jurisdictions, a feature of the law of murder in all but one Australian jurisdiction,<sup>1</sup> is a rule that provides that if a person kills another in doing or attempting to do an act amounting to a felony, the killing is murder.<sup>2</sup> The rule holds the felon liable for murder and it matters not whether the death occurs during preparation, before, or flight after felon,<sup>3</sup> was intended or the product of a reckless disregard for the risk to human life or criminally negligent, or even, completely unintended or accidental, whether committed by—the victim, police officer, or a bystander—death may trigger murder liability for felons. This definition of murder, differs fundamentally in one respect, with murder within the meaning of s 18 (1)(a) of the crimes act,<sup>4</sup> in that it departs from the mens rea requirement for the commission of actual murder but for the intent to commit the felony, thus operating in direct opposition to the fundamental principle of criminal law that liability ought to reflect culpability.<sup>5</sup>

It is for this incongruence that, I argue in this paper that, the constructive murder rule is, “unfair, unprincipled and inconsistent with other criminal and civil standards,”<sup>6</sup> and thus worthy of complete abrogation from the NSW criminal and legal jurisprudence. In so doing, I divide the paper into three parts. The first part is the introduction, the second part briefly enunciates reasons for the abolition of the rule and the last part offers the conclusion.

## Reasons for Abolition of the Rule

If most people agree that “murder is the most serious of crimes,”<sup>7</sup> then logically, it follows that homicide offences be clearly defined and ranked in an order that allows the relative culpability of an offender be ascertained<sup>8</sup> with sufficiency. The desirability for precision and rigor that should accompany grave offences such as murder is greatly undermined by the constructive

---

<sup>1</sup> Prue Bindon, ‘The Case for Felony Murder’ (2006) 9(2) *Flinders Journal of Law Reform* 149.

<sup>2</sup> Lloyd Babb, Richard Button, ‘Some Aspects of Constructive Murder in New South Wales’ (2007) 31(4) *Criminal Law Journal* 234-249.

<sup>3</sup> Rudolph J. Gerber, ‘The Felony Murder Rule: Conundrum Without Principle’ (1999) 31(3) *Arizona State Law Journal* 763-786.

<sup>4</sup> *New South Wales Crimes Act 1900* (NSW) S 18(1)(a).

<sup>5</sup> Roth, Nelson E. and Sundby, Scott E., ‘The Murder Felony Rule: A Doctrine at Constitutional Crossroads’ (1985) 70(3) *Cornell Law Review* 446.

<sup>6</sup> Grant, Isabel and MacKay Wayne, ‘Constructive Murder and the Charter: In Search of Principle’ (1987) 25(2) *Alberta Law Review* 129.

<sup>7</sup> Crofts, Thomas, ‘Two Degrees of Murder: Homicide Law Reform in England and Western Australia’ (2008) 8(2) *Oxford University Commonwealth Law Journal* 187- 210.

<sup>8</sup> *Ibid*, 7.

murder rule. New South Wales, unlike other jurisdictions where the doctrine of constructive murder is rooted in common law, its doctrine is anchored in the legislation<sup>9</sup> and requires that the perpetrator, attempts, omits, or commits a crime “punishable by imprisonment for life or for 25 years,<sup>10</sup>” (the foundational offence) during, or immediately after, commission of the offence by accused or accomplice is a crime punishable for life or 25 years imprisonment, and it be “willed or voluntary.”<sup>11</sup> In many ways the constructive murder rule in NSW creates a legal anomaly as it pertains to homicide matters. First, in its current formulation, the constructive murder rule, substitutes and transfers the intent to commit the foundational offence to the act to killing in order to find culpability for the homicide.<sup>12</sup> In so doing, the rule obliterates a fundamental pillar of criminal law: the confluence of criminal act and criminal mind. Another odd derivative that arises from this conceptualization is that the expunction of mens rea from the offence renders it “either as a rule that serves as a means of presuming malice to” prove a homicide or it “constitutes a distinct form of homicide based upon the intent to commit the underlying felony.” Either way, it must be examined either as a presumption or as a form of strict liability.<sup>13</sup> Thus, if it operates as a presumption, it then, conclusively shifts the burden of proof to the defendant, thereby violating the due process guarantees of imposing “onus of prove” on the prosecution as articulated by the court<sup>14</sup> in *Woolmington v DPP*.<sup>15</sup>

Secondly, the constructive murder rule generally violates accepted principles of culpability.<sup>16</sup> In all respects, all the rule requires, with exception of an accomplice, is prove of an attempt, omission, or commission of a foundational offence, even if violence was not present, as long as it is conducted during or immediately after a crime and punishable for life or for 25 years, then the crime gets elevated to murder. In many ways not only does such a degradation erode the relationship between criminal liability and moral culpability<sup>17</sup>; but it rather does so in a disproportionate fashion. This anomaly of the legal system later on extends and reflects in the sentencing, and to the detriment, of an offender.

