[HIGH COURT OF AUSTRALIA.]

MRAZ

AGAINST

THE QUEEN.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

H. C. OF A. 1955.

SYDNEY, *Nov.* 7; 18.

McTiernan, Williams, Webb, Fullagar and Taylor JJ.

Criminal Law—Murder—Death consequent upon rape—Ingredients of offence—Malice—Rape with and without malice—Misdirection—Verdict of manslaughter—Miscarriage of justice—Crimes Act 1900 (*N.S.W.*), *ss.* 5, 18 (1) (2) (*a*), 23 (2)—*Criminal Appeal Act of* 1912 (*N.S.W.*), *s.* 6 (1).*

Where upon a trial for murder a jury is prepared to conclude that the crime of rape has been committed and that the acts of the prisoner associated with or done in furtherance of his purpose have caused the death alleged it is unnecessary for the jury to embark upon an independent inquiry to ascertain whether those acts were malicious. The very fact that they were so associated or so done establishes that they were done "of malice."

Accordingly, where on such a trial a jury was directed that if it were satisfied of the commission of rape it might take the view that such rape was not malicious in that it was committed not with intent to injure the deceased but to gratify the prisoner's own desires and that if such view prevailed a

*Section 6. (1) The court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside . . . the ground that it is unreasonable, . . . cannot be supported, having regard . . . the evidence, or that the judgment of the court of trial should be set aside . . . on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by 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.

[EDITOR'S NOTE.—The appellant was on 16th March 1955 convicted in the Central Criminal Court at Sydney of the rape of the deceased woman on 27th September 1954, the date specified in his indictment for murder and sentenced to twelve years' penal servitude.]

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verdict of guilty of manslaughter was appropriate, one of murder being dependent upon a finding of intent to injure,

Held, that the direction was erroneous.

After a summing-up which included the direction above-mentioned a jury returned a verdict of guilty of manslaughter. The Court of Criminal Appeal held the direction to be erroneous, but taking the view that the jury's verdict involved a finding of rape causing the death alleged it considered that no miscarriage of justice had occurred in that with proper directions a verdict of guilty of murder should have been returned. Considering that the summing-up was too favourable to the prisoner and operated for his benefit, the court in the application of the proviso to s. 6 (1) of the *Criminal Appeal Act of* 1912 dismissed an appeal against such verdict.

Held, by *Williams*, *Webb*, *Fullagar* and *Taylor* JJ. (*McTiernan* J. dissenting), that, the case being one of murder or nothing, the introduction of the topic of manslaughter may well have operated to lessen the prisoner's chances of acquittal and that, as it could not be said that a reasonable jury properly directed would on the admissible evidence without doubt have convicted, there had been a miscarriage of justice and the application of the proviso to s. 6 (1) was inappropriate.

Per Fullagar J.: The proviso to s. 6 (1) of the *Criminal Appeal Act of* 1912 does not mean that a convicted person on appeal must show that he ought not to have been convicted of anything. It should be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence strictly followed. If there is a failure in any of these respects, and the accused may thereby have lost a chance of acquittal which was fairly open to him, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the accused has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

Decision of the Court of Criminal Appeal of New South Wales: *Reg.* v. *Mraz* (1955) 55 S.R. (N.S.W.) 479; 72 W.N. 422, reversed.

APPEAL from the Court of Criminal Appeal of New South Wales.

Gyula Mraz was arraigned on 14th March 1955 in the Central Criminal Court of New South Wales before *Nield* J. and a jury of twelve on an indictment charging that he on 27th September 1954 at Woolamai in the State of New South Wales did feloniously and maliciously murder Isabella Joyce Wilson. He pleaded not guilty.

The death of the said Isabella Joyce Wilson occurred during or immediately after sexual intercourse had taken place between her and the accused and the Crown case was that in the circumstances

such sexual intercourse amounted to rape of the deceased by the accused.

The trial was conducted both by the Crown and on behalf of the accused as a case of murder or nothing. On the third day of the trial and immediately before summing-up to the jury, and in their absence, *Nield* J. informed counsel that it appeared to him that the case raised the issues of murder and manslaughter. After some discussion his Honour had the jury brought back into court and proceeded to sum up, indicating at the outset that they might either convict the accused of murder, or of manslaughter, or acquit him. Having informed the jurors that before convicting the accused of either crime they must be satisfied beyond reasonable doubt that the accused had had intercourse with the deceased without her consent and against her will and that her death had resulted from some act or acts of the accused, his Honour referred to the provisions of s. 18 (2) (a) of the *Crimes Act* 1900 and the definition of " maliciously " in s. 5 of such Act and directed them that rape did not necessarily connote an intention to injure, and that in the present case, if they considered the accused had acted towards the gratification of his own lust and not to injure the deceased, they might conclude that the accused's acts were not malicious, in which event a verdict of murder would not be open to them, one of manslaughter being appropriate. The relevant portion of the summing-up appears in the judgment of *Fullagar* J. (1). The jury brought in a verdict of guilty of manslaughter, and the accused was sentenced to imprisonment for twelve years with hard labour.

From his conviction and sentence the accused appealed to the Court of Criminal Appeal of New South Wales (*Street* C.J., *Herron* and *McLelland* JJ.) upon the ground of misdirection in relation to the matters set out in the preceding paragraph. The court held that the directions given were erroneous, but taking the view that there had been no miscarriage of justice it dismissed the appeal pursuant to the proviso in s. 6 (1) of the *Criminal Appeal Act of* 1912.

On 5th September 1955 the accused moved the High Court for special leave to appeal against the judgment of the Court of Criminal Appeal of New South Wales, which was granted. The grounds of the appeal were (1) that there was no evidence to support a verdict of manslaughter; (2) that the trial judge misdirected the jury on the law as to manslaughter; (3) that the Court of Criminal Appeal erred in deciding that no substantial miscarriage of justice had occurred; and (4) that such court should have set

(1) (*infra*), pp. 511, 512.

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aside the conviction of manslaughter and entered a verdict of acquittal.

Further facts appear, and the relevant statutory provisions are set out, in the judgments of the Court hereunder.

