HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

THE QUEEN APPELLANT

AND

WAYNE KELVIN LAVENDER RESPONDENT

The Queen v Lavender [2005] HCA 37
4 August 2005
S499/2004

ORDER

1. *Appeal allowed.*

2. *Orders 1, 2 and 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 21 May 2004 on the appellant's appeal against conviction set aside. In place of those orders, order that the appeal against conviction be dismissed.*

3. *Orders 1 and 2 take effect from 10.00 am on 1 September 2005.*

On appeal from the Supreme Court of New South Wales

Representation:

G E Smith SC with J A Girdham for the appellant (instructed by Solicitor for Public Prosecutions (NSW))

P Byrne SC with P J D Hamill SC for the respondent (instructed by Legal Aid Commission of New South Wales)

CATCHWORDS

The Queen v Lavender

Criminal law – Manslaughter – Involuntary manslaughter by criminal negligence – Respondent killed a 13 year old boy by running over him with a front end loader – *Crimes Act* 1900 (NSW), s 18 – Whether malice an element of the offence – Relevance of former statutory requirement that indictment include a charge of maliciously killing for murder but not for manslaughter – Interaction of provisions of the *Crimes Act* with the common law of punishable homicide – Application of the defence of honest and reasonable mistake of fact to manslaughter by criminal negligence – Distinction between murder and manslaughter.

Statutes – Interpretation – Relevance of historical context in resolving questions of statutory construction – Relevance of past amendments to Act – Use of contemporary historical materials in statutory construction – Relevance of the rule of strict construction of penal statutes – Relevance of uniformity in the criminal law throughout Australia.

Sentencing – Appeal on sentence – Whether matter before the High Court – Restoration of custodial sentence after entry of an acquittal by New South Wales Court of Criminal Appeal – Whether parties now entitled to seek leave of Court of Criminal Appeal to appeal against sentence.

Practice and procedure – Trials – Jury directions.

Words and phrases – "malice", "maliciously".

Crimes Act 1900 (NSW), ss 5, 18.

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. Section 18 of the *Crimes Act* 1900 (NSW) ("the Crimes Act") defines the crime of murder, and goes on to provide that every other punishable homicide shall be taken to be manslaughter. The principal issue in this appeal concerns the elements of that form of punishable homicide commonly described as involuntary manslaughter.

2 As this Court held in *Wilson v The Queen*[1], there are two categories of involuntary manslaughter at common law: manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury; and manslaughter by criminal negligence. Involuntary manslaughter is so called because, unlike murder, it involves neither intent to cause death or grievous bodily harm to the victim, nor the other mental elements necessary for murder. In cases of voluntary manslaughter, on the other hand, the elements of murder are present, but the culpability of the offender's conduct is reduced by reason of provocation, or substantial impairment by abnormality of mind. The Crimes Act makes specific provision with respect to provocation (s 23) and impairment (s 23A), but it makes no specific provision concerning the elements of involuntary manslaughter. Consistently with the common law, the Crimes Act treats manslaughter as a residual category of punishable homicide. It states the elements of murder, and then provides that all other forms of punishable homicide are manslaughter. It is necessary to look to the common law in order to understand what is meant by the reference in s 18 to "other punishable homicide". The Crimes Act is not a Code. Although in some respects it makes detailed provision for, and in that sense codifies, aspects of the criminal law, it does not exclude the common law.

3 In the present case, the Court of Criminal Appeal of New South Wales (Hulme and Adams JJ, Giles JA dissenting)[2] allowed the respondent's appeal against a conviction for manslaughter by criminal negligence on the basis that, at trial, counsel for both the prosecution and the defence, and the trial judge, fundamentally misconceived the nature of the offence in question by failing to advert to what was said to be an essential element of the offence, that is to say, malice as defined in s 5 of the Crimes Act. The prosecution appeals to this Court, contending that malice is not an element of involuntary manslaughter, either at common law or under the Crimes Act, and that the decision of the Court of Criminal Appeal is contrary to principle, to the language of the statute, particularly when understood in context, and to more than a century of practice in New South Wales.

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1 (1992) 174 CLR 313 at 333.

2 *R v Lavender* (2004) 41 MVR 492.

4 Subsidiary issues in the appeal concern two challenges to the trial judge's directions to the jury, one of which was taken at trial and the other of which was not. It is convenient to put those subsidiary issues to one side for the present.