---

<sup>9</sup> Ibid, 4.

<sup>10</sup> NSW Law Reform Commission, Complicity, (Report No. 129 December 2010)

<sup>11</sup> *Ryan v Queen* (1967) 121 CLR 205

<sup>12</sup> Ibid, 5

<sup>13</sup> Guyora Binder, ‘The Culpability of Felony Murder’ (2008) 83(2) *Notre Dame Law Review* 2.

<sup>14</sup> David Crump, Susan Waite Crump, ‘In Defense of Felony Murder Doctrine’ (1985) 359(8) *Harvard Journal of Law and Public Policy* 361-376.

<sup>15</sup> *Woolmington v DPP* [1935] AC 462

<sup>16</sup> Ibid, 7

<sup>17</sup> Tomkovicz. James J., ‘The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law’ (1994) 52(4) *Washington and Lee Law Review* 8.

Thirdly, in respect to accomplices who did not commit the act that caused the death, *R v Sharah*<sup>18</sup> dictates the rule prove they “had in mind” that “contingency” that the principal offender might carry out the act causing death.<sup>19</sup> Even though this variation of the rule raises the standard of culpability required to convict an accomplice, in its crudest form, it still presumes a foreseeability from a homicidal mental state merely from evidence of the underlying felony.<sup>20</sup> In offences where the accomplice was passive, even though docility on his part should not completely exonerate him from the crime, extension of culpability after merely proving “contingency” in most circumstances amounts to what the New South Wales Law Reform Commission’s Report<sup>21</sup> refers to, and rightly so, as an “over criminalization of the matter.” Such an aberration should have no place in criminal law especially in circumstance like homicide, where the stakes are extremely high.

Fourthly, the inherent overlap of cases of extended joint criminal enterprise and constructive murder rule, as pertains, the requisite mens rea is quite flummoxing to jurors who lack legal training needed to grasp, adequately, the nuances in a trial judge’s directions. The combination of such a confusion with the protocol of external noninterference during jury deliberations, in other circumstances may leave the jury prone to render decisions that are inconsistent; thus, undermining the principal of *stare decisis* necessary to bolster public confidence in the legal system.

Lastly, abolitionists of the constructive rule contend that, sentence for the foundational offence, in other circumstances, can be imposed in addition to the murder, and if not served concurrently, will automatically result in a double jeopardy,<sup>22</sup> such an occurrence runs afoul the principle of just desserts.

Proponents of the constructive murder rule, however, insist that the soundness of the rule is essential for the “deterrence of foundational offences, retribution for those allured to engage in criminal enterprises, and more importantly, facilitates the prosecution of cases where mental element required for murder is difficult to prove.”<sup>23</sup> By transferring intent to commit a felony to murder even if death is accidental or unanticipated, supporters argue, the rule deters such

---

<sup>18</sup> *R v Sharah* (1992) 30 NSWLR 292

<sup>19</sup> *Ibid*, 10 see para [5.34]-[5.35]

<sup>20</sup> *Ibid*, 3

<sup>21</sup> *Ibid*, 10.

<sup>22</sup> *Ibid*, 10 see para [5.49]

<sup>23</sup> *Ibid* 10 see para [5.41]

deaths by “inducing felons to exercise care during felonies,” or even “dissuade themselves from committing felonies” nor can “they hide behind claims of accident or mere negligence.”<sup>24</sup> This assertion may be valid only as pertains liability of an accomplices; however, upon consideration of the actions of the principal, in cases of accidental killing, an illogicality emerges in three ways. First, how does one deter an accident? Secondly, in cases where the rule is used to convict a person for the offences committed by a victim or policeman present at the vicinity, action of third parties as such, cannot be deterred. Thirdly, the rule distorts marginal deterrence incentives, in the sense that “once a felon has accidentally caused death, there is less to deter him from intentionally killing other witnesses at the crime.”<sup>25</sup>

Lastly, the constructive murder rule, its advocates claim, remains a tool critical in aiding prosecution solve cases, otherwise, difficult to prove mens rea.<sup>26</sup> While that is true to a certain extent. The facility operates, too, in some respects, as a tool of injustice or procedural impropriety by permitting prosecutors to dispense with the legal burden of proving all elements beyond a reasonable doubt. Moreover, the argument that the rule casts the net wide enough to bring unrepentant felons within the ambit of murder, I argue, is not a necessity because all felony murders could “adequately be prosecuted” under punishable homicide within the meaning of s 18(1)(b) of the crimes act.