J. J. Davoren, for the appellant. The Court of Criminal Appeal having found that the learned trial judge had misdirected the jury should have refrained from applying the proviso to s. 6 (1) of the *Criminal Appeal Act of* 1912. In applying such proviso it proceeded on wrong principles. The court below applied the proviso because it took the view that the summing-up was too favourable to the accused, in that the case being one of murder or nothing the jury were told they could find manslaughter, and because, having been directed that there could be no conviction of either crime unless they found rape causing the death, they had by their verdict indicated that they had so found. The court said in effect that the appellant was fortunate in having been convicted only of manslaughter. The misdirection altered the position that would otherwise have obtained, had the learned trial judge of his own motion or in response to a question from the jury told them of their statutory right to bring in a verdict of manslaughter, and left the matter there.

[McTIERNAN J. Your complaint is really that by reason of the misdirection the jury did not squarely face the issue of murder?]

Yes. [On the principles touching the application of the proviso to s. 6 (1) he referred to *Cohen and Bateman* v. *The King* (1); *Brain otherwise Jackson* v. *The King* (2); *Sanders* v. *The King* (3); *White* v. *The King* (4); *Woolmington* v. *Director of Public Prosecutions* (5); *R.* v. *Haddy* (6); *Stirland* v. *Director of Public Prosecutions* (7); *Mohamed Farid* v. *The King* (8); *Archbold's Pleading Evidence and Practice in Criminal Cases*, 33rd ed. (1954), pp. 344, 345.] In the present case it is impossible to say that without doubt the jury would have convicted of manslaughter, this being the one verdict a jury properly directed could not have reached, the case being one of murder or nothing, subject to the jury exercising its statutory right to bring in a verdict of manslaughter. The misdirection arose from his Honour's interpretation of the definition of " maliciously " in s. 5 and of s. 18 of the *Crimes Act* 1900. No

(1) (1909) 2 Cr. App. R. 197, at pp. 207, 208.
(2) (1918) 13 Cr. App. R. 197, at p. 199.
(3) (1919) 14 Cr. App. R. 11, at p. 13.
(4) (1922) 17 Cr. App. R. 60, at p. 65.
(5) (1935) A.C. 462, at pp. 482, 483.
(6) (1944) K.B. 442, at pp. 444-446.
(7) (1944) A.C. 315, at p. 321.
(8) (1945) 30 Cr. App. R. 168, at p. 176.

mention need here have been made of manslaughter in the summing-up, and if the jury had inquired about manslaughter his Honour could have told the jurors that they were free to bring in such a verdict but that it was not a proper one on the evidence. [He referred to *R.* v. *Surridge* (1).] The appellant has been deprived of the jury's consideration of the real issue of murder or nothing by the introduction of the manslaughter issue.

[FULLAGAR J. In *Ross* v. *The King* (2) the disadvantage to an accused of introducing the issue of manslaughter is pointed out.]

Because of the direction it received it cannot be said that the jury must have found rape. The verdict may well have resulted from a compromise approach because of the misdirection.

[MCTIERNAN J. Assume the verdict be set aside, can a new trial be ordered generally ? See *Kelly* v. *The King* (3).]

No. [He referred to *Evans* v. *The King* (4); *Fisher* v. *The King* (5).] The latter cases do not turn on the absence of a right in the appellate court to order a new trial but rather upon the exercise of the powers conferred by s. 5 (2) of the *Criminal Appeal Act* 1907 (Imp.).

[FULLAGAR J. Because of the distinction made at the trial between malicious and non-malicious rape, manslaughter was really the only unfavourable or adverse verdict, it being highly unlikely that the jury would have found that the appellant made the assault with intent to injure the girl as distinct from gratifying his own desires.]

Yes. The issue was murder or nothing and as that issue was not squarely put to the jury, the appellant was disadvantaged.

W. J. Knight Q.C. (with him *J. Hall*), for the Crown. The learned trial judge clearly directed the jury that unless they found the commission of rape and that the rape caused the death they should acquit, so that here they must have been satisfied that rape was committed.

[WEBB J. Do you propose arguing that the summing-up was unobjectionable ?]

Yes. It was open to the learned trial judge to tell the jury of the necessity for finding malice and of the ingredients of malice. His Honour was not bound to direct the jury as a matter of law that malice existed, that being a question of fact for the jury.

(1) (1942) 42 S.R. (N.S.W.) 278; 59 W.N. 221.
(2) (1922) 30 C.L.R. 246.
(3) (1923) 32 C.L.R. 509, at p. 516.
(4) (1916) 12 Cr. App. R. 8, at p. 9.
(5) (1921) 16 Cr. App. R. 53.

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Whilst it may be difficult to imagine a non-malicious rape, it was a matter for the jury.

[TAYLOR J. If the jury were told that it was open to them to find rape and that they might find a malicious or non-malicious rape, then they were not told what rape is.]

They were given directions. It remains a question of fact for the jury whether or not they find malice.

[TAYLOR J. I do not understand what the question of fact is. If a jury finds that a man had intercourse with a woman without consent and against her will, that is rape. There is no room for any further question whether or not he acted maliciously. The ingredients of the offence establish malice beyond doubt.]

It was not wrong to tell the jury of the necessity for malice and to define malice. It was correct to direct them that they could find manslaughter, and the jury must be taken to have acted in accordance with the directions. The court below was justified in its view that the jury must have found rape causing the death. The directions favoured the appellant.

[FULLAGAR J. referred to *Ross* v. *The King* (1).]

When the issues are clear cut as here, a direction which enables the jury to find manslaughter easily does not mean that the jury has failed to give consideration to the two preliminary directions as to finding first rape and secondly that the rape brought about the death. It would be a miscarriage of justice to acquit the appellant having regard to what the jury must have found. The question is whether there has been a substantial miscarriage of justice because the appellant has received a smaller penalty than on the facts as found by the jury he should have received.

[TAYLOR J. It does not seem right to say that because he should have been convicted of murder and was not, but was convicted of manslaughter when he should not have been, the matter should remain as it is.]

[FULLAGAR J. referred to *Ross* v. *The King* (2) and *Clinton* v. *The King* (3). Those passages tend to support the view that the court below was not correct in regarding the reference to manslaughter in the summing-up as too favourable to the accused.]