The facts

5 The following summary of the facts is taken substantially from the reasons of Giles JA.

6 The case involved alleged criminal negligence by the respondent in the driving of a front end loader which ran over and killed a 13 year old boy. There was an alternative charge of dangerous driving occasioning death, but because the jury found the respondent guilty of manslaughter they did not need to deal with the alternative.

7 The respondent was employed as the operator of a front end loader at a sand mine at Redhead near Newcastle. The loader weighed 25 tons, and was much higher and longer than a car. It only travelled at about four kilometres per hour. The driver's vision was obscured by a bucket at the front end. The function of the machine was to move processed and unprocessed sand within the area of the mine. The mine site was unfenced, and was in an area of sand dunes covered with vegetation. In places the vegetation was thick, and consisted of bushes and trees up to four metres high. On 2 October 2001, the victim, and three friends aged respectively 11, 14 and 15, went to the mine site to play in the sand. They should not have been there. The respondent decided to chase them away. He drove the loader towards the boys. They ran into an area covered by thick vegetation. The respondent pursued them, driving the loader through the scrub. It was difficult for him to see where he was going. He ran over the victim, causing injuries resulting in death.

8 In sentencing, the trial judge referred to a submission made by counsel for the respondent, who said that of all offences known to the criminal law, manslaughter, because it involves in most cases no criminal intent or malice, is the one which attracts the widest variety of sentences. That submission reflects the way in which the case for the respondent was conducted at trial. Counsel for the respondent described the test of criminal negligence as "objective". In his argument on sentencing, he said the case was one of a "gross error of judgment" on the part of the respondent.

9 The trial judge said that the respondent "embarked upon a course of action which was criminally negligent". Although the front end loader was moving only slowly, the respondent "in effect drove blind". The judge said:

> "Whilst there can be no doubt that the offender did not have any intention to injure these boys, he simply did not direct his mind to what was such an obvious risk. The inference is that he assumed that because he was driving a very large vehicle which was readily visible and very noisy at a very slow speed ... the boys would have been able to readily avoid him. This was an assumption that no person in his position was entitled to make and the horrific consequences of this mistaken assumption were realised on this occasion."

10 If the prosecution had alleged that the respondent had intended to drive the front end loader into or over the victim, and if the jury had found that to be proved beyond reasonable doubt, then the case would have been one of murder. Such use of the front end loader would obviously have been likely to cause either death or grievous bodily harm. The respondent was not charged with murder. The charge of manslaughter assumed that he did not intend to run over, or into, the boys. The proceedings were conducted on the basis that the act causing death was not intentional.

11 The respondent was sentenced to imprisonment for four years with a non-parole period of 18 months. He appealed against his conviction.

The directions to the jury

12 Before the commencement of the summing-up, and in the absence of the jury, the trial judge gave counsel a written outline of the directions he proposed to give, and invited submissions. The only submission of direct relevance to this appeal concerned one of the subsidiary issues. It will be considered later. As to what has now become the principal issue, no objection was taken to the proposed directions.

13 The trial judge told the jury that, relevantly to this case, there were five elements in the offence of involuntary manslaughter. The first was that the respondent had a duty of care to the victim. The second was that he was in breach of that duty. The third was that his actions were deliberate in the sense that he was in control of the vehicle. The fourth was that the actions of the respondent in driving the vehicle caused the death of the victim. The trial judge explained those four elements, but that explanation is not presently relevant. It is what he said about the fifth element that is now important.

14 The trial judge said:

> "And finally, the Crown has to prove that that action of driving into the bush in the circumstances that the Crown says obtained fell so far

short of the standard of care which a reasonable person would have exercised in the circumstances and involved such a high risk that death or really serious bodily harm would follow, that the actions merit criminal punishment.

Members of the jury can I say this here and now that the degree of negligence required to constitute the crime of manslaughter is very high indeed. It has been described in the past as having to be wicked. In other words, a person has to be wickedly negligent before they can be convicted of the crime of manslaughter.

