[HIGH COURT OF AUSTRALIA.]

ROSS . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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SYDNEY, *Mar.* 29, 30, 31; *April* 3, 5.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Criminal Law—Murder—Appeal against conviction—Misdirection—Omission to direct that jury might find manslaughter—Evidence of confessions by accused—Need of warning to jury—Miscarriage of justice—Crimes Act 1915 (*Vict.*) (*No.* 2637), *secs.* 593, 594.

Practice—High Court—Appeal from Supreme Court of State—Criminal matter—Application for special leave to appeal—Notice to Crown—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 35 (1) (*b*).

Sec. 593 of the *Crimes Act* 1915 (Vict.) allows a person convicted on indictment to appeal to the Full Court (*inter alia*) with the leave of the Full Court upon any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Full Court to be a sufficient ground of appeal. Sec. 594 provides (*inter alia*):—(1) That on an appeal against conviction the Full Court "shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal. Provided that the Full Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." (2) That the Full Court, if it allows the appeal, shall quash the conviction and direct either an acquittal or a new trial.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ., that if on a criminal trial the presiding Judge correctly instructs the jury on the essential ingredients of the crime charged, and fully and fairly puts to the jury the defence set up by the accused, a verdict of guilty amounts to a finding by the jury of every essential element of that crime, and cannot, under secs. 593 and 594 of the *Crimes Act* 1915 (Vict.), be disturbed by a suggestion that the jury on the evidence might have found the accused guilty of a lesser offence if the Judge had informed them that they were at liberty to do so.

Held, also, by the whole Court, that it is for the jury alone to estimate the value of evidence of confessions alleged to have been made by an accused person, with the assistance of any comments which the presiding Judge may in his discretion think proper to make upon it; but there is no rule of law or of practice which requires the Judge to caution the jury against acting on such evidence or which prescribes any measure of the comment which it is his duty to make upon it.

An application for special leave to appeal to the High Court from the Supreme Court of a State in a criminal matter should be on notice to the Crown.

Held, also, by *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ., (1) that in a criminal matter the High Court has an unfettered discretion to grant special leave to appeal from the Supreme Court of a State in any case where special circumstances are shown to exist; and (2) that in the circumstances of the present case special leave to appeal should not be granted.

Per Isaacs J.:—(1) In applications for leave to appeal in criminal cases to this Court from a State Court this Court sits as a National Court of Criminal Appeal appointed by the Constitution, and the applicant has, as an Australian citizen, a statutory right under the Constitution to seek redress measured only by the justice of the case, but unqualified by any other consideration, and not in any way limited by the practice of the Privy Council in criminal cases acting by way of grace under the prerogative and not as a statutory Court of Criminal Appeal. (2) In the present case leave to appeal should be given and a new trial ordered on the ground of substantial miscarriage of justice.

Special leave to appeal from the decision of the Supreme Court of Victoria: *Ross* v. *The King*, (1922) V.L.R., 329; 43 A.L.T., 187, refused.

APPLICATION for special leave to appeal.

At the Criminal Court at Melbourne before *Schutt* J. and a jury, Colin Campbell Ross was tried on a charge of murder of a little girl. The case for the Crown was, shortly, that the accused, who kept a wine saloon in the Eastern Arcade, Bourke Street, Melbourne, on the afternoon of 30th December 1921 enticed the girl, who was under sixteen years of age, into his wine saloon; that he

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took her into a small room off the saloon, referred to as the "cubicle," and supplied her with liquor to drink; that while she was under its influence he had carnal knowledge of her and strangled her; and that subsequently he stripped the girl's body naked and placed it in a lane near by, where it was found the following morning. The jury found the accused guilty, and he was sentenced to death. He then applied to the Full Court of the Supreme Court for leave to appeal against the conviction on the grounds: (1) that the verdict was against the evidence and the weight of the evidence; (2) that evidence was wrongly admitted and wrongly rejected; (3) that since the trial fresh evidence had been discovered which could not with reasonable diligence have been discovered before it was discovered; (4) that the learned Judge misdirected the jury or failed to direct them fully and properly on matters requiring direction; (5) that the learned Judge should have directed the jury that in view of the evidence of a witness named Harding it was open to them to return a verdict of manslaughter; and (6) that the public mind prior to the commencement of the trial was so inflamed by sensational *ex parte* statements published in certain newspapers as to make a fair trial impossible, and that the conviction therefore amounted to a miscarriage of justice. The Full Court dismissed the application: *Ross* v. *The King* (1).

The accused now applied for special leave to appeal to the High Court from that decision.

The other material facts are stated in the judgments hereunder.

T. Brennan, for the applicant. Special leave to appeal is asked for on the following grounds: (1) that the finding of the jury is against the evidence and the weight of the evidence—in other words, that the verdict is "unreasonable or cannot be supported having regard to the evidence" within the meaning of sec. 594 of the *Crimes Act* 1915; (2) that in his summing-up the trial Judge misdirected the jury as to some matters and omitted to direct them as to others; (3) that on the evidence of Harding it was open to the jury to return a verdict of manslaughter and the jury should have been so directed; and (4) that the accused should have an opportunity of calling the

(1) (1922) V.L.R., 329; 43 A.L.T., 187.

new evidence. As to first of these grounds, all evidence of confessions by an accused person should be received with the greatest caution (*Wills on Circumstantial Evidence*, 6th ed., p. 119; *Taylor on Evidence*, 11th ed., vol. I., secs. 862, 868; *Kenny's Outlines of Criminal Law*, 7th ed., p. 394; *Phipson on Evidence*, 6th ed., p. 264; *Russell on Crimes*, 7th ed., vol. II., p. 2155; *Best on Evidence*, 9th ed., p. 459). The evidence of a confession must be taken as a whole (*Jack* v. *Smail* (1)). The confessions alleged to have been made are so contradictory of one another and of the independent evidence that there was, in support of the Crown case, only a confused mass of conflicting evidence upon which no jury could reasonably find a verdict of guilty (see *Middleton* v. *Melbourne Tramway and Omnibus Co.* (2); *Scott* v. *Pauly* (3)). As to the second ground, it was the duty of the trial Judge to warn the jury of the danger of acting on evidence of confessions, and failure to give such a warning is an error in law amounting to a misdirection. The giving of such a warning is a matter of practice which has hardened into a rule of law, and is now in the same position as the giving of a warning in the case of the evidence of accomplices (see *R.* v. *Sykes* (4); *R.* v. *Finch* (5); *R.* v. *Lovett and Flint* (6)).