There could be factors that would operate the other way.

J. J. Davoren, in reply.

Cur. adv. vult.

(1) (1922) 30 C.L.R. 246.
(2) (1922) V.L.R., at p. 336.
(3) (1917) 12 Cr. App. R. 215, at p. 218.

The following written judgments were delivered :—

McTIERNAN J. Gyula Mraz was arraigned under the provisions of the *Crimes Act* (1900) (N.S.W.) on an indictment for murder in which the Crown charged that he did feloniously and maliciously murder Isabella Joyce Wilson. The date of the alleged crime was 27th September 1954 and the place was Woolamai. The indictment was in the form in which s. 376 of the *Crimes Act* says it shall be sufficient to charge murder. The accused pleaded not guilty. The trial took place before *Nield* J. and a jury. The verdict was " not guilty of murder but guilty of manslaughter ". The accused was sentenced to be imprisoned for twelve years. He appealed under the provisions of the *Criminal Appeal Act of* 1912 of New South Wales against his conviction. The ground of the appeal was that *Nield* J. was in error in directing the jury that upon the case proved by the Crown they could find a verdict of manslaughter as an alternative to a verdict of murder and the direction operated to the prejudice of the accused because, according to the contention made on his behalf, it exposed him to the peril of being convicted of manslaughter if the jury considered that he was not guilty of murder. The Court of Criminal Appeal which heard the appeal was constituted by *Street* C.J., *Herron* and *McLelland* JJ. All the learned judges were of the opinion that the basis of the direction complained of was wrong. The basis was a view expressed by *Nield* J. as to the circumstances in which a rape and acts done during the commission of this crime would not be malicious. *Street* C.J. and *McLelland* J. were of the opinion that the direction should not have been given. *Herron* J. was of a different opinion. He said : " But I do not dissent from the decision of his Honour, in the somewhat unusual and special circumstances of this case, to leave to the consideration of the jury the alternative verdict of manslaughter, even though such a verdict may be thought to have been improbable " (1). I should infer from his Honour's judgment in the Court of Criminal Appeal which very fully reviews the evidence, that his Honour thought that that verdict would be improbable because of the strength of the evidence of murder. The Court of Criminal Appeal applied the proviso to s. 6 of the *Criminal Appeal Act*. The words of the proviso are : " provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually

(1) (1955) 55 S.R. (N.S.W.) 479, at p. 487 ; 72 W.N. 422, at p. 428.

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occurred ". Accordingly the court unanimously dismissed the appeal.

The accused applied to this Court for special leave to appeal against the judgment of the Court of Criminal Appeal. Leave was granted. The substantial ground of the appeal is that the Court of Criminal Appeal erred in applying the proviso and should have allowed the appeal by the accused against his conviction of manslaughter. Mr. *Davoren*, who appeared for the accused, argued upon the footing of the opinions of *Street* C.J. and *McLelland* J., that *Nield* J. should not have directed the jury that, upon the evidence, they could find the accused not guilty of murder but guilty of manslaughter and that the Court of Criminal Appeal was in error in applying the proviso to s. 6. Mr. *Knight*, who appeared for the Crown, argued that the direction was right in principle, but supported, in any event, the conclusion reached by the Court of Criminal Appeal that no substantial miscarriage of justice had actually occurred. I agree with that conclusion of the Court of Criminal Appeal and, accordingly, I would dismiss this appeal.

The case put on behalf of the Crown at the trial was that the accused caused the death of Isabella Joyce Wilson by acts done during the commission by him of the crime of rape, and that these acts were done with the malice requisite in law to make them murder. The acts alleged came within s. 18 of the *Crimes Act*. With this section it is necessary to read s. 5 which enumerates a number of acts which, as the section says, " shall be taken to have been done maliciously within the meaning of this Act and of every indictment and charge where malice is by law an ingredient in the crime ".

Section 19 made the crime of murder punishable by death. The Act abolishing the death penalty in New South Wales was passed subsequently to the trial.

Another material provision of the *Crimes Act* is sub-s. (2) of s. 23. This says : " Where, on any such trial (the trial of a person for murder) it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly ".

By s. 24, the punishment for manslaughter is penal servitude for life or for any term not less than three years or imprisonment for any term not exceeding three years.

The case put by the accused to the jury was that on the occasion alleged he had sexual intercourse with the deceased woman with her consent, indeed at her express wish, and her death was by

misfortune. Commenting on this part of the defence, *Nield* J., in summing-up said : " Quite apart from medical testimony on the matter, I suppose one can contemplate the possibility of the shock of his success in having his way with her against her will causing her death. Is it easy to imagine that the consummation of her desires could result in her death ? However, there is the situation for you to consider. It is for you to determine the facts ".

The Crown adduced convincing evidence that the accused committed the crime of rape against Isabella Joyce Wilson : that she died of shock : that acts of violence, done in the commission of the rape, caused injuries to her body : that these acts and the carnal knowledge of her effected by force resulted in the shock from which she died.

There was no evidence that the accused did anything with the express intention of killing her. There was no evidence that any injury discovered on her body was of a mortal kind, except that it could have caused or contributed to the shock and there was no evidence of any act of violence intrinsically likely to kill.

Neither counsel for the Crown nor for the accused suggested to the jury that they could find manslaughter as an alternative to murder. That suggestion was made by *Nield* J. in his summing-up. The decision in *Beavan* v. *The Queen* (1) does not refer to a case in which the evidence does not strictly justify a verdict of manslaughter, but the judge directs the jury that they can acquit of murder and convict of manslaughter. However, it is clear from the decision that, if in the present case *Nield* J. had not given such a direction to the jury, the verdict which they brought in could not be set aside because in this case the proofs of an unlawful homicide were strong. Evidently the jury acted upon the direction. If the direction had not been given, what verdict would the jury have returned ? It was within their province to find a verdict of not guilty or guilty of murder or manslaughter. But it is not to be presumed that they would have failed to perform their duty to give a true verdict according to the evidence. *Nield* J., as *Street* C.J. said, " pointed out clearly and correctly that unless they were satisfied that the accused had committed or attempted to commit a rape upon the girl in question they could not find him guilty " (2). What *McLelland* J. said is also quite accurate : " In his summing-up, the trial Judge made it abundantly clear to the jury that, before any question of murder or manslaughter could arise, they must first be clearly satisfied that the prisoner

(1) (1954) 92 C.L.R. 660.