The Crown in this case says that you would be satisfied beyond reasonable doubt that the actions of the accused did amount to such a high degree of negligence. The Crown says that you would be satisfied beyond reasonable doubt that the accused intentionally drove the loader into an area of bush where he knew there were four boys. In circumstances where he had lost sight of the boys, he continued to drive his loader in that area where the Crown says the evidence would satisfy you that the topography and the vegetation combined with the nature and structure of the loader, necessitated an inability on the part of the accused to see and hear adequately and to proceed with safety. And the Crown says in those circumstances you would be satisfied that his actions fell so far short of the standard of care which a reasonable person would have exercised in the circumstances, and involved such a high risk that death or really serious bodily harm would follow, that they merit criminal punishment.

...

Now members of the jury, they are matters for you to determine. A determination of this question of negligence and the degree of negligence is an objective test. You have to decide whether – you have to compare the conduct of the accused as you find it to have been with the conduct of a reasonable person who possesses the same personal attributes as the accused, that is to say a person of the same age, having the same experience and knowledge as the accused and the circumstances in which he found himself, and having the ordinary fortitude and strength of mind which a reasonable person would have, and determine on that basis whether the Crown has made out its case. In other words, it is an objective test. The Crown does not have to prove that the accused appreciated that he was being negligent or that he was being negligent to such a high degree. It is your task to determine whether having decided on the conduct of the accused, whether his actions amounted to negligence based upon, as I say, what you think a reasonable person in the position of the accused would have done.

The Crown says that when you look at it on that basis, you would be satisfied beyond reasonable doubt that a reasonable person in the position of the accused, that is to say, of his age and experience and with the knowledge that he had of the circumstances at the time and being a person of normal fortitude and strength of mind would never have done what he did. A reasonable person in that situation would have realised that there was a very high risk of death or serious injury by proceeding into the bush in circumstances, the Crown says, where he knew that he could not see properly, his vision was obscured by the vegetation and by the loader itself to some extent, where he knew that there were young boys, the Crown says, behaviour was always going to be unpredictable [sic], and the Crown says that when you compare the actions of the accused with what you might expect a reasonable person in his position to have done, you would be satisfied beyond reasonable doubt that those actions were negligent, they were deliberate and that they caused the death of Michael Milne and that they were so negligent, that is to say they fell so far short of the standard of care which a reasonable person would have exercised in the circumstances and involved such a high risk that death or really serious bodily harm would follow, that they merit criminal punishment.

If you are so satisfied members of the jury, then your verdict in respect of that count will be guilty, and you need not proceed any further. If you are not so satisfied as to all of those elements, then your verdict in relation to that count will be not guilty and you would go on to consider count 2.

Can I just reiterate members of the jury, it is immaterial in this case both in relation to count 1 and count 2 what the accused believed to be the case at the time. The test is an objective one, that is to say you must try to put yourself in a position of a reasonable person in the position of the accused, same age, knowing what he knows and a person of ordinary fortitude and strength of mind, and ask yourselves would that person have done what the accused did. Was it reasonable for him to have done that? If not, were his actions negligent, were they deliberate, and I do not mean deliberate in the sense of intending to hurt Michael Milne, no one has suggested that, but deliberate in the sense that he had control over his vehicle. Were the actions the cause of Michael Milne's death and were the actions so far short of the standard of care which a reasonable person would have exercised, and did they involve such a high risk of death or really serious bodily injury that [it] would follow that they merit criminal punishment?"

15 For the purposes of one of the subsidiary issues, it is to be noted that, although the trial judge described the test as "objective" he told the jury, repeatedly, to have regard to the circumstances in which the respondent found himself and "the knowledge that he had of the circumstances at the time". The jury were told to put themselves in the position of the respondent "knowing what he knows". Indeed, some aspects of what the respondent knew were relied upon by the prosecution, but the jury were invited to consider everything he knew. The reference to the immateriality of "what the accused believed to be the case at the time", in the context in which that was said, was plainly a reference to, and a reiteration of, the earlier statement that "[t]he Crown does not have to prove that the accused appreciated that he was being negligent". That the statement was so understood by those at the trial is evident from the fact that no objection was taken by trial counsel to that aspect of the directions.

The decision of the Court of Criminal Appeal

16 The grounds of appeal to the Court of Criminal Appeal raised only what are now the subsidiary issues. The Court of Criminal Appeal considered that the written submissions and oral argument were insufficiently clear. Giles JA recorded that, because it was not practicable to reconvene the Court, the Court was regrettably deprived of full and complete argument. This explains why the reasons of the Court of Criminal Appeal do not address the matters of statutory context, including history, that were debated in this Court.