[HIGGINS J. referred to *Archbold's Criminal Pleading, Evidence & Practice*, 22nd ed., p. 193.]

As to the third ground, in view of the evidence of the witness Harding it was open to the jury to find that the accused, some time after he had had carnal knowledge of the girl, without intending to kill her had accidentally done so while attempting to stifle her moans. That being so, it was the duty of the trial Judge to direct the jury that if they believed those to be the facts, they should find a verdict of manslaughter. The duty to give such a direction is not affected by the fact that counsel for the accused did not raise the question of manslaughter at the trial either before or after the summing-up (*R.* v. *Hopper* (7)).

[HIGGINS J. referred to *R.* v. *Clinton* (8); *R.* v. *Naylor* (9).

(1) (1905) 2 C.L.R., 684, at p. 695.
(2) (1913) 16 C.L.R., 572, at pp. 579, 581.
(3) (1917) 24 C.L.R., 274, at p. 278.
(4) (1913) 8 Cr. App. R., 233, at p. 235.
(5) (1916) 12 Cr. App. R., 77.
(6) (1921) 16 Cr. App. R., 41.
(7) (1915) 2 K.B., 431.
(8) (1917) 12 Cr. App. R., 215.
(9) (1910) 5 Cr. App. R., 19.

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[KNOX C.J. referred to *R.* v. *Gorges* (1).]

The direction to the jury was not exhaustive, and was in such terms as to lead the jury to believe that it was exhaustive and that they must find murder or not guilty. As to the fourth ground, the new evidence might reasonably have affected the minds of the jury and the Supreme Court wrongly exercised its discretion in refusing to give an opportunity of putting the evidence before the jury. [Counsel also referred to *Director of Public Prosecutions* v. *Beard* (2); *Brown* v. *The King* (3); *R.* v. *Bradley* (4); *R.* v. *Stoddart* (5); *R.* v. *Richards* (6); *R.* v. *Moss* (7); *R.* v. *Dinnick* (8); *R.* v. *Gray* (9); *Hargan* v. *The King* (10).]

McIndoe, for the Crown, was heard on the point as to manslaughter only. The trial Judge properly directed the jury as to what in the circumstances would constitute murder and told them that, unless they came to the conclusion that the evidence brought the case within the definition of murder given by him, they should acquit the accused. He was not bound to do anything more. In view of all that happened at the trial, an omission to direct as to manslaughter did not cause any miscarriage of justice.

Cur. adv. vult.

April 5. The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. A motion has been made on behalf of Colin Campbell Ross, a prisoner under sentence of death for murder, for special leave to appeal to this Court from the judgment of the Supreme Court of Victoria in Full Court refusing the prisoner leave to appeal to it pursuant to the provisions of the *Crimes Act* 1915, sec. 593.

There is no doubt of the jurisdiction of this Court to grant special leave to appeal (The Constitution, sec. 73; *Judiciary Act*, sec. 35), and it has held that it has an unfettered discretion in a criminal

(1) (1915) 25 Cox C.C., 218.
(2) (1920) A.C., 479.
(3) (1913) 17 C.L.R., 570.
(4) (1908) 1 Cr. App. R., 146.
(5) (1909) 2 Cr. App. R., 217, at p. 246.
(6) (1910) 4 Cr. App. R., 161, at p. 163.
(7) (1910) 4 Cr. App. R., 112, at p. 114.
(8) (1909) 3 Cr. App. R., 77, at p. 79.
(9) (1911) 6 Cr. App. R., 242, at p. 245.
(10) (1919) 27 C.L.R., 13, at p. 21.

cause to grant that leave in any case where special circumstances are shown to exist (*In re Eather* v. *The King* (1)). Our practice as to allowing appeals in criminal cases is more liberal to the prisoner than that adopted by the Privy Council, but we must never lose sight of the fact that in regulating our practice the interests of the community as well as those of the prisoner are to be considered. Adapting the words of that tribunal to the practice of this Court, we may say there are reasons which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout Australia it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to this Court, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the several States (*Arnold* v. *The King-Emperor* (2)). Accordingly, in any application for leave to appeal in a criminal case, we have thought it necessary that the application should be made on notice to the law officers of the Crown for the State, and that the grounds of the appeal should be examined with extreme care before special leave is given.

In the present case, the nude body of a young girl, twelve years of age, was found lying dead in an alley off Little Collins Street, Melbourne. Medical evidence disclosed that the cause of death was strangulation from throttling, that there were bruises and abrasions which indicated violence, and that there was a recent tear at the lower border of the hymen which passed completely through the hymen into the tissue of the vaginal wall. Evidence was also adduced by the Crown from which a jury might infer that this child had gone into an arcade known as the Eastern Arcade, in which the prisoner had a wine saloon, that she was there enticed by the prisoner into his wine saloon and was carnally known and killed by him. The prisoner, who gave evidence on his own behalf, did not suggest that he had killed the child in circumstances that might reduce the act from one of murder to one of manslaughter. He admitted that he had noticed a young girl, similar in appearance to the dead child, in the Arcade; but he denied that he had spoken to her or that she had been in his wine saloon, and he denied that

(1) (1915) 20 C.L.R., 147. (2) (1914) A.C., 644, at p. 646.

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he had anything to do directly or indirectly with the death of the murdered child. The jury found the prisoner guilty of the murder of the child.

By the law of Victoria, to have carnal knowledge of a girl under the age of sixteen years is a felony, and the unintentional killing of one person by another while such other is in the course of committing a felony or acting in furtherance of the purpose of committing a felony, that is to say, in the promotion or advancement of the purpose of committing a felony not yet accomplished, is murder. The presiding Judge, in addition to making such comments as he thought proper on the credibility of the witnesses and the nature of their evidence, proceeded to direct the jury thus: "The accused . . . is charged with the crime of murder; and, if you are satisfied beyond reasonable doubt that he caused the death of this young girl and that he caused her death with the intention of bringing that death about, or if you are satisfied beyond reasonable doubt that in the course of having sexual intercourse with that young girl he caused her death, or that he caused her death in furtherance of that purpose, he would be guilty of murder."

The plain meaning of the direction was that, if the jury, considering the whole of the evidence and accepting such part of it as they believed to be true, came to the conclusion that the prisoner had killed the child in any one of the ways declared by the presiding Judge to constitute murder, they should find the prisoner guilty of murder, and that otherwise they should acquit him. Counsel in the Supreme Court accepted this as the meaning of the charge, and made no attempt to distort this meaning, and the members of the Supreme Court Bench, among whom was the Judge who presided at the trial, definitely adopted this view and repudiated the possibility of any other interpretation. It is therefore not only unnecessary, but it is misleading and mischievous to suggest that it in fact meant something else, or to proceed on the hypothesis that the jury were asked to consider any particular part of the evidence as relevant only to any particular part of the presiding Judge's definition of the crime of murder.