(2) (1955) 55 S.R. (N.S.W.), at p. 484 ; 72 W.N., at p. 426.

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had raped the woman" (1). It may be presumed that the jury followed the directions of *Nield* J. The inevitable inference from the verdict is that the jury were satisfied beyond reasonable doubt that the accused committed a rape involving acts of violence, against the woman named in the indictment, and thereby caused her death. The rape and the violence constituted conduct capable of justifying at least a verdict of unlawful homicide. It is not a reasonable hypothesis that in the absence of a direction that the conduct could amount to manslaughter, the jury would have reached a conclusion that the death was due to accident or to misadventure. The only reasonable hypothesis upon the whole case is that in the absence of the direction, the jury would have found the accused guilty of murder, provided they were ignorant of their powers under sub-s. (2) of s. 23 of the *Crimes Act*. Having read all the evidence and the painstaking summing-up of *Nield* J. I am of the opinion that there were most convincing proofs of the crime of rape and the injuries done by the accused to the victim in perpetrating it and of the fatal result to her of the rape and of those injuries. I am of the opinion that, in the absence of the direction, the jury were not at all likely to have acquitted him. The direction removed the clear and real danger in which he stood of being convicted of murder. It was favourable to the accused and in nowise prejudicial to any chance he had of being acquitted of murder. I can entertain no doubt that if the direction was not given the jury would have convicted the accused of an unlawful homicide—either manslaughter or murder. I agree with the conclusion of the Court of Criminal Appeal that no substantial miscarriage of justice actually occurred. This conclusion is not precluded by any of the tests stated in the series of decisions to which Mr. *Davoren* referred the Court.

The appeal should be dismissed.

WILLIAMS, WEBB AND TAYLOR JJ. Upon his trial for the murder of Isabella Joyce Wilson the appellant was convicted of manslaughter and sentenced to imprisonment for twelve years with hard labour. A subsequent appeal to the Court of Criminal Appeal (N.S.W.) was dismissed and the present appeal is brought by special leave from the order of dismissal.

The unfortunate woman's death occurred during or immediately after sexual intercourse had taken place between her and the appellant and the case for the Crown was that the sexual intercourse had taken place in such circumstances as to constitute the crime of rape. A conclusion on this point depended, of necessity, upon the

(1) (1955) 55 S.R. (N.S.W.), at p. 492; 72 W.N., at p. 432.

view taken by the jury concerning the appellant's testimony at the trial, on the one hand, and earlier inconsistent statements made by him and a body of circumstantial evidence on the other.

At the time of the alleged rape the appellant was twenty-two years of age and the deceased was thirty. They had for a period of nearly twelve months been on friendly, if not affectionate, terms. On the day of the occurrence which led to the death of the deceased she had visited the appellant's home at Woolamai, some distance from Nowra, where he lived with his father and mother and the other members of his family. It was established that she arrived there about 2 p.m. or 3 p.m. when the members of the appellant's family, other than his mother, were absent. Various members of the family arrived home from time to time and the appellant arrived about 7.30 p.m. About half an hour later the deceased left to return to her own home and the appellant accompanied her. They apparently walked some fifty or sixty yards along a bush track which leads from the side of the appellant's home to the Seasongood Road before reaching the spot where the crime is said to have been committed. There is no doubt, upon the evidence, that sexual intercourse took place at that spot and there is no doubt that at its conclusion or very shortly afterwards the deceased was dead. A post mortem examination failed to reveal any injury which could account for her death though superficial injuries appeared on various parts of her body. There was, however, medical evidence that her death " was due to the shock associated with the injuries which she had received " and " the assault that had apparently taken place ". This opinion, it should be observed, assumes that there had been an assault and that the superficial injuries were caused, at least substantially, during the assault and not at any later stage when, for a lengthy period, attempts were made at resuscitation, or during the period when the deceased was conveyed to Nowra in the back of a motor truck.

The indictment was laid under s. 18 of the *Crimes Act* 1900, sub-s. (1) of which is in the following terms :—" 18. (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life. (b) Every other punishable homicide shall be taken to be manslaughter ".

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In view of the course which the trial took it is of importance to note that by sub-s. 2 (a) of s. 18 " No act or omission which was not malicious, or for which the accused had lawful cause or excuse shall be within this section " and that " maliciously " is defined by the Act in the following terms :—" 5. ' Maliciously ' : Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime ".

The only other provision to which it is necessary to refer is s. 23 (2) which provides that where, on any trial for murder, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter.

The evidence at the trial and the addresses of counsel occupied two days and the Crown case was that the death of the deceased had been caused by the acts of the appellant done during the commission of the crime of rape and, this being so, it was a case of murder or nothing. Nevertheless it was competent for the jury to return a verdict of manslaughter (see *Beavan* v. *The Queen* (1) and cases there cited) for this appears to be the result of judicial decision in spite of the opening words of s. 23 (2) (cf. the observations of *Jordan* C.J. in *R.* v. *Surridge* (2)). But it was a case in which it was unnecessary for the learned trial judge to refer to the crime of manslaughter for neither the Crown nor counsel for the accused suggested such a course nor did the jury seek a direction on the matter. Yet upon the present state of the authorities it was permissible for his Honour to inform the jury that they might return such a verdict.

On the third day of the trial and immediately before charging the jury—and in their absence—the learned trial judge informed counsel that it appeared to him that the evidence raised two issues, that of murder and that of manslaughter. After a brief discussion his Honour proceeded to sum up to the jury and at the outset told them that upon the evidence they might adopt one of three courses. They might find the appellant guilty of murder or guilty of manslaughter or they might acquit him. Thereafter

(1) (1954) 92 C.L.R. 660.