17 The trial judge's directions on what he called the fifth element of the offence were based on the judgment of the Full Court of the Supreme Court of Victoria in *Nydam v The Queen*[3], a judgment which was approved by four members of this Court in *Wilson v The Queen*[4]. The directions made no reference to malice, or to the definition of "maliciously" in s 5 of the Crimes Act. All three members of the Court of Criminal Appeal decided that these were matters that were relevant to the charge against the respondent, although each was of a different opinion as to how they were relevant. Giles JA, who was in favour of dismissing the appeal to the Court of Criminal Appeal, considered that what might be described as the *Nydam* test of fault in the offence of involuntary manslaughter by criminal negligence subsumed any issues that would otherwise have been raised by a requirement for the prosecution to establish malicious

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3 [1977] VR 430.

4 (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ.

conduct within the meaning of s 5 of the Crimes Act. He accepted that, on the true construction of the Crimes Act, s 5 was relevant to the offence, but he considered that it added nothing of present significance to the *Nydam* test. Hulme J and Adams J also accepted that s 5 was relevant, but they attached to it significantly different meanings in its application to a case such as the present.

18 In this Court, the appellant submits that all three members of the Court of Criminal Appeal were in error in treating s 5 as relevant to a charge of involuntary manslaughter. In that respect, the appellant points out that it is necessary, in construing the Crimes Act, to pay attention to both kinds of involuntary manslaughter, and submits that the Court of Criminal Appeal appears to have given no consideration to the full implications of its decision. Alternatively, the appellant submits that, if s 5 is relevant, the reasoning of Giles JA is to be preferred. For the reasons that will appear, the appellant's primary submission should be accepted.

19 The issue is one of the meaning of the Crimes Act. It turns upon the meaning of s 18 and, in particular, s 18(2)(a). As is so often the case, the meaning of the statutory provision is influenced powerfully by context. The error in the Court of Criminal Appeal resulted from paying insufficient regard to that context, probably because of the way the case was argued.

The Crimes Act

20 The Crimes Act was enacted in 1900 as an Act to consolidate the statutes relating to criminal law. It was not a criminal code. In important respects it modified or added to the common law, but it assumed the continuing operation of the common law as a source of legal obligations and liabilities. It has been amended many times since 1900, but the provisions of relevance to this case are in substantially the same form as they took in 1900. Section 18, as Windeyer J pointed out in *Ryan v The Queen*[5], was "a re-enactment of a provision of the *Criminal Law Amendment Act of* 1883 (NSW)". So also was s 5. It will be necessary to make detailed reference to the 1883 legislation in due course.

21 Part 3 of the Crimes Act is headed "Offences against the person". Division 1 of that Part deals with homicide. In its present form, it comprises ss 17A to 24. Sections 17A, 20, 21, 22 and 22A are irrelevant. Section 18 is described in its heading as defining murder and manslaughter. As will appear when the section is set out in full, that description is misleading. Section 18

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5 (1967) 121 CLR 205 at 238.

defines murder, but it merely provides that punishable homicide which is not within the definition of murder shall be taken to be manslaughter. It is not possible, either from a reading of s 18, or from a reading of the entire Act, to identify all the forms of punishable homicide apart from murder. The elements of involuntary manslaughter are prescribed, not by the Crimes Act, but by the common law. Sections 23 and 23A deal with voluntary manslaughter. Section 19A provides the punishment for murder. Now, a person who is convicted of murder is liable to imprisonment for life. When the Crimes Act was enacted in 1900, a person who was convicted of murder was subject to the death penalty (s 19). As will appear, that was of major importance in the parliamentary history of those provisions of the *Criminal Law Amendment Act of 1883* (NSW) ("the 1883 Act") concerning homicide which were re-enacted in 1900. Section 24 now provides that the maximum penalty for manslaughter is imprisonment for 25 years. It further provides that if, in any case, the sentencing judge is of the opinion that, having regard to all the circumstances, a nominal punishment would be sufficient, the judge may discharge the jury from giving any verdict, and such discharge shall operate as an acquittal. When s 24 was originally enacted, in 1900, the maximum penalty for manslaughter was imprisonment for life, and the minimum term was imprisonment for three years, but that was subject to the same proviso. Section 24 was also a re-enactment of a provision (s 13) of the 1883 Act.