But Mr. *Brennan*, in the Supreme Court and before us, urged that the presiding Judge should have further directed the jury that a

confession alleged to have been made by the prisoner to one Harding would justify them, if they believed it to be an accurate account of what took place, in finding the prisoner guilty of manslaughter and not guilty of murder. He told us that this point occurred to him during the Judge's summing-up, and that, after consultation with his leader, counsel deliberately abstained from asking, either in the presence of the jury or after they had retired, for a direction on the subject. In view of the case made for the prisoner, potent reasons for this exercise of discretion by counsel are apparent, and need not be here referred to. But let us examine the point on its merits without considering counsel's conduct of the case.

The effect of Harding's deposition was as follows :—The prisoner said to him that at six o'clock or a few seconds afterwards he closed the wine cafe and went back into the cubicle. When he got there the little girl was still asleep and he could not resist the temptation and had connection with her. Harding asked him whether she called out. The prisoner said yes. She moaned and sang out, but he put his hand over her mouth and she stopped and appeared to faint. After a little time she commenced again to call out and he went in to stop her, and in endeavouring to stop her from singing out he must have choked her. There was nothing in this evidence to suggest that the child was killed during the act of intercourse or in furtherance of the purpose of having intercourse; but the jury were at liberty to believe as much of or as little of the confession as they choose, and on this evidence, coupled with the medical evidence of the injuries to the throat, might well have found that the prisoner, wishing to silence the child for ever, caused her death, in the language of the charge, "with the intention of bringing that death about," and was therefore guilty of murder. If they did so, they acted precisely in accordance with the direction of the Judge as to what they should do if they found an intention to kill. If the child was killed after intercourse had concluded and they were unable to find an intention to kill, the Judge directed them to find the prisoner not guilty, and we must assume that they bore that direction in mind. What possible benefit could have accrued to the prisoner from a direction that instead of a verdict of acquittal they might find a verdict of manslaughter? In our opinion, none. We think the

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learned Judge acted wisely and in the interests of the prisoner in excluding from the consideration of the jury an issue which was not raised by the prisoner's counsel, which no reasonable jury could have found in his favour, and which, if found in his favour, was less advantageous to him than the verdict of acquittal which the jury were bound to find under the Judge's direction if they did not find an intention to kill.

In view of the opinion which we have expressed, it is unnecessary to discuss the decisions of *R.* v. *Hopper* (1) and *R.* v. *Clinton* (2), because we think it is clear that, if on a trial the Judge correctly instructs the jury on the essential ingredients of the crime charged and fully and fairly puts to the jury the defence set up by the prisoner, a verdict of guilty amounts to a finding by the jury of every essential element of that crime, and cannot be disturbed by a suggestion that the jury on the evidence might have found him guilty of a lesser offence if the Judge had informed them that they were at liberty to do so.

The next point argued by the learned counsel for the prisoner was that the Judge misdirected the jury because he failed to warn them of the danger of acting on evidence of statements alleged to have been made by the prisoner to the witnesses Maddox, Matthews and Harding, and because he failed to point out the inconsistencies in the several statements alleged to have been made by the prisoner —both as between the statements themselves and as between those statements and other facts established by the evidence—and also because he failed to point out the weakness of the evidence which went to identify the hair of the dead child with that found on certain blankets, and of the evidence identifying certain serge found on the Footscray Road with that of the dress worn by the child on the day of her death.

Dealing first with the evidence of alleged confessions, it was not and could not be argued that the evidence was inadmissible. The principle on which such evidence is admitted is well stated in *Taylor on Evidence*, 11th ed., par. 865, as follows :—" All reflecting men are now generally agreed, that deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the

(1) (1915) 2 K.B., 431. (2) (1917) 12 Cr. App. R., 215.

law ; their value depending on the sound presumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, therefore, so made by a prisoner to any person, at any time, and in any place, are at common law receivable in evidence, while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case." When such evidence is admitted it should no doubt be scrutinized with an amount of suspicion varying with the circumstances of each case, but it is for the jury, and the jury alone, to estimate its value, with the assistance of any comments which the trial Judge may in his discretion think proper to make upon it. There is no rule of law or of practice which requires the Judge to caution the jury against acting on such evidence or which prescribes any measure of the comment which it is his duty to make upon it.

Turning to the facts of this case, we find that after the jury had heard all the evidence and the observations of counsel upon it, the Judge read the critical parts of the evidence to them, and called their attention to the character of the witnesses, the attacks that had been made upon their veracity, and the inducements which may have led to their statements. He specifically told them that it was entirely a matter for them to determine how far the facts that were elicited in respect to the witnesses' characters might affect their evidence. Under these circumstances it is impossible for us to hold that there is in this respect error in point of law in the charge or miscarriage arising because of it.

Again, as to the evidence relating to hair on the blankets and to serge found on the Footscray Road, the presiding Judge in his charge stated in detail the salient points of the evidence, and left it to the jury to attach to it such weight as they might think proper. No error in law can be assigned arising out of this treatment of the evidence.

Another ground urged by counsel for the prisoner was that the verdict of the jury was against the weight of evidence. As we have before indicated, there was, in our opinion, abundant evidence, if the jury believed it, to sustain their verdict. But we desire to add that if there be evidence on which reasonable men could find a verdict

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of guilty, the determination of the guilt or innocence of the prisoner is a matter for the jury and for them alone, and with their decision based on such evidence no Court or Judge has any right or power to interfere. It is of the highest importance that the grave responsibility which rests on jurors in this respect should be thoroughly understood and always maintained.

The only remaining ground was that a new trial should be had in order that the prisoner might bring forward new evidence. On this ground we find it unnecessary to say more than that we agree with the decision of the Full Court.

ISAACS J. I deeply regret there should be any division in this "remarkable case," as *Schutt* J. properly termed it. I am fully conscious of the weight of judicial opinion opposed to my own, all of which I unfeignedly respect and value. But as the conclusion I have formed is clear and distinct, and affects not merely the present appellant but also the general administration of the criminal law, I take the liberty of stating my reasons explicitly. These reasons conflict with the ultimate views that prevail, but, as I understand, there is not, to say the least, entire unanimity between the views entertained by the Supreme Court and my learned colleagues in this Court; and this adds to the difficulty of the case. The reasons upon which I found my conclusions rest upon a very broad ground: Has the prisoner had substantially the fullest chance for his life before the jury which the law says he shall have? If, as I believe, a material gap exists, it cannot, in my opinion, be filled up by judicial conjecture or judicial opinions of guilt as has been done in this case. I found my reasons on what I conclude as to the jury's understanding of the learned Judge's charge, gathered from the original proceedings themselves, and confirmed by the very frank admissions of the learned Crown Prosecutor in the argument before us, to which I shall refer.