(2) (1942) 42 S.R. (N.S.W.) 278, at p. 281 ; 59 W.N. 221, at p. 223.

his Honour, in effect, told the jury that, upon the case as it stood, they must be satisfied beyond reasonable doubt of two things before they could convict the appellant of either crime. They must be satisfied that intercourse had taken place without the consent and against the will of the deceased and that her death had resulted from some act or acts of the appellant. The latter statement we take to mean, in the circumstances of this case, some act or acts of the appellant in the course of sexual intercourse or in furthering his purpose of having sexual intercourse (cf. *Ross* v. *The King* (1)). But thereafter his Honour referred to the provisions of s. 18 (2) (a) of the *Crimes Act* and to the definition of " maliciously " contained in s. 5 and went on to say that the jury might take the view that " the act of sexual intercourse even against consent is not itself a malicious act ". The substance of the ensuing observations was that it was open to the jury to entertain the notion that rape is not necessarily directed towards the injury of another person, that it does not necessarily connote an intent to injure and that, they might, if they considered that the appellant's conduct was directed to the gratification of his own desire and not to the injury of the deceased, conclude that the appellant's acts were not malicious. In that event it would not be open to them to return a verdict of murder; a verdict of manslaughter would be the proper verdict if they were satisfied that rape had taken place and that the associated acts of the accused or those done for the furtherance of his purpose had caused the death of the deceased.

The appellant now complains that this direction was erroneous and upon the appeal to the Court of Criminal Appeal it was so held. With that decision we agree entirely. If upon the evidence the jury was prepared to conclude that the crime of rape had been committed and that the acts of the appellant associated with or done in the furtherance of his purpose had caused the death, it was unnecessary that they should embark upon an independent inquiry to ascertain whether those acts were malicious. The very fact that they were so associated or so done established beyond question that they were done " of malice ". On the other hand unless the jury was satisfied that rape had taken place the appellant, as the learned trial judge pointed out, should have been acquitted for, in those circumstances, there was no evidence of any act of the accused amounting either to murder or manslaughter.

As already appears the Court of Criminal Appeal found that there had been a misdirection but, nevertheless, it dismissed the appeal pursuant to the proviso to s. 6 (1) of the *Criminal Appeal*

(1) (1922) 30 C.L.R. 246.

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Act of 1912. This proviso enacts that " the court may, notwithstanding that it is of opinion that the point or points raised by 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 ". In the opinions of the members of the Court of Criminal Appeal the jury, upon the trial of the appellant, must have been satisfied beyond reasonable doubt, firstly, that the appellant had raped the deceased and, secondly, that those acts of the appellant associated with or done in furtherance of his purpose caused the death of the deceased. In those circumstances they considered that there had been no miscarriage of justice of which the appellant could complain for on that view, and with proper directions, a verdict of murder should have been returned. The only result of the misdirection, it was thought, was that the appellant had escaped more lightly than he otherwise would have done. In other words they formed the opinion that the error of the learned trial judge resulted in a summing-up which was too favourable to the accused and which operated for his benefit. The problem, however, is not so easily solved. No doubt if the appellant had been convicted of murder he could not now succeed upon an appeal based upon the misdirection for it would be a simple matter to say that the summing-up was too favourable. The same observation might also be made if it could be assumed, without doubt, that with proper directions the jury would have returned such a verdict. But the fact is no such verdict was returned and it does not appear to us to be safe to assume that, properly instructed, the jury would have returned such a verdict. We do not feel that we can, by any means, be certain of the impression made upon the minds of the members of the jury by the erroneous portions of the summing-up or by the suggestion that, upon the facts, there may have been rape without malice. But in any event the appellant was entitled to have the case put to the jury as one of murder or nothing and to have the various issues of fact considered in relation to the graver charge. It was, of course, within the competence of the trial judge to tell the jury that they were at liberty to return a verdict of manslaughter but it was a case also in which it would have been " 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 " (*Beavan* v. *The Queen* (1)). We find it impossible to say with any degree of certainty that if the case had been so presented the jury would have found either murder

(1) (1954) 92 C.L.R., at p. 662.

or manslaughter. In *Ross* v. *The King* (1) one of the complaints of the appellant, who had been convicted of murder, was that, on one view of the facts, the killing had taken place in circumstances which did not amount to murder but which might have constituted manslaughter and that the latter issue had been entirely omitted from the charge to the jury. On this point the Full Court of the Supreme Court of Victoria said : " They (the jury) must have been satisfied ' beyond reasonable doubt ' (as the learned Judge said) that the prisoner did one of the three things which His Honour there clearly indicated would amount to murder, and which alone would amount to murder—(1) that he did what he did with the intention of bringing death about ; or (2) that it was in the course of having sexual intercourse with that young girl ; or (3) that he caused her death in furtherance of the purpose of sexual intercourse. No complaint can be made that if the jury found that he did any of these things he was therefore guilty of murder, but that if they did not find any of these three conditions against him that he might be guilty of manslaughter, instead of being not guilty. Therefore, the absence of any express direction as to manslaughter was an omission, as far as it went, entirely in the prisoner's favour " (2). In the High Court *Knox* C.J., *Gavan Duffy* and *Starke* JJ. said concerning this matter : " 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 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 " (3), whilst *Higgins* J. said : " 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 " (4). Whilst, perhaps, the like comment may not now be made with quite the same force it is clear that the appellant was entitled to have the issues decided upon the graver

(1) (1922) 30 C.L.R. 246.
(2) (1922) V.L.R., at pp. 335, 336.
(3) (1922) 30 C.L.R., at pp. 253, 254.
(4) (1922) 30 C.L.R., at p. 273.

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charge and, to us, it seems quite wrong to attempt to justify the verdict of manslaughter, returned in the circumstances of this case, by the observation that the jury, upon an issue of manslaughter which they were invited to consider, must have reached conclusions on issues of fact which would have required them, if properly instructed, to have returned a verdict of murder. It is, of course, quite possible to say that the same conclusions on these issues of fact must have led the jury to find the appellant guilty of murder if they had been properly instructed. But it would be ignoring the realities of the matter to assume that if they had been required to consider whether they should convict the appellant of murder or acquit him they would have reached the same conclusions. The degree of doubt which we entertain on this aspect of the case is increased by considerations which present themselves upon a careful reading of the whole transcript. As we have already said the deceased was thirty years of age whilst the defendant was twenty-two, they were, and had been for some time, on friendly, if not affectionate terms and were in the habit of going about together, the rape is said to have taken place only fifty or sixty yards away from the appellant's home and there was no indication that any attempt had been made to silence the deceased and, finally, examination of the deceased's body failed to disclose any tangible cause of death. In the circumstances we feel strongly that the introduction of the topic of manslaughter may well have operated to lessen the appellant's chances of an acquittal and, accordingly, we are by no means satisfied that, had the jury been properly instructed, they would have found the appellant guilty either of murder or manslaughter (*R.* v. *Haddy* (1)), or that "a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict" (*Stirland* v. *Director of Public Prosecutions* (2)).