## Conclusion

The English origins of the felony murder rule are obscure<sup>27</sup> and its purpose was also vague.<sup>28</sup> What is certain, however, was that the rule was effectively utilized, in the United Kingdom—its birthplace—to convict felons when there was an avalanche of homicides resulting from other foundational felonies. That success, it is believed by legal historians, may have been a reason for its importation to Australia. And perhaps that emulation may have been prudent then, however, with time, those reasons, it can be argued, have dissipated. In New South Wales,

---

<sup>24</sup> Malani, Anup, ‘Does the Felony-Murder Rule Deter? Evidence from the FBI Crime Data’ (2002) Working Paper, University of Chicago Seminar

<sup>25</sup> Darley, John M and Robinson, Paul H., ‘Does Criminal Law Deter? A Behavioral Science Investigation’ (2004) 24(2) *Oxford Journal of Legal Studies* 173-205.

<sup>26</sup> *Ibid*, 23

<sup>27</sup> Leonard Birdsong, ‘Felony Murder: A Historical Perspective by Which to Understand Today’s Modern Felony Murder Statutes’ (2006) (32)1 *Thurgood Marshall Law Review* 20.

<sup>28</sup> Jeanne Hall Seibold, ‘The Felony-Murder Rule: In Search of a Viable Doctrine’ (1978) 23(2) *The Catholic Lawyer* 8.

according to the BOCSAR,<sup>29</sup> in the last five years there has been a 11.7%<sup>30</sup> steady decrease of murder cases. So far, from 2022-2023, the number of reported murder cases is, dismally, 48.<sup>31</sup> These statistics do not support, any longer, the archaic reasons for the importation of the murder rule.

The combination of this encouraging statistical data, better legislative framework to deal with the accused, wide array of means for prosecution of offenders at the disposal of the state, the growth of improved and robust technology that enhances accurate collection of evidence and data, if efficiently used and coordinated, amalgamates to relief the prosecution from the onerous imposition of proving intent even in very difficult, challenging circumstance. It is for these reasons that I propose the constructive murder rule should be abolished in New South Wales.

The rule is archaic and since it has died in the United Kingdom, its birthplace, it, too, should die in NSW.

---

<sup>29</sup> BOCSAR

<sup>30</sup> Ibid, 29

<sup>31</sup> Ibid, 30

## Bibliography

### Journals and Articles

1. Anup., Malani, 'Does the Felony-Murder Rule Deter? Evidence from the FBI Crime Data' (2002) Working Paper, University of Chicago Seminar
2. Babb, Lloyd, Richard Button, 'Some Aspects of Constructive Murder in New South Wales' (2007) 31(4) *Criminal Law Journal* 234-249
3. Binder, Guyora, 'The Culpability of Felony Murder' (2008) 83(2) *Notre Dame Law Review* 2
4. Bindon, Prue, 'The Case for Felony Murder' (2006) 9(2) *Flinders Journal of Law Reform* 149
5. Birdsong, Leonard, 'Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Statutes' (2006) (32)1 *Thurgood Marshall Law Review* 20
6. Crump, David., Susan Waite Crump, 'In Defense of Felony Murder Doctrine' (1985) 359(8) *Harvard Journal of Law and Public Policy* 361-376
7. Gerber, Rudolph J., 'The Felony Murder Rule: Conundrum Without Principle' (1999) 31(3) *Arizona State Law Journal* 763-786
8. Isabel, Grant., and MacKay Wayne, 'Constructive Murder and the Charter: In Search of Principle' (1987) 25(2) *Alberta Law Review* 129
9. James J., Tomkovicz, 'The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law' (1994) 52(4) *Washington and Lee Law Review* 8
10. John M., Darley, and Robinson, Paul H., 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24(2) *Oxford Journal of Legal Studies* 173-205
11. Nelson E. Roth, and Sundby, Scott E., 'The Murder Felony Rule: A Doctrine at Constitutional Crossroads' (1985) 70(3) *Cornell Law Review* 446

12. Seibold., Jeanne Hall, 'The Felony-Murder Rule: In Search of a Viable Doctrine' (1978) 23(2) *The Catholic Lawyer* 8
13. Thomas, Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8(2) *Oxford University Commonwealth Law Journal* 187-210

### **Cases**

1. *R v Sharah* (1992) 30 NSWLR 292
2. *Ryan v Queen* (1967) 121 CLR 205
3. *Woolmington v DPP* [1935] AC 462

### **Legislation**

1. *New South Wales Crimes Act 1900* (NSW) S 18(1)(a).

### **Reports and Others**

1. Bureau of Crime, Statistics and Research
2. New South Wales Law Reform Commission, *Complicity* (Report No. 129 December 2010)