A detestable crime has undoubtedly been committed whereby a young girl was deprived of her honour and her life in appalling circumstances. No words can adequately express one's abhorrence of both the crime and the criminal. But as British law in defending the weak and the innocent against the strong and the guilty demands

vindication, and not possible victims, it proceeds by what Lord *Shaw* aptly calls "the ordered march of justice." The question is whether that has been preserved in the present case, or whether the prisoner was exposed to a peril of conviction for wilful murder which, had the jury been adequately instructed, they might not have arrived at. That is all that is in debate, namely, "Were the jury in the circumstances, and taking the Judge's charge as a whole, sufficiently instructed and directed as to the legal effect of a most important portion of the evidence?"

Putting the matter into the smallest compass, and showing the chain of reasoning before demonstrating it in detail, it comes to this:—(1) It is clear to me from the proceedings, as I read them, that the jury might have accepted the Harding confession both as made and as true. That confession, after showing that the connection was over and the prisoner had left the room and gone into another room, continued: "After a little time she commenced again to call out, that he went in to stop her, and in endeavouring to stop her from singing out, he said he must have choked her." (2) If accepted as true, it is conceded that the killing of the girl was not (*a*) intentional or (*b*) during sexual intercourse. The accepted facts would be inconsistent with either (*a*) or (*b*), and would exclude other inconsistent facts in the case. (3) As the triple definition of murder given by the learned Judge to the jury was limited to three things—(*a*) intention to kill, (*b*) killing during sexual intercourse, (*c*) killing in furtherance of the purpose of having sexual intercourse—it follows that the finding must in that case have rested on the third ground. (4) But as the intercourse had before that time entirely ceased, when the purpose was completely accomplished and ended, it was impossible to answer the description, and no other description of murder was placed before the jury. Therefore, assuming they did their duty, they confined themselves to a legal impossibility. (5) The purpose of stopping cries, though detestable enough, is still an entirely distinct and separate purpose, not within the definition and therefore not found by the jury. (6) The Supreme Court conjecturally formulated a new finding by raising a new branch of the triple definition, namely, "intention of doing grievous bodily harm," never raised at the trial, never included by the Judge in his definition

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to the jury. *And the Supreme Court proceeded to treat the prisoner as guilty of that, without the intervention of the jury.* (7) The words in the Harding confession were such as were, if the jury thought fit, capable of sustaining a verdict of manslaughter. *The Crown Prosecutor admitted before this Court that the words in that confession do not necessarily mean that the prisoner intended to kill the girl.* I go further, and say that, if taken to be true, *they are a denial that he had such an intention.* (8) But as to every alleged confession, and therefore *as to this one, the jury were told it would "incriminate" the prisoner, and was of "a damning character."* That surely would, unless very carefully guarded, convey to a jury that the Harding confession was sufficient in itself to answer one or other of the triple definitions and therefore to convict the prisoner of murder. In face of that, I am unable to consider that the jury necessarily went beyond the confession itself to find murder. (9) *The charge ought therefore to have included an instruction to the jury that, in the event of their accepting the Harding confession as true, they should find manslaughter, unless they found upon the new issue first suggested on appeal by the Supreme Court, namely, that the prisoner intended to inflict bodily harm, and then only it would be murder.*

It seems to be an inescapable conclusion from this chain of reasoning that it is too unsafe to hold to the verdict, and there should be a new trial.

The Crown placed before the jury a mass of evidence, but in that mass there were three principal pieces of testimony: the Matthews confession, the Maddox confession and the Harding confession. On certain crucial points they were absolutely inconsistent. But the Crown left to the jury the choice, *inter alia*, of accepting any one of them as having been made *and as being true*; the whole matter now centres around this one vital question: What is the true position, supposing the jury believed that Ross did *make* the Harding confession, and that every word of it was *true*? Now, to my mind, if the Crown arguments are constantly tested by this one question, "*Suppose the Harding confession was accepted as true*," all difficulties disappear, because, being itself a denial of intention to kill, it at once excludes other evidence relied on to show a contrary

state of facts. It is only when that question is lost sight of, and it is conjectured, that the jury did an impossible thing, namely, accepted the Harding confession as the true state of facts, namely, that murder was not intended, and at the same time drew from other evidence an inference entirely inconsistent with it, namely, that murder was intended, that the verdict can be sustained.

I have accordingly applied that question as the touchstone to every consideration that I find opposed to my view, and the answer I find is : (1) that, all contrary evidence being excluded, the jury should have been told that the confession did not necessarily amount to murder, but may have been manslaughter ; and (2) that the limited definition of murder given was in the circumstances inapplicable to the Harding confession, and was calculated to confuse, and probably did mislead the jury into a fatal error.

In determining the question, we have to bear in mind some fundamental truths as to our own duties. First, we are sitting as an Appellate Court of Criminal Appeal constituted by the will of the Australian people, not only for Federal matters, but as truly representative of each State as its own Supreme Court to guard and maintain its laws, to protect the weak and to punish aggressors, but at the same time to see that no person is called on to suffer punishment except in substantial accordance with law. It follows that an Australian citizen does not approach this Court, in either civil or criminal matters, as a suppliant asking for intervention by way of grace—as in the Privy Council. He comes with a right to ask for justice, and I hold, as I have fully stated on a former occasion, that our sole duty in such a case is to see whether justice to him requires an appeal to be allowed. Any other view is, in my opinion, contrary to the basic conception of the Constitution as to the judicial power in Australia. We have next to consider what order the Supreme Court should have made, and then, if the case be a proper one, to make it, if not already made. Lastly, we must allow the appeal if a miscarriage of justice has occurred, provided it is substantial.

In form this matter has come before us as an application for leave to appeal, which to some extent involves discretion. But the whole form has so far been disregarded. We have recognized that there is so much involved that we have heard it right through, hearing

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both sides; and, having so far treated it as an appeal in fact, every reason of justice requires that attitude to continue.