For these reasons—which, we think, are substantially the same as those given by *Fullagar* J.—the appeal should be allowed and the question arises as to what form of order should be made. The appellant has been acquitted on the charge of murder and there is no jurisdiction to direct a new trial on that charge (*Kelly* v. *The King* (3)). But, as the Crown agrees, that is the only crime with which he could properly be charged and it would not be proper to present him on a charge of manslaughter. The appeal should be allowed and the conviction quashed.

(1) (1944) 1 K.B. 442, at p. 445.
(2) (1944) A.C. 315, at p. 321.
(3) (1923) 32 C.L.R. 509.

FULLAGAR J. This is an appeal by special leave from an order of the Full Court of the Supreme Court of New South Wales, sitting as a Court of Criminal Appeal. By that order an appeal by the appellant against a conviction for manslaughter was dismissed.

The appellant, a young man of about twenty-two years of age, was charged with the murder of Isabella Joyce Wilson, a young woman of about thirty years of age. On 27th September 1954 she had been on a visit to the house where the appellant lived with his parents. There had apparently before this been talk of marriage between them, and there is evidence that they were on affectionate terms. When she came to leave about 8 o'clock in the evening, the accused accompanied her along a path which leads from the house through some scrub to the road. On the way he had sexual intercourse with her. According to the Crown this was done by force and against the woman's will. According to the accused's statement from the dock at the trial it was done with her consent. When he had completed the act, he attempted to raise her from the ground where she was lying, but she was unconscious, and he could not do so. In fact either she was then dead, or she died shortly afterwards while being conveyed to hospital in a motor truck. A post mortem examination disclosed certain bruises and other signs of interference, but it disclosed no traumatic injury which could have caused death, and all the organs were normal and healthy. In these circumstances the doctor who made the examination expressed the opinion that the cause of death was " shock ", the effect of which he explained physically as a sudden and severe reduction of blood pressure, which, if maintained for more than an extremely short period, is inconsistent with the continuance of life.

The common law definition of the crime of murder has been replaced in New South Wales by s. 18 of the *Crimes Act* 1900 which also purports to define the crime of manslaughter. Section 18 is in the following terms :—" (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life. (b) Every other punishable homicide shall be taken to be manslaughter. (2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse,

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shall be within this section. (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence ". Section 5 contains what purports to be a definition of " malice ", which it is desirable to set out in full, because his Honour referred to it in the material part of his charge to the jury. The " definition " is as follows :—" ' Maliciously ' : Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime ". So far as it is material to the present case, this appears to me to be a mere question-begging definition, saying no more than that " every act done of malice . . . shall be taken to have been done maliciously ".

At the trial before *Nield* J. the appellant was represented by counsel though not by the counsel who appeared for him on this appeal. He made a statement from the dock, and evidence was called on his behalf. The trial was conducted, up to the end of the addresses of counsel, on the basis that, if the appellant were found to have caused the death of the woman by the commission of the crime of rape upon her, he was guilty of murder, but that, if he did not commit rape, he was innocent of any crime. However, after the close of the addresses, and before he charged the jury, the learned trial judge, in the absence of the jury, told counsel that he proposed to direct the jury that it was open to them on the evidence to return a verdict of manslaughter. He explained the basis on which he thought that a verdict of manslaughter might be justified, and he invited counsel to make any submissions on the question thus raised. Counsel appear to have been taken completely by surprise, and no submissions were made either for the prosecution or for the defence. It is clear, in my opinion, that the appellant cannot be prejudiced by the failure of his then counsel to object to the course which his Honour proposed to take. The jury were recalled, and his Honour proceeded to charge them. So far as manslaughter was concerned, his Honour's direction followed the lines which he had adumbrated to counsel in the absence of the jury. The material part of the charge is of considerable length, but it is desirable to set it out in full. His Honour began by telling the jury that, unless they were satisfied beyond reasonable doubt that the appellant had committed rape, he was

entitled to a verdict of acquittal. He then told them that, if they were satisfied that rape had been committed, they might find the appellant guilty of either murder or manslaughter. Then, after referring to ss. 5 and 18 of the *Crimes Act*, he proceeded :—" The act of rape with the loss of self respect and respect for him in that event would be the cause of death, the cause of the shock, but you may take the view that the act of sexual intercourse even against consent is not itself a malicious act, it is not an act in some circumstances directed towards the injury of another person, it is not an act done with intent to injure, the normal matter of sexual intercourse, or even the normal matter, if one can use the words, the normal kind of rape is not a matter of design to injure the woman, but more towards the gratification of the desires of the man and gratifying his desire even against the will of the other party, but not directed to injury. You would not speak of it in the ordinary sense as malicious. You would not speak of it as something intended to injure. Of course, there are some cases where rape may be directed not merely to the gratification of the sexual desire of the man, but may be directed also to the injury of the woman, the sort of thing that you might envisage in that connection would be soldiery in a hostile country who indiscriminately rape the women of that territory intending to injure them as well as to gratify their own lust. That might in those circumstances be regarded as rape with intent to injure, but except under exceptional circumstances like that it is more a matter of gratification of lust than intention to injure the woman. If you come to the conclusion here that the cause of death was the raping of the woman by the accused with the consequent effect on her mind, it would be open to you to say that that was the cause of death and it was wrongful to cause her death in that way, but it was not a malicious act and consequently was not within s. 18 of the *Crimes Act*, and in that event it would not be murder, it would be manslaughter. On the other hand, I am now speaking on the assumption that you are satisfied there was the crime of rape committed—on that assumption you have rape and you have certain injuries. If in your view, if you are satisfied that the death was caused by the rape and the injuries, and that those injuries were injuries inflicted in such a way that they were malicious, then of course the conclusion would be that he was guilty of murder, but if those injuries she in fact suffered were not the result of some intention to injure, some malicious act, but rather used with force to overcome resistance, that would be a slightly different thing. You may hold the view that that was not malicious within the meaning of those words, if the injuries were caused by his attempt to overcome her resistance, you may