22 The circumstance that at all material times the legislation as to homicide has expressly recognised that, in a case of manslaughter, a nominal punishment only may be sufficient, is consistent with the common law position that malice is not a necessary element of manslaughter. For more than a hundred years, judges in all Australian jurisdictions, and in England, have observed that, of all serious offences, manslaughter attracts the widest range of possible sentences. The culpability of a person convicted of manslaughter may fall just short of that of a person guilty of murder or, as s 24 recognises, it may be such that a nominal penalty would suffice.

23 Section 18 provides:

> "(1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her 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 or her, of a crime punishable by imprisonment for life or for 25 years.

(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, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only."

24 Central to the present case is a question of the meaning of s 18(2)(a). At common law, the presence or absence of malice was the point of difference between the two forms of unlawful homicide known as murder and manslaughter. It thus would be an error to approach the construction of s 18, and, in particular, the relationship between sub-s (1) and sub-s (2)(a), by stressing the general significance for the common law of the requirement of mens rea. It would also be an error to equate mens rea in all forms of unlawful homicide with malice[6].

25 In Sir James Fitzjames Stephen's *A Digest of the Criminal Law*, published in 1877, murder was defined as unlawful homicide with malice aforethought[7]. Manslaughter was defined as unlawful homicide without malice aforethought[8]. Writing extra-judicially in 1935[9], Sir Owen Dixon said that, from the beginning of the sixteenth century, the chief concern of the law of homicide has been malice aforethought, and that it is because homicide is a single felony that, upon an indictment of murder, a verdict of manslaughter may be found. The complexity of the common law as to malice for the purposes of the crime of murder, and the drawing of elaborate distinctions between actual, implied or constructive malice, was a source of much concern in the second half of the nineteenth century. The existence of capital punishment for murder heightened that concern. Sir James Fitzjames Stephen summarised the state of the common law in 1877 by saying that malice aforethought covered any one or more of the

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6 For a discussion of the various states of mind that constitute mens rea for the purpose of various offences, see *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 568-575.

7 Stephen, *A Digest of the Criminal Law*, (1877) at 144.

8 Stephen, *A Digest of the Criminal Law*, (1877) at 144.

9 Dixon, "The Development of the Law of Homicide", (1935) 9 *Australian Law Journal* (Supplement) 64 at 66-67.

following states of mind: intent to kill or cause grievous bodily harm; knowledge that the act causing death will probably cause death or grievous bodily harm although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused; an intent to commit any felony whatever; or an intent to oppose by force an officer executing a duty of arrest or custody[10].

26 In *Parker v The Queen*[11], speaking of the legislation that was re-enacted in s 18, Windeyer J said that "it should be remembered that, in relation to murder and manslaughter, the Act of 1883 was intended to be a restatement of common law doctrine, but shorn of some of the extravagances of malice aforethought and constructive malice." Section 18(1) was a statutory re-formulation of the element of malice in the crime of murder. Subject to that, the section followed the common law. Murder is punishable homicide which involves one of the elements stated in s 18(1)(a). Every other punishable homicide is manslaughter.

27 What, then, is to be made of s 18(2)(a) and its relationship to s 18(1)? Is the result, contrary to what was said by Windeyer J, a radical change in the common law? Did it make malice an element of manslaughter? If the answer to that question is in the affirmative, it must apply to both forms of involuntary manslaughter. Furthermore, logically, the malice involved in involuntary manslaughter must be different from the states of mind described in s 18(1)(a), for otherwise the crime would be murder. In the present case, if the respondent's case had fallen within s 18(1)(a) because he acted with reckless indifference to human life, he would have been guilty of murder, not manslaughter.

28 Section 18(2)(a) commences with a reference to acts or omissions. That fits in with s 18(1)(a), which deals with acts or omissions involving a certain state of mind. Are the acts or omissions to which it refers acts or omissions of the kind that would or might otherwise fall within the definition of murder, or do they include all acts or omissions which might constitute punishable homicide? Does "within this section" refer to the work done by the section in defining murder, or does it cover both forms of punishable homicide mentioned in the section, that is, murder and manslaughter?

29 The question of construction for this appeal turns upon the concluding words in s 18(2)(a) "shall be within this section". What were not "within" the section are acts or omissions which lack the quality or character of malice or

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10 Stephen, *A Digest of the Criminal Law*, (1877) at 144-145.