What is meant by "substantial miscarriage"? We are materially assisted by what the Privy Council has said in a recent case. In *Dal Singh* v. *The King-Emperor* (1) Viscount *Haldane*—recognizing that the Privy Council acted only by way of prerogative grace and not as a Court of Criminal Appeal and was limited to "substantial miscarriage," and thinking therefore in that case, where there was no jury, but merely a Judge aided by assessors, that some evidence wrongly admitted made no difference—was very distinct with reference to a case where there was a jury. Lord *Haldane* said (2):—"Now, it is true that error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may, for example, deprive a man of constitutional or statutory right to be tried by a jury, or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. *Even if their Lordships thought the accused guilty*, they would not hesitate to recommend the exercise of the prerogative were such the case."

I cannot for myself imagine a more serious breach of the fundamental principles which justice requires to be observed, than the want of a sufficient instruction to a jury to distinguish between wilful murder and manslaughter where the facts require it. And there is in that case substantial error, and therefore substantial miscarriage, even if, as the Privy Council says, the appellate tribunal were to consider the accused guilty. The opinion of the appellate tribunal as to that is nothing—they are not the tribunal for that purpose—where a jury is by law the tribunal of fact. I take it, therefore, to be my duty to disregard everything not shown to be strictly irregular, and to disregard also everything in the nature of mere technicality which a Court of appeal cannot allow to shelter a criminal from the consequences of an atrocious crime, but fully to regard and give effect to any substantial miscarriage which constitutes a material and fundamental departure from justice.

Now, on a consideration of the materials before us, it appears to

(1) (1917) 25 Cox C.C., 705. (2) (1917) 25 Cox C.C., at p. 711.

my mind clear to demonstration that the matter was left to the jury in such a way as to leave great room for, great probability of, a fundamental error as to the degree of the prisoner's culpability.

Ross was not tried for rape—let that be clearly understood. That was not and is not the charge, or the issue we have to consider. He was tried for wilfully murdering the girl. He was found guilty of wilful murder, and has been sentenced to death. The Victorian Court rejected his appeal. Of the several grounds placed before us, I agree that none are sustainable except the one with respect to which I have the misfortune to differ from my learned brethren. That ground is that, having regard to the whole circumstances of the intricate case, the evidence was left to the jury without sufficiently guarding the accused against the danger of a conviction for wilful murder upon facts which a jury properly instructed might consider only manslaughter. Some preliminary explanation is necessary.

The arguments for the prisoner ranged themselves into three divisions. First, there was a massed objection that, having regard to the whole circumstances, the learned trial Judge should have given a more detailed and lucid explanation of the evidence, and a comparison of its various parts. Mr. *Brennan*, on behalf of Ross, dwelt with much earnestness and force upon the unusual circumstances of the case. He said that, in view of its special circumstances, the learned trial Judge did not sufficiently enlarge on what Mr. *Brennan* urged were the improbabilities, discrepancies and motives appearing in the evidence. He pressed upon us the horror of the crime itself, the public excitement, the unsavoury and untrustworthy sources of the main evidence for the Crown, the tainted character of some of the chief unofficial witnesses for the prosecution, the extraordinary nature of the story they told, their possible motives, such as the reward of £1,000 offered about 3rd January, the discrepancies and inconsistencies in the various confessions deposed to, the strange nature of the corroboration relied on to support the Harding confession, the divergent legal results according as one or other of the confessions was believed by the jury, and, above all, the penalty in case of conviction; all these circumstances, he urged, made the case one where a miscarriage of

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justice may be properly said to have occurred because the necessary precision was not observed to eliminate a possible misunderstanding by the jury of the full duty they were required to perform. I agree that no legal error can be imputed to the learned Judge's charge in this respect. The circumstances referred to would, no doubt, have justified the learned Judge, if he had thought proper, to have warned the jury in respect of several matters; but no Court can say there has been legal error.

The second division was as to new evidence. As to this, I conclude, on the whole, that it should not be made the ground of a new trial in the circumstances. I think the principle stated in *Hip Foong Hong* v. *H. Neotia & Co.* (1) by Lord *Buckmaster* for the Privy Council applies. It is there said with reference to such a point: "If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result." After carefully examining the new evidence, I am of opinion that it falls short of this requirement.

The third division, however, stands in an entirely different position. To begin with, I entirely assent to the argument on behalf of the prisoner that the many complicated and unusual circumstances of the case made it all the more essential to guard the jury against the possibility of a fatal error. To say the least of it, as matters stand, this fatal error may, for all the Court can tell, have occurred in arriving at the verdict.

The charge being wilful murder, it was open to the jury to find manslaughter only if the facts permitted. If the facts were capable of either interpretation, murder or manslaughter, the jury—and I wish to emphasize, *the jury only*—must determine which of the two it was. The ground upon which I agree to a rejection of all the other grounds brought forward by Mr. *Brennan* is that, however powerful the considerations he advanced, however tainted and discrepant and improbable any of the facts relied on by the Crown might be, that was all matter for the jury alone, and I have no right to express

(1) (1918) A.C., 888, at p. 894.

or to form any opinion about them in favour of the prisoner, except so far as they are relevant to a point within my own jurisdiction to determine. And it is precisely because I apply the same rule to the remaining point, and decline, against the prisoner, to usurp the function of the jury in determining whether the facts in the Harding confession amounted to wilful murder or manslaughter, that I think the question should go back for a new trial. It does not appear, in my opinion, that the jury have determined that point in the way the law requires or at all. The summing-up never mentioned the word "manslaughter." It is true the prisoner's counsel did not suggest it. It would have been probably unwise to have suggested it for the prisoner. Neither did the Crown suggest it. And the learned Judge, not having heard any suggestion of manslaughter from either side, did not refer to it. It was not surprising that the learned Judge, who plainly took the very greatest care in placing in systematic order the aspects, so to speak, of the three confessions, should have abstained from mentioning manslaughter. But it is unfortunate that the possibility was not pointed out, because, as established by two great decisions that in my opinion deserve to stand as pillars of the criminal law and should never be weakened by any Court, except so far as the Legislature specially chooses to relax them, no prisoner can validly consent to any serious breach of the administration of criminal law. It is such a breach if, in a case where manslaughter is on the evidence a possible verdict, the necessary instruction is not given to the jury. The first case is *R.* v. *Bertrand* (1), where the Privy Council says: "The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party"; and their Lordships reaffirm "the common understanding . . . that a prisoner can consent to nothing." The other is *R.* v. *Hopper* (2), where Lord *Reading* C.J., for the Court, says:—"We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the

(1) (1867) L.R. 1 P.C., 520, at p. 534. (2) (1915) 2 K.B., at p. 435.