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say that you could not properly describe those acts as done of malice or done with indifference to human life or suffering. You see, none of them are sufficiently grave in themselves to cause death or with intent to injure some person—not with intent to injure, but with the intent rather to effect his will and overcome resistance, which may be sometimes a different thing, sometimes it may approximate to the same thing. So that it would be a matter for you in considering those things to ask yourselves are you satisfied. If you are satisfied that the crime of rape was made out, satisfied that the death was caused by the accused, are you satisfied beyond reasonable doubt that it was all done, that the acts that caused it, that caused the death, were acts that come within the definition of ' malicious ' that I read to you, or whether they do not do so ? If you think that the acts involving both the act of intercourse itself and the other act which caused injury, if you think the injuries were caused before death or before the intercourse, if you are not satisfied that they were malicious acts, then your proper verdict would be manslaughter. If you are satisfied that he committed the crime of rape, satisfied that by committing the crime of rape he caused the girl's death, but not satisfied that he was malicious in the sense that I have indicated to you from the *Crimes Act*, your proper verdict would be manslaughter. If you are satisfied that he committed the crime of rape, satisfied that his acts caused the death, and satisfied also that those acts were malicious in the sense indicated, that is with intent to injure or done recklessly or wantonly, done regardless of the consequence as long as he had his way with her, then you would find him guilty of murder . . . If you are satisfied that the acts caused her death, but if you are not satisfied that the acts or the rape were malicious within the meaning of the section, that is with intent to injure or done recklessly or wantonly, regardless of consequence or indifference to human life or suffering, if you are not satisfied of those elements but were satisfied as to the rape and satisfied that he caused her death in the commission of that offence, you would find him guilty of manslaughter ".

The jury, by their verdict, acquitted the appellant of murder but found him guilty of manslaughter, and he appealed to the Court of Criminal Appeal.

The passage quoted above from the learned judge's charge contains a misdirection so obvious that it is not necessary to comment upon it beyond saying that it almost certainly proceeds from a confusion of the two distinct senses in which the word " malice " is unfortunately used in the law, a confusion made worse confounded by the so-called definition in s. 5 of the *Crimes Act*.

In the one sense it refers to the intentional doing of a wrongful act, and in the other sense it denotes spite or ill-will or a desire to injure. In the former sense it is a matter of volition. In the latter sense it is a matter of motive. The act of rape is essentially and necessarily a malicious act in the only relevant sense. A non-malicious rape is a legal contradiction in terms.

The Court of Criminal Appeal held that the passage quoted was based on a clear misconception of the law. Their Honours were, however, of opinion that, in so far as there was error in the charge, the charge was too favourable to the appellant, and that it followed that no miscarriage of justice had occurred. There is a proviso to s. 6 (1) of the *Criminal Appeal Act of* 1912, which provides that " the court may, notwithstanding that it is of opinion that the point or points raised by 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 ". The court was of opinion that this proviso was applicable to the case, and the appeal was dismissed.

I am, with respect, quite unable to agree with the view that " no substantial miscarriage of justice had actually occurred " within the meaning of the proviso. I am equally unable to agree that the error in the charge made the charge " too favourable " to the accused in any sense which could bring the case fairly within the proviso. It is, of course, true that, if the erroneous part of the charge had been omitted, the jury might have convicted the appellant of murder, which is a more serious crime than manslaughter. But it is equally true that a jury not confused by the erroneous matter might have acquitted the appellant on the only charge in the presentment. In many murder trials the question whether the possibility of a verdict of manslaughter should be raised presents a serious problem to counsel for the accused. Probably in most cases it is regarded as disadvantageous to the accused to suggest the possibility of a verdict of manslaughter. A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them. The position is well illustrated by *Ross* v. *The King* (1) : see especially per *Irvine* C.J. (2). In the same case in the High Court *Higgins* J. said :—" 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

(1) (1922) V.L.R. 329.

(2) (1922) V.L.R., at p. 336.

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leads to death " (1): see also *Clinton* v. *The King* (2). In the present case the jury may well have hesitated long before convicting the appellant of murder, and it is very far indeed from clear that the misdirection did not operate to his grave disadvantage. In such circumstances it is impossible to say that no substantial miscarriage of justice has occurred. These " too favourable " directions can only too often be veritable gifts from the Greeks.

It is very well established that the proviso to s. 6 (1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried. Mr. *Davoren* referred us to a number of cases in England (where the relevant statutory provision is in identical terms) in which the principle on which the proviso must be interpreted and applied has been laid down. There are, as one would expect, differences of expression, and this or that particular word or phrase has been subjected to criticism or qualification, but the broad principle shines clearly enough through the cases.

In *Cohen and Bateman* v. *The King* (3), *Channell* J. for the Court of Criminal Appeal said :—" Taking s. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury *must* have come to the same conclusion " (4). (The italics are those of *Channell* J.). In *Sanders* v. *The King* (5), *Sankey* J. said :—" The question is, can the court say that the jury would have come to the same conclusion after a proper direction ? This question must be answered in the affirmative, before the proviso to s. 4 can be applied " (6). In *White* v. *The King* (7), Lord *Hewart* said :—" In this case it is not possible to hold that the jury must inevitably—or, as the other

(1) (1922) 30 C.L.R. 246, at p. 273.
(2) (1917) 12 Cr. App. R. 215, at p. 218.
(3) (1909) 2 Cr. App. R. 197.
(4) (1909) 2 Cr. App. R., at p. 207.
(5) (1919) 14 Cr. App. R. 11.
(6) (1919) 14 Cr. App. R., at p. 13.
(7) (1922) 17 Cr. App. R. 60.

