[HIGH COURT OF AUSTRALIA.]

SMYTH . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

H. C. OF A. 1957.

SYDNEY, *April* 4, 17.

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

Criminal Law—Specific intention—Evidence—Conduct—Presumption.

Where upon the trial for a criminal offence a specific intent must be found, any reference to the supposed presumption that a person intends the natural and probable consequences of his acts, is apt to be misleading, and no reference should be made.

APPLICATION for special leave to appeal to the High Court.

At the Central Criminal Court in Sydney on 27th April 1956, Eugene Aloysius Smyth, then aged about sixty-nine years, was convicted on a charge of feloniously and maliciously murdering Joseph Patrick Cahill on 5th January 1956.

Smyth appealed on several grounds to the Court of Criminal Appeal against his conviction. One of such grounds was in respect of a direction by the trial judge to the jury in the following terms :— " If you think that grievous bodily harm or perhaps death, at any rate grievous bodily harm, some serious interference with the health or comfort of the deceased man, was a natural and probable consequence of what the accused man might be found by you to have done, then the law is that he is presumed to have intended those very consequences."

The appeal was dismissed (1) whereupon Smyth applied to the High Court of Australia for special leave to appeal to that Court.

F. W. Vizzard, for the applicant. The trial judge misdirected the jury on the question of specific intent. Such a misdirection would have the effect of preventing the jury from properly considering whether the applicant had, in fact, an intention to kill, or,

(1) (1956) 73 W.N. (N.S.W.) 539.

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to inflict grievous bodily harm. Regard should be had to the context in which that direction appears. The proposition that a sane man intends the natural and probable consequences of his acts is at best a working rule: *R.* v. *Steane* (1); *Hosegood* v. *Hosegood* (2); *Stapleton* v. *The Queen* (3).

Reg. v. *Ward* (4) deals with foresight and not the question of specific intent: see also *Reg.* v. *Lenchitsky* (5).

[McTIERNAN J. referred to *Reg.* v. *Ward* (6).]

The danger in the case now before the Court is increased by the fact that the judge had previously split up the matter into the field of fact and the field of law.

[DIXON C.J. referred to *Baily* v. *Baily* (7); *Deery* v. *Deery* (8); *Cox* v. *Smail* (9) and *Gow* v. *White* (10).]

Where injuries are serious it may be more dangerous for the jury to have that presumption put to them than perhaps if they had not been. [He referred to *Mancini* v. *Director of Public Prosecutions* (11).] The fact that a man was punched hard and received a broken jaw was not necessarily evidence that the assailant intended to inflict grievous bodily harm: *Reg.* v. *Horsey* (12); *Reg.* v. *Vamplew* (13). *Beavan* v. *The Queen* (14) was approached in a different manner.

[McTIERNAN J. referred to *Shaw* v. *The Queen* (15).]

That is the kind of consideration that the jury might well have been prevented from considering in this case by having it put to them as the law that there was this presumption. The real problem in *R.* v. *Murtagh and Kennedy* (16) was what were the alternatives. The proviso was not applied and the conviction was quashed. In this case the direction was a wrong direction in law and it is extremely probable that it misled the jury, or it cannot be said that it did not mislead the jury. In such circumstances, the verdict should not be allowed to stand.

H. A. Snelling Q.C. (Solicitor-General for New South Wales) (with him *J. R. Nolan*), for the respondent. This is not a case in which the Court should grant special leave to appeal, because it is unlikely that the jury were misled by the portion of the summing-up complained of. This respondent does not join issue with the legal

(1) (1947) K.B. 997, at p. 1003.
(2) (1950) W.N. (Eng.) 218, at p. 219; 66 T.L.R. 735, at p. 738.
(3) (1952) 86 C.L.R. 358, at p. 365.
(4) (1956) 2 W.L.R. 423, at p. 428.
(5) (1954) Crim. Law Review 216.
(6) (1956) 2 W.L.R., at p. 425.
(7) (1952) 86 C.L.R. 424, at p. 427.
(8) (1954) 90 C.L.R. 211, at p. 219.
(9) (1912) V.L.R. 274.
(10) (1908) 5 C.L.R. 865.
(11) (1942) A.C. 1.
(12) (1862) 3 F. & F. 287 [176 E.R. 129].
(13) (1862) 3 F. & F. 520, at p. 522 [176 E.R. 234].
(14) (1954) 92 C.L.R. 660, at p. 663.
(15) (1952) 85 C.L.R. 365, at p. 374.
(16) (1955) 39 Cr. App. R. 72.