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evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand." It was suggested that this case was weakened by later cases, such as *R.* v. *Clinton* (1). So far from thinking so, I am of opinion that it was in substance reaffirmed by the observations distinguishing it. The last-mentioned case is only the converse of the principle in *R.* v. *Hopper*, that is, the facts in *Clinton's Case* did not raise a possible case of manslaughter. *Clinton's Case* has not, I believe, found its way into any other report, and merely because it is unimportant. *Hopper's Case* stands, and I trust will always stand, as a protective landmark of British criminal law. Otherwise any poor undefended criminal appealing against a verdict of murder when manslaughter ought to have been left to the jury, would be denied redress because he had waived his right. The learned Crown Prosecutor contended that this was the law. Not only is *Bertrand's Case* (2) opposed to that, but so is every fundamental consideration of our law and sense of justice. The learned Judges of the Supreme Court, however, say in effect, that a verdict of manslaughter was impossible; and on a ground never presented to the jury. If that be a tenable position, their judgment is of course correct. But, as I shall show, that position is not maintainable in point of law. The summing-up was obviously based on the supposition that manslaughter was impossible, and the effect of the summing-up as a whole was that, *if any one of the confessions*, no matter which, was accepted as true, that was sufficient in itself and taken by itself to require a verdict of murder, and that the alternative, and the only alternative, was acquittal based really on the rejection of all the confessions. The learned Judge at the beginning of his charge to the jury observed :—"The accused, as I have said, is charged with the crime of murder, and, if you are satisfied beyond reasonable doubt that he caused the death

(1) (1917) 12 Cr. App. R., 215. (2) (1867) L.R. 1 P.C., 520.

of this young girl and (1) that he caused her death with the *intention* of bringing that death about, or (2) if you are satisfied beyond reasonable doubt that *in the course of* having sexual intercourse with that young girl he caused her death, or (3) that he caused her death in *furtherance of that purpose*, he would be guilty of murder." This triple division—though unexceptionable in point of abstract law—becomes a distinct source of error, as applied to the admitted facts of the case, when read in conjunction with the rest of the charge, and particularly in the absence of any further instruction in respect of the Harding confession. And one thing must be steadily borne in mind, namely, that while we must assume, in the absence of evidence to the contrary, that the jury followed the instructions given to them, *we must assume they did not go beyond them* and find their verdict on some new basis of law not put before them, and not suggested until the Victorian Court delivered its appellate judgment. When we come to consider the judgment of the Supreme Court of Victoria, this last observation is of great importance.

It must be remembered that, apart from the three confessions relied upon by the Crown, the case was practically unsustainable. It is necessary to state what those several confessions disclosed. They were all deposed to by what were called "disreputable witnesses." One was the Olive Maddox confession, said to have been made on 5th January. With this confession, taken by the jury as the basis, it might be considered by them that Ross had deliberately made away with the girl and endeavoured to throw suspicion on someone else. But there was no room for manslaughter once that confession was believed. That confession would naturally be applied to the first branch of the triple definition. There was nothing in that confession to support the second or the third branches; such would be pure conjecture so far as that confession is concerned. Another confession relied on was that to Ivy Matthews, on 31st December, the day after the girl's death. That confession relates exclusively to the second branch of the definition. There was no room for manslaughter once that confession was believed. As to both of these, the clear meaning of the charge was murder, if you believe the confession; acquittal, if you do not. The third, and

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by far the most prominent, confession was the Harding confession; and this is placed in precisely the same category as the other two. The learned Judge observed, in introducing this confession: "There is a third witness who has been called to give evidence of deeply incriminating statements made by the accused. That witness is Sydney John Harding, who was in the Melbourne Gaol at the time when he says that this statement was made to him." The date of the alleged confession was 23rd January. Harding is an oft-convicted criminal. Now, the Harding confession was pressed greatly at the trial. Three things are of importance for the present circumstances in connection with this confession. It relates: (1) that Ross ravished the girl while she was asleep in the room called the cubicle, where there were blankets; (2) that after he had ravished her and completed the outrage he left the room, she having fainted, and after a little time she commenced again to call out, and that he went in to stop her, and in endeavouring to stop her from singing out he must have choked her; (3) that he subsequently that night tore her clothes into strips and bits, and went round with his bicycle and distributed them along the Footscray Road and elsewhere. This confession, like both the other two, was read to the jury during the Judge's charge. His Honor also drew attention to another portion of the Crown case relied on in corroboration of Harding's statement, namely, the finding of some pieces of serge on the Footscray Road on 26th and 27th January by Mrs. Sullivan after seeing a newspaper account of the Harding confession. The finding of these pieces of serge, identified as part of the girl's dress and found in extremely good condition on the main Footscray Road, folded together, practically a month after they were supposed to have been scattered there by Ross, was stressed as corroborating Harding, and, what is more, as indicating that the story contained in the Harding confession was *true*. The more the proceedings are looked at, the more it becomes evident that the Harding confession occupied a position of extreme prominence, and it is essential to notice that the Harding confession does not fall into either of the first two branches of the definition. According to that confession, as I have said, the killing was neither (1) intentional nor (2) during intercourse, and therefore must, if

attributed to the Harding confession, have been thought to come under (3) in furtherance of that purpose. It is convenient at once to state that *during the argument before this Court the learned Crown Prosecutor, in answer to a direct question by me, very candidly and properly admitted that the words deposed to in the Harding confession did not necessarily mean that Ross intended to kill.* That admission, in my opinion, practically concludes the matter. The whole of the confession evidence was introduced by the learned trial Judge in his address to the jury by these observations :—" I now pass on, gentlemen, to another feature of the Crown case which is very strongly relied on. That is the statements which it is said Ross made, and which undoubtedly if made *incriminate him and directly show that he it was who killed the girl.*" Further on, his Honor alludes to deeply incriminating statements by the accused to Harding. Further on, in relation to all the confessions, it is said : " They are, of course, statements of a *damning character.*"

Now, bearing in mind that the triple definition given at the beginning had reference to the evidence actually given, that each confession was distinct and leads to a totally different view, that in each case it was murder and no other crime that was to be looked for if guilt appeared at all, what would any ordinary jury, knowing nothing of the legal distinction between murder and manslaughter, understand by saying of these confessions indiscriminately that they " undoubtedly if made *incriminate him* " and are " of a *damning character* " ? Incriminate him in what ? And damning as to what ? Why, *wilful murder*, and nothing else, so far as the jury were informed. How can any one say the jury would not reasonably understand that, once they arrived at the conclusion that the statement in any one of these cases was made and was true, then that " murder " was against the man they believed guilty the inevitable verdict. That it all depended on the one condition—if any one confession was believed that was an end of the matter, and the verdict must be " wilful murder." If no confession was believed, then acquittal. Nothing else was in view of Judge or counsel. The jury were laymen, and would naturally look either for culpability or innocence, and, if culpability, none but wilful murder.