phrase is, would certainly—have returned the same verdict after a proper direction" (1). In *Woolmington* v. *Director of Public Prosecutions* (2), Lord *Sankey* (with whom Lord *Hewart*, Lord *Atkin*, Lord *Wright* and Lord *Tomlin* concurred) said:—"We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion" (3). The case was held, therefore, to be outside the scope of the proviso. This is perhaps the strongest statement of the test to be applied, and the word "inevitably" (though by no means here used for the first time) has been the subject of comment. But no one would suppose that Lord *Sankey* was thinking of any such abstraction as absolute certainty (which is inevitably unattainable), or would doubt that he was thinking of a reasonable, and not a perverse, jury: see *R.* v. *Haddy* (4), and *Stirland* v. *Director of Public Prosecutions* (5). Finally, reference should be made to *Kelly* v. *The King* (6). The circumstances in that case were not exactly the same as in the present case, but there is some analogy, and the case affords one more illustration of the correct approach where a question arises under the proviso. This Court said:—"The prosecution was conducted throughout . . . on the footing that the offence with which the accused was charged was murder and that alone. The charge of manslaughter was sprung on the accused in the absence, through illness, of his counsel, at a time when he had no opportunity of putting before the jury any defence he might have had to that charge as distinct from the charge of murder on which he was presented. In these circumstances it is impossible for us to hold that the Crown has established that no miscarriage of justice has actually occurred, and it is our duty to allow the appeal and quash the conviction" (7).

If the test propounded in these cases is applied, it appears to me impossible to maintain that the Crown has established that no miscarriage of justice has actually occurred in this case. I have already pointed out that the accused may well have been gravely prejudiced in respect of his chance of a simple acquittal. But there is more in it than that. As my brother *Williams* pointed out during the hearing, the whole tendency of the erroneous part of the charge was to create a fundamental confusion in the minds of the jury as to what constitutes the crime of rape, and one feels a very real doubt whether the jury, if it had been correctly directed on the subject, would have found that rape had been committed.

(1) (1922) 17 Cr. App. R., at p. 65.
(2) (1935) A.C. 462.
(3) (1935) A.C., at pp. 482, 483.
(4) (1944) K.B. 442, at pp. 444, 445.
(5) (1944) A.C. 315, at p. 321.
(6) (1923) 32 C.L.R. 509.
(7) (1923) 32 C.L.R., at p. 516.

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It seems very clear to my mind that the conviction cannot be allowed to stand.

The question then arises whether we should simply quash the conviction or whether we should order a new trial. I do not think that we should order a new trial. The appellant has been acquitted of murder, and it does not seem to me that he could properly be convicted of manslaughter. In any case the circumstances are such that I do not think that he should be put in jeopardy again.

Whatever fault may be found with the direction of *Nield* J. to the jury, he was clearly right in telling them that they could not convict of either murder or manslaughter unless they were satisfied beyond reasonable doubt that rape had been committed. And the Crown case with regard to rape was really a very weak one. It rested practically on " statements " made by the appellant to the police, and on what were supposed to be " signs of a struggle " at the place where the incident occurred.

With regard to the statements, it seems to me a fact of great importance that the appellant is a man of foreign birth, who speaks English very imperfectly : at the trial he made his statement from the dock through an interpreter. There is no reason to doubt the bona fides of Sergeant Devonport or of Senior Constable Fletcher, but one cannot read their accounts of their interview with the appellant without seeing endless possibilities of mistake and misunderstanding. It seems a most astonishing thing that no serious attempt was made by counsel who then appeared for the accused to cross-examine either of these witnesses. But, however this may be, the police evidence, having regard to all the circumstances, bears, to my mind, little resemblance to a reliable confession of rape.

With regard to the " signs of a struggle ", it is only necessary to reflect that, after the accused had failed to raise the woman from the ground, he summoned his father and mother to his assistance. Strenuous efforts, which seem to have included attempts at artificial respiration, were then made to revive and raise the woman. Ultimately a truck was driven into the scrub, and her body was lifted into it and carried away. These activities were obviously sufficient to account for a very marked disturbance of the ground and of the vegetation.

I am, of course, not prepared to say that there was no evidence of rape to go to the jury. But I am strongly inclined to think that the learned judge would have been justified in suggesting to the jury that they might well feel a reasonable doubt as to whether rape had been committed.

It seems clear to me that no order should be made for a new trial. The conviction should simply be quashed.

I think I should mention two matters in conclusion. The first is a suggestion which I made during argument that the case might not be covered by s. 18 (1) (a) of the *Crimes Act*. The immediately material words of s. 18 (1) (a) are as follows :—" Murder shall be taken to have been committed where the act of the accused . . . causing the death . . . was done . . . during . . . the commission, by the accused . . . of a crime punishable by death ". Rape is such a crime by virtue of s. 63. I had in mind the recent decision of this Court in *Hughes* v. *The King* (1), and what occurred to me was that it might not be possible to say that any particular act of the accused, as distinct from the commission of the alleged crime itself, caused the death. There was such a distinct act in *Ross* v. *The King* (2) and in *Director of Public Prosecutions* v. *Beard* (3). After consideration, I do not think that my suggestion was sound. I think it would have been open to the jury, if they found that rape had been committed, to say that some act, which they could not specify, done in the course of committing the rape, had caused death. The New South Wales section is framed differently from the Queensland section which was considered in *Hughes* v. *The King* (1). The whole point of that case was that the jury had been directed under the wrong paragraph of the statutory definition of murder.

The other matter is this. It is no answer to the argument for the appellant in this case to say that it is always permissible for a jury, on a trial for murder, to return a verdict of manslaughter : see e.g., *Brown* v. *The King* (4). This right was referred to in *Hughes* v. *The King* (5) as " the privilege of returning a merciful verdict of manslaughter ". The verdict in the present case cannot be taken to have been returned in the exercise of that " privilege ". It was returned on an erroneous direction as to what constituted the crime of manslaughter.

Appeal allowed. Set aside order of Court of Criminal Appeal. Quash conviction. Direct that judgment and verdict of acquittal be entered.

Solicitor for the appellant, *J. D. Mahony*.

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

R. A. H.

(1) (1951) 84 C.L.R. 170.
(2) (1922) 30 C.L.R. 246.
(3) (1920) A.C. 479.
(4) (1913) 17 C.L.R. 570.
(5) (1951) 84 C.L.R. 170, at p. 175.