[HIGH COURT OF AUSTRALIA.]

BEAVAN . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

H. C. OF A. 1954.

SYDNEY. *Aug.* 19, 20; 30.

Dixon C.J., McTiernan, Webb, Fullagar and Taylor JJ.

Criminal Law—Murder—Manslaughter—Direction as to verdict—Duty of judge—Verdict of manslaughter—Facts point to murder—Satisfaction of jury—Validity of verdict—Crimes Act 1900-1950 (*N.S.W.*), *s.* 23 (2).

Upon an indictment for murder where the proofs suffice to justify a verdict of murder, but on no view of the evidence which might reasonably be adopted would the crime amount to manslaughter and not murder, and counsel for the prisoner has not suggested to the jury the possibility of their returning a verdict of manslaughter, the judge is not under any duty to inform the jury that it is within their power to find a verdict of manslaughter, unless they ask a question upon the subject.

If the jury exercise their power to find a verdict of manslaughter, and it is certain that they are satisfied beyond reasonable doubt that the prisoner unlawfully killed the deceased, their verdict of manslaughter will not be invalidated merely because the facts proved by the evidence upon which the jury must have acted amount in point of law to murder. The verdict must be taken to mean that the jury were satisfied of all the elements of the crime of murder except the existence of the requisite intention or other form of malice aforethought but that they were not prepared to find that this element existed.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of New South Wales.

Doris Wilma Beavan was, in company with Raymond Leslie Harvey, tried at the Central Criminal Court, Sydney, on the charge of having feloniously murdered George Henry Brett at Millers Point, New South Wales, on 13th July 1951. On 6th December 1951, the jury returned a verdict against both accused of manslaughter, and each accused was sentenced to thirteen years' imprisonment with hard labour.

An appeal by Beavan against that conviction and sentence was dismissed by the Court of Criminal Appeal on 18th April 1952.

By notice of motion dated 26th July 1954, an application was made to the High Court on 19th August 1954, on behalf of Beavan for special leave to appeal to that Court against the said decision of the Court of Criminal Appeal.

Further facts appear in the judgment hereunder.

J. W. Shand Q.C., *G. E. Quinn* and *J. H. Wolff*, for the applicant.

H. A. Snelling Q.C. (Solicitor-General for New South Wales) and *W. J. Knight*, for the respondent.

Cur. adv. vult.

Aug. 30.

THE COURT delivered the following written judgment:—

This is an application for special leave to appeal from a decision of the Supreme Court of New South Wales confirming a conviction for manslaughter. The conviction took place upon an indictment for murder. The applicant, Doris Wilma Beavan, was indicted jointly with Raymond Leslie Harvey for the murder on 13th July 1951, of one George Henry Brett.

George Henry Brett was an elderly man who lived in a third-floor attic room of a lodging-house in Agar Steps, Millers Point. On the night of 12th, or early morning of 13th July 1951 he was killed in his room by repeated blows upon the head with some heavy instrument. His wounds and the marks of blood in the room showed that he must have been violently attacked. For a number of years he had associated with the applicant, and she at the time when the deceased was killed was frequenting the company of the prisoner, Harvey. A body of evidence implicated the applicant and Harvey as the joint authors of Brett's death. There was evidence to show that they had participated in a violent assault upon him in the course of which one or other of them had struck him with a hammer. It appeared that both had been drinking.

The trial took place before *Clancy* J., who took the view that if it was found that it was the prisoners who killed Brett, the crime was murder. Accordingly he did not include in his charge to the jury any direction as to manslaughter. At the conclusion of the summing-up counsel for Harvey in the presence of the jury said that he desired to make an application about manslaughter. The jury then retired to consider their verdict and counsel's application that the jury should be directed that they might find a verdict of manslaughter was heard. Counsel for the applicant declined to make a similar application. The learned judge adhered to the view