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A new definition—a fourth branch—entirely distinct, was formulated in the Supreme Court judgment, which it was considered was sufficient to support the verdict, namely, "intent to do grievous bodily harm"; but it is admitted all round that the jury did not, and could not be assumed to, travel outside the triple definition. The Court says indeed: "The absence of any express direction as to manslaughter was an omission, as far as it went, entirely in the prisoner's favour." I absolutely dissent from that. The jury had been led to believe, by the way in which the case was left to them, that if only they believed Harding's evidence the prisoner was "incriminated." This, as I have just said, cannot be supported by saying that the Harding confession, if believed, is in itself capable of sustaining a finding of killing in furtherance of a purpose of sexual intercourse. Nor does the second point made by the Supreme Court establish its correctness; nor, indeed, do I think the second point in the circumstances relevant. It is this: Suppose, said their Honors, the jury misunderstood the meaning of the word "furtherance," thought it meant "continuance"—that is, something further; and suppose they came into Court to ask the Judge to clear up the matter. And clinching the assumption, the Court assumed the jury to put this question—really the same position as the Court had already assumed—"Suppose we believe Harding's evidence, suppose we believe that the prisoner in his statement to Harding *was truly stating the condition of his mind* when he said he *merely wanted to stop the outcries of the girl, and not to kill her*; suppose the issue was narrowed down to that, is that murder, or what is it?" On the opinion of the Court the answer *again* would have been the same: that it was murder. The learned Chief Justice goes on to say that, having regard to the condition of the girl, the purpose of the prisoner to stop her moaning and groaning by using violence of that particular "nature," the opinion of the Court was—apart altogether from the earlier felony—that would be an assault with *the intention of doing grievous bodily harm*, and that assault followed by death would constitute murder.

In other words, the second point is that, the jury having been confined by the direction to three specified points of consideration, the Court, having in the earlier part of its judgment assumed the jury

to have followed that direction and of course not to have gone beyond it, now proceeds to hold that if the jury had asked, and had been directed, *on another ground altogether* which they had not in fact been asked to consider and cannot be presumed to have considered, they would necessarily have found the same verdict. And therefore it is held that the verdict—the totally different verdict—they *did* find is to stand. But, further, the conclusion assumes what I respectfully maintain a Court can never properly hold as a matter of law, particularly in a capital case, that, where a man says he had no intention of killing but merely of stopping cries, he had nevertheless in fact the intention of doing bodily harm. That is essentially the function of a jury upon consideration of the circumstances, and least of all, I venture to think, should a Court invade the jury's constitutional function when the result is to deprive a prisoner of his life.

If, contrary to my opinion, it be permissible for the Court to take up the jury's function of deciding what was the prisoner's intention by the condition of the unfortunate girl as she appeared when found the next day, after her body had been carried to Gun Alley and placed there with, we know not what, violence or carelessness, these are some things necessary to remember. Though the body when examined by Dr. Mollison showed many injuries, yet, except the genital injury, showing ravishment, and what the doctor described thus, "internally, there was a bruise on the left tonsil," all the injuries described by him were external abrasions and bruises, and the *learned Crown Prosecutor admitted to me that there was nothing to show whether these abrasions and bruises were caused before or after death.* Certainly the doctor proved that "the cause of death was strangulation from throttling," but that, though tremendously weighty evidence, upon which a jury properly instructed could have found intention to inflict bodily harm, left it open to them, if the issue had been raised and fought, to have found such intention did not in fact exist. But, in any case, the radical underlying fallacy in this additional point of the Victorian Court is that it is known that the jury did not find such a fact. It is not included in the third part of the triple definition, and therefore was outside their directed sphere of consideration; if it is assumed that they accepted the

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Harding confession, they could not have found what the Supreme Court assumed they might have found, because the two assumptions are mutually contradictory, and, above all, special inferences made by the Court to sustain a verdict for the higher crime, not otherwise supportable—inferences based on conjectural answers to conjectural questions—are essentially outside the province of the criminal law. *R.* v. *Lumley* (1) shows that this question is no exception to the rule that matters of fact must be left to the jury. I draw special attention to what Lord *Halsbury* L.C. said in *Bray* v. *Ford* (2).

If the second point of the Supreme Court is put as showing there was no substantial miscarriage of justice, it is in my opinion entirely misconceived. The fundamental flaw in it, as I have already said, and I hope with proper respect, is that the prisoner is deprived by that course of reasoning of his constitutional right, not to be deprived of his life except by the considered verdict of a jury determining the very facts constituting the crime.

Even in a civil case each party has this right. In *Bray* v. *Ford* (2), the leading case on this branch of law on substantial miscarriage, the House of Lords held that where a question was withdrawn from the jury which the defendant had a right to have submitted that was itself a substantial miscarriage. Lord *Halsbury* L.C., in answer to an argument very similar to that rested upon by the Supreme Court, said (3) :—" It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. *I absolutely decline to speculate what might have been the result if the Judge had rightly directed the jury.*" I would add, that it is even less permissible to speculate where the issue is life or death.

In my opinion, and without hesitation, I hold that there should be a new trial, because the proper finding of the guilt of the accused, involving capital punishment, should be ascertained, not by Judges, but, on a sufficient direction, by a jury in the way the law requires.

HIGGINS J. I concur with the opinions of the Chief Justice and of *Gavan Duffy* and *Starke* JJ. ; but I want to add certain considerations.

(1) (1911) 22 Cox C.C., 635.
(2) (1896) A.C., 44.
(3) (1896) A.C., at p. 48.

The jury, by its verdict, found the accused guilty of murder, the trial Judge having explained what would constitute murder. "If you are satisfied beyond reasonable doubt that he caused the death of this young girl, and that he caused her death with the intention of bringing that death about, or if you are satisfied beyond reasonable doubt that in the course of having sexual intercourse with that young girl, he caused her death, or that he caused her death in furtherance of that purpose, he would be guilty of murder." This direction was absolutely clear and admittedly correct; it follows an ordinary formula appropriate to such cases, and there is no ground that I can see for the assertion that each separate hypothesis suggested was directed to one specific witness or piece of evidence. The direction, indeed, precedes any reference to the evidence. "In furtherance of that purpose" refers to the purpose of having sexual intercourse; and if the killing took place after the intercourse it would not be "in furtherance" of the purpose. The verdict is general—"guilty"; and there is nothing to show which of these three hypotheses the jury accepted; but there was ample evidence on which the jury could have accepted any one of the three. The accused elected to give evidence on his own behalf, denied on oath, as well as in a written statement made to the detectives, that he had spoken to the girl, or had anything to do with her; and, whichever view the jury took, the twelve jurors necessarily found, from the form of the verdict, that in this denial he lied. The jury believed as to this fact the witnesses for the prosecution, and did not believe the accused. In three alleged confessions made by the accused, he admitted sexual intercourse, and in two of them he admitted that he killed the child. One confession—that to Matthews—was made on 31st December, directly after the death; the other—to Harding— was made on 23rd January, when he was under arrest, and in imminent danger of his life. These two confessions of killing vary in detail, but they do not vary as to the two facts which I have mentioned; and if there is any inconsistency, it is an inconsistency in the prisoner's statement, not any inconsistency in the evidence of the witnesses to the alleged confessions. A combination of circumstances has led to disproportionate attention being given to the alleged confession to Harding; but if the alleged confession to Matthews were accepted by the jury,

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it would fully justify the verdict of murder. He (Ross) said: "First of all after Stan." (his brother) "went I got fooling about her, and you know the disease I am suffering from; when in the company of children (or young children) I cannot control myself." He strangled her while he was going with her. He said he strangled her in his passion. He said: "I pressed round her with my hands. I did not mean to kill her but it was my passion that did it." It is true that, according to this confession, the child was not raped, but was a willing party to the connection; but she was under sixteen, and carnal connection with a girl under this age is felony in Victoria; and if the child died in the course of the connection, or in furtherance of it, it was murder, coming within the second or third hypothesis put by the Judge. The jury was entitled to find murder if it believed any one of the three hypotheses; the issues were absolutely left to the jury with a charge from the Judge that correctly represented the law; and as there was evidence sufficient to support any of the hypotheses, the Supreme Court of Victoria would not have been justified in setting aside the verdict of the jury. There has been no "miscarriage" of justice when all the requirements of justice have been satisfied in the process of ascertaining the guilt or innocence of the prisoner.

It is said, however, that according to the confession made to Harding, if taken by itself and believed in all respects by the jury, there is an aspect in which the accused could be regarded as having committed manslaughter, not murder; for the accused stated (as is sworn by Harding) that the child "moaned and sang out, but he put his hand over her mouth, and she stopped, and appeared to faint. After a little time, she commenced to call out, that he went in to stop her, and in endeavouring to stop her from singing out, he said he must have choked her." It is said that this statement is consistent with innocence of intention to kill; and so it is. But it is also consistent with intention to kill. The first attempt to stop her cries having been found to be only temporarily successful, it *may* have occurred to him that it would be better to silence the child for ever. It was open to the jury to find that the accused intended thus to kill; and, if they followed the confession made to Harding in the main in preference to the confession made to Matthews (which

of itself is doubtful), they might legitimately find that he intended to kill unless they disregarded the directions of the Judge.

The true position is that the jury was not bound to rest on Harding's evidence alone, or on Matthews', or on any particular evidence. The jury was entitled to believe or not believe anything that was said by Ross or by any of the witnesses. The jury has said in effect that Ross was guilty of murder, as defined by the Judge; and as the jury saw and heard Ross and the witnesses, we have no right to interfere with the verdict. I thoroughly concur with the view put by the Supreme Court that "the absence of any express direction as to manslaughter was an omission, as far as it went, entirely in the prisoner's favour." As those who are familiar with murder trials well know, if the only alternatives before a jury are acquittal and sentence of death, there is a strong tendency to shrink from pronouncing a verdict which leads to death. Neither the prisoner nor his counsel ever suggested the alternative of manslaughter to the Court. It might have been injurious to the chances of the prisoner to suggest it in the presence of the jury, as it might seem to be inconsistent with Ross's absolute denial of any talk with the girl; but when the jury retired the Judge could have been asked by counsel to remind the jury of the alternative, of the Court's own accord. The whole matter was discussed between prisoner's counsel, and they decided that it was better not to suggest manslaughter. Now the complaint is that the Court did not do that which prisoner's counsel did not wish to be done. I may say, in passing, that there is no law to the effect that the Judge must always direct the jury that they can find a lesser offence (*Naylor's Case* (1)). The case of *Hopper* (2) has been explained by the same Court as decided it, in the case of *Clinton* (3). One can easily conceive of cases in which such a direction would be essential; but the present is not such a case.

My opinion is that the Supreme Court rightly exercised the grave discretion committed to the Court by statute. Until recent years there were no appeals allowed in criminal cases; and the reasons for this practice are obvious. But, in order to meet as far as possible

(1) (1910) 5 Cr. App. R., at p. 21. (2) (1915) 2 K.B., 431.
(3) (1917) 12 Cr. App. R., at p. 218.

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the awful possibility that an innocent man may suffer through legal process, the British Parliament in 1907 granted to the Courts the power, under carefully guarded provisions, to reopen convictions. This legislation has been copied in Victoria, as well as in other States. It is a power, however, to be exercised with the greatest care; and I certainly do not feel free to say that the discretion to refuse an appeal was in this case wrongly exercised. In my opinion, it was rightly exercised. The prisoner has had fair play and due process of law. The twelve jurors have unanimously found the accused guilty; the responsibility for the verdict rests on the jury; and if the Courts were to interfere they would be unwarrantably usurping the functions of the jury.

Special leave to appeal refused.

Solicitor for the applicant, *N. H. Sonenberg.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING AND THE MINISTER FOR CUSTOMS . . . . . } PLAINTIFFS;

AGAINST

AUSTRALASIAN FILMS LIMITED AND ANOTHER . . . . . } DEFENDANTS.

H. C. OF A. 1922. SYDNEY, *Mar.* 30; *April* 6. Knox C.J.

Practice—High Court—Costs—Taxation—Judgment for plaintiff with costs—Finding against plaintiff as to part of claim—Costs incurred in respect of that part—Unnecessary costs—Supreme Court Rules of 18th November 1915 (N.S.W.), r. 42.

Rule 42 of the *Rules of the Supreme Court* of 18th November 1915 (N.S.W.) provides that "The Court or Judge may, at the hearing of any cause or matter, . . . disallow the costs of any document, evidence or proceeding which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter . . . or may direct the taxing officer to consider such document, evidence or proceeding and to disallow the costs thereof, or of such