11 (1963) 111 CLR 610 at 657.

lawful cause or excuse. The acts or omissions which otherwise would be "within" s 18, because they are in direct terms so identified, are those found in s 18(1)(a). That paragraph tells the reader when "[m]urder shall be taken to have been committed". The acts or omissions identified in s 18(1)(a) remain within the section if they further satisfy s 18(2)(a). That, as a matter of textual relationship and verbal congruity, is the linkage between s 18(2)(a) and the remainder of s 18.

30 Section 18 defines murder. It does not define manslaughter, except by providing that it is punishable homicide that is not murder. The reader must go to the common law of homicide in order to find out what is punishable. The section refers to manslaughter, but only in excluding from the category of murder any form of punishable homicide which does not satisfy s 18(1)(a). The section contains a positive and a negative definition of murder. The effect of s 18(1)(a) is that certain forms of punishable homicide, which at common law would have been described as unlawful homicide with malice aforethought, are taken to be murder, and all other forms of punishable homicide are not murder but manslaughter.

31 The awkward structure of s 18 has been noticed in the past, although New South Wales courts, in practice, have not treated s 18 as materially altering the law of involuntary manslaughter. There are many provisions in other parts of the Crimes Act which create offences of which malice is an element, just as there were many other such provisions in the 1883 Act. In Pt 1 of the Crimes Act there are a number of interpretation provisions, including s 5 which defines the word "maliciously". That section 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."

The concluding words of s 5 involve, in a case such as the present, a problem of circularity. The question to be resolved is whether malice is by law an ingredient in the crime of involuntary manslaughter. As to the form of indictment for voluntary manslaughter, the provisions of s 376 of the Crimes Act 1900 (which were repealed in 1951 by one of a number of amendments said by the Attorney-

General in his second reading speech to be "drafting amendments in the strict sense [which] do not alter the law at all"[12]) are important. That section provided:

> "In an indictment for murder, or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death alleged was caused, but it shall be sufficient in an indictment for *murder* to charge that the accused did feloniously *and maliciously* murder the deceased, and in an indictment for manslaughter to charge that the accused did feloniously slay the deceased." (emphasis added)

That section re-enacted s 318 of the 1883 Act. It appears that s 376 was not drawn to the attention of the Court of Criminal Appeal in this case. That was a significant omission. The charge against the respondent was that he did feloniously slay the deceased. Section 376 of the Crimes Act, like its precursor in the 1883 Act, consistently with the common law, distinguished between the forms of indictment for murder and manslaughter by reference to the need, or the absence of need, to allege malice. That provision formed part of the statutory context in which s 18 appeared when first enacted. Nobody suggests that s 18 changed its meaning when s 376 was repealed in 1951. As will shortly appear, there were other important features of the wider context that should also have been brought to the attention of the Court of Criminal Appeal, but s 376 is a powerful indication that s 18(2) was not intended to alter the common law of involuntary manslaughter, and supports the observation of Windeyer J in *Parker v The Queen*.

32 In *Ryan v The Queen*[13], Menzies J made passing reference to a "difficulty" about whether s 18(2) makes malice in the defined sense a necessary element in the crime of manslaughter. He did not take the matter further. In *Royall v The Queen*[14] Toohey and Gaudron JJ also referred to the difficulty. They said that "[o]n the face of the section" a homicide punishable at common law is no longer punishable if the act or omission constituting the homicide, be it murder or manslaughter, was not malicious. The issue, however, is not to be resolved on the face of the section. Their Honours gave no consideration to s 376 (which had been repealed by the time of their decision), and made no detailed reference to the other matters of context which must be considered in order to understand

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12 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 September 1951 at 3223.

13 (1967) 121 CLR 205 at 234.

14 (1990) 172 CLR 378 at 429-430.

s 18. Their Honours noted that the subject was not dealt with clearly in argument, and recorded that the Court was told "that the prevailing view in the Supreme Court of New South Wales is to treat sub-s (2) as having very little to do with the offence of murder"[15]. They were concerned in that case with a conviction of murder, and their comments on manslaughter were made in the course of responding to that rather vague piece of information.