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he had formed that it was not a case in which he ought to direct the jury that they might, upon some view of the evidence, find a verdict of manslaughter. But after deliberating for two hours and more the jury returned into court and said that they would like to ask the judge's "rule about manslaughter." In answer to this question his Honour informed them that it is open to a jury on any charge of murder to return a verdict of manslaughter although it is not specifically mentioned in the indictment. The learned judge then went on to say that the jury must act upon the evidence and there did not appear to be evidence which would warrant a verdict of manslaughter in respect of either accused. After further deliberation the jury again returned to court, and on a suggestion that the jury might not have heard fully the judge's direction as to manslaughter it was read to them. His Honour added that, if he took a view of the facts, that was not to affect their decision; they were the sole judges of the facts and the law gave them the right to return a verdict of manslaughter. The jury again retired and after some time returned a verdict of manslaughter against both prisoners. The present applicant appealed from her conviction unsuccessfully to the Supreme Court, as a Court of Criminal Appeal, upon a variety of grounds which did not include a complaint that it was not reasonably open to the jury to find her guilty of manslaughter. However the application to this Court for special leave to appeal was supported only upon that ground and the further ground that the direction as to manslaughter was insufficient. We need say nothing about the failure to take the point before the Supreme Court or the length of time that has elapsed since the decision was given from which it is sought to appeal. For we are of opinion that the grounds upon which reliance is placed fail in substance.

Upon an indictment for murder where the proofs suffice to justify a verdict of murder, but on no view of the evidence which might reasonably be adopted, would the crime amount to manslaughter and not murder, and counsel for the prisoner has not suggested to the jury the possibility of their returning a verdict of manslaughter, the judge is under no duty to inform the jury that it is within their power to find a verdict of manslaughter, unless the jury ask a question upon the subject. In that case it will usually be incumbent upon the judge to inform them that upon an indictment for murder it is within the province of a jury to find a verdict of manslaughter; but it is proper for him to add an expression of his opinion that in no view of the evidence which the jury might reasonably take are findings of fact open that fall short of murder but amount to manslaughter.

If, however, the jury do exercise their power to find a verdict of manslaughter, and it is certain that they were satisfied beyond reasonable doubt that the prisoner unlawfully killed the deceased, the verdict of manslaughter will not be invalidated merely because the facts proved by the evidence upon which the jury must have acted amount in point of law to murder. The verdict must be taken to mean that the jury were satisfied of all the elements of the crime of murder except the existence of the requisite intention or other form of malice aforethought but that they were not prepared to find that this element existed. It is within a jury's province to refuse to make this or any other finding involving guilt and it is by that refusal that the verdict of manslaughter is warranted. We think that the law, as we have stated it, is established by *Mancini* v. *Director of Public Prosecutions* (1), per Viscount *Simon* L.C.; *R.* v. *Roberts* (2); *R.* v. *Gauthier* (3); *R.* v. *Surridge* (4); *R.* v. *Piekutowski* (5); *Brown* v. *The King* (6), per *Barton* A.C.J.; *Reg.* v. *Grimes* (7), per *Windeyer* J.

The foregoing is the position alike at common law and under s. 23 (2) of the *Crimes Act* 1900-1950 (N.S.W.).

The case is not one where a possibility arose, as in *Kelly* v. *The King* (8), of the jury convicting a prisoner of manslaughter on the footing that a criminal neglect of duty had arisen or on the footing that an injury resulting in death had been inflicted through negligence. Needless to say the existence of such a possibility might call for a direction as to the kind of conduct which would amount to manslaughter.

The application for special leave to appeal is refused.

Order accordingly.

Solicitors for the applicant, *E. R. Tracey & Co.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.

(1) (1942) A.C. 1, at p. 8.
(2) (1942) 1 All E.R. 187; 28 Cr. App. R. 102.
(3) (1943) 29 Cr. App. R. 113.
(4) (1942) 42 S.R. (N.S.W.) 278, at p. 281; 59 W.N. 221, at p. 223.
(5) (1952) S.A.S.R. 44.
(6) (1913) 17 C.L.R. 570, particularly at p. 578.
(7) (1894) 15 L.R. (N.S.W.) 209, at p. 221; 10 W.N. 211.
(8) (1923) 32 C.L.R. 509.