propositions advanced on behalf of the applicant and based on *R.* v. *Steane* (1); *Hosegood* v. *Hosegood* (2) and *Stapleton* v. *The Queen* (3) as to the nature of the presumption or the maxim that was used by the trial judge, nor is issue joined with the proposition that it is often and perhaps usually unwise and unsafe to place such a proposition without full elaboration before a jury. "Intention" was discussed in *Stephen's History of the Criminal Law of England* (1883), vol. 2, pp. 110, 111. From the balance of the judge's summing-up, and in particular certain passages therein, the judge made it abundantly plain to the jury that he was not taking from them the subjective issue of intention but was, in fact, leaving to them the subjective issue of intention and explaining the bearing of the various aspects of the case. The passage complained of would not be likely to mislead the jury because (i) of the context of the summing-up, and (ii) by the basic circumstances of the case. The defence in this case was self-defence. In other words it was necessary to inflict those blows by the exigencies of the occasion, and the very defence involved the fear of death or serious injury and a counter-attack designed to defeat those injuries. The jury were not likely to be misled by the passage in the summing-up, in the light of the circumstances of the case, that is on the question as to whether or not they had to consider whether the accused did intend to inflict grievous bodily harm. Here natural and probable consequences are equivalent to intended consequences, if the accused is a reasonable person. The test under the proviso is that the Court of Criminal Appeal of New South Wales, before it applies the proviso, has to be satisfied that if this direction had been given more correctly the jury would, without doubt, have reached the same conclusion: see *Stirland* v. *Director of Public Prosecutions* (4). Unless the conclusion of the Court of Criminal Appeal was so unreasonable that it was plainly wrong in applying the proviso, this Court should not disturb a considered application of the proviso of the Court of Criminal Appeal (*R.* v. *Ellis* (5)). In New South Wales there is a statutory requirement that there must be intent.

Reg. v. *Ward* (6). while criticised in England perhaps, is even less applicable to the law of murder in New South Wales. It is quite clear here that there has been no miscarriage of justice. The fact that a point is not raised by counsel is relevant on the question as to whether there is a miscarriage of justice. Unless this Court can find that such a decision was plainly wrong, as the Court did in

(1) (1947) K.B. 997.
(2) (1950) W.N. (Eng.) 218; 66 T.L.R. 735.
(3) (1952) 86 C.L.R. 358.
(4) (1944) A.C. 315.
(5) (1925) 37 C.L.R. 147, at p. 151.
(6) (1956) 2 W.L.R. 423.

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Mraz v. *The Queen* (1), the decision should not be disturbed. What the Court has to consider under the proviso is not what this jury did—or may have done—but what a jury, a hypothetical jury, instructed with complete propriety would be likely to do in the circumstances of the case if properly directed. Even if this Court were itself exercising the proviso independently altogether of the Court of Criminal Appeal, this Court would itself come to the conclusion that any jury properly instructed would, undoubtedly, find that these blows struck in the circumstances present in this case were at best struck with an intention to inflict grievous bodily harm on the accused's own story. This is not a case where, if it were considering the case independently, this Court would grant leave to appeal.

[DIXON C.J. referred to *Cornelius* v. *The King* (2).]

The facts in this case are conclusive. This Court ought to assume that juries will perform their duties properly, and, particularly where the Court of Criminal Appeal has considered the matter, should not interfere to give the accused a further chance which could only be based on illegitimate considerations.

F. W. Vizzard, in reply.

Cur. adv. vult.

April 20.

THE COURT delivered the following written judgment :—

Having considered the evidence in this case we think that a jury properly directed and understanding the question could not reasonably fail to draw the inference that when the appellant struck the deceased several times with the wrench he intended to cause him what would amount to grievous bodily harm.

For that reason we think that we ought not to grant special leave to appeal notwithstanding that we think that the direction complained of is not in accordance with law and ought not to have been given. In this Court disapproval has been expressed on more than one occasion of the use, where a specific intent must be found, of the supposed presumption, conclusive or otherwise, that a man intends the natural, or natural and probable, consequences of his acts : see *Stapleton* v. *The Queen* (3) ; *Baily* v. *Baily* (4) ; *Deery* v. *Deery* (5) ; *Gow* v. *White* (6), per *O'Connor* J. The ruling of Lord *Goddard* C.J. in *Reg.* v. *Ward* (7), is difficult to reconcile

(1) (1955) 93 C.L.R. 493.
(2) (1936) 55 C.L.R. 235.
(3) (1952) 86 C.L.R. 358, at p. 365.
(4) (1952) 86 C.L.R. 424, at p. 427.
(5) (1954) 90 C.L.R. 211, at pp. 219-223.
(6) (1908) 5 C.L.R., at p. 876.
(7) (1956) 2 W.L.R. 423, at p. 428.

with his Lordship's statement in *R.* v. *Steane* (1), which we think is to be preferred and is certainly sound. The fact is that, as *Cussen* J. remarked in *Cox* v. *Smail* (2), the statement that a person must be held to intend the natural consequences of his act merely conceals the true position.

Application for special leave to appeal refused.

Application refused.

Solicitor for the applicant, *R. W. Hawkins*, Public Solicitor for New South Wales.

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

J. B.

(1) (1947) K.B. 997, at pp. 1003-1005.

(2) (1912) V.L.R. 274, at p. 279.