Context

33 This case provides an example of the importance of context in resolving questions of statutory construction[16].

34 The task is to construe s 18 of the Crimes Act of 1900. The immediate context is Div 1 of Pt 3, dealing with homicide, one of the offences against the person dealt with by the Act. The structure of that Division has already been described. In particular, punishable homicide is classified as either murder or manslaughter. In 1900, the penalty for murder was death (s 19). The maximum penalty for manslaughter was penal servitude for life, but specific provision was made for cases of manslaughter where a nominal punishment would be sufficient (s 24). The Division contained no definition of manslaughter beyond providing that it was punishable homicide that did not amount to murder. It was necessary to look to the common law in order to determine what constituted punishable homicide other than murder.

35 The wider context included the whole of the Crimes Act. Section 376 prescribed the forms of indictment for murder and manslaughter. Sections 18 and 376 should be read consistently if possible. An indictment for murder was to allege felonious and malicious murder. An indictment for manslaughter was to allege felonious slaying. It did not have to allege malice. The treatment of the presence or absence of malice as distinguishing murder from manslaughter reflected the common law. Various other sections of the Crimes Act created offences of "maliciously" acting in a certain fashion. (The closest to s 18 was s 31, which dealt with maliciously sending threatening letters, but there were many others.) The general interpretation provisions included s 5, defining "maliciously". Some parts of that definition could overlap with s 18(1)(a); others would not. Section 5, in its terms, dealt only with acts, and not omissions. To be precise, it dealt with acts that were to be "taken to have been done maliciously,

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15 *Royall v The Queen* (1990) 172 CLR 378 at 428.

16 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

within the meaning of this Act". Section 18 dealt with both acts and omissions. Further, s 5 referred to indictments and charges "where malice is by law an ingredient in the crime". Section 18(2) raised a question whether malice was by law an ingredient of involuntary manslaughter. Section 367 provided that malice did not have to be alleged in a charge of involuntary manslaughter.

36 The wider context, however, extends beyond that. The reference in s 18 to "[e]very other punishable homicide" would be incomprehensible without a knowledge of the common law, including the common law as to involuntary manslaughter. Division 1 of Pt 3 was enacted in the context of the common law on the subjects it addressed. The extent to which it changed the common law is the question to be decided, but an understanding of s 18 requires an understanding of the common law.

37 The Court has not been invited, in examining the principal issue in this appeal, to re-consider and, if necessary, modify the common law of involuntary manslaughter. The subsidiary issues require closer attention to the common law, but for the purpose of dealing with the principal issue the decision of this Court in *Wilson v The Queen*[17] has been accepted as authoritative[18]. The first question is whether, on a charge of involuntary manslaughter in New South Wales, malice is an ingredient of the offence, and the definition of "maliciously" in s 5 is to be applied. As the reasons of Giles JA in the Court of Criminal Appeal show, even if that question were to be answered in the affirmative, there would be a further question as to whether directions on manslaughter by criminal negligence in accordance with *Nydam v The Queen*[19] would sufficiently cover the topic of malice. If the first question is answered in the negative, that further question (upon which there were three different opinions in the Court of Criminal Appeal) falls away.

38 At common law there are two kinds of involuntary manslaughter. The first involves the causing of death by an unlawful and dangerous act carrying with it an appreciable risk of serious injury. The second involves manslaughter by criminal negligence. At common law, murder was the form of unlawful homicide that was accompanied by malice aforethought. Manslaughter was

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17 (1992) 174 CLR 313.

18 See also *Director of Public Prosecutions v Newbury* [1977] AC 500; *R v Adomako* [1995] 1 AC 171.

19 [1977] VR 430.

unlawful homicide not involving malice aforethought. This view of the categories of homicide was reflected precisely in the structure of s 18(1), and in s 376. If it were found to be altered by s 18(2), then it would be necessary to consider how it was altered.

39 Let it be assumed that s 18(2)(a), in its reference to malice, picks up the definition of "maliciously" in s 5. How is that definition to be applied to a charge of involuntary manslaughter? There is no escape from that question if the assumption is correct.

40 Giles JA, analysing the definition of "maliciously", and comparing it with the directions given by the trial judge in this case, which followed *Nydam v The Queen*, said that, if the acts of the respondent fell within those directions, then they would also fall within s 5. Hulme J and Adams J each disagreed, but for different reasons. Even if the view of Giles JA were correct, would that cover a case of manslaughter by criminal negligence involving not an act but an omission? As noted above, s 5, in defining "maliciously", refers only to acts. Furthermore, how would one relate s 5 to manslaughter by an unlawful and dangerous act? The decision in *Wilson v The Queen* establishes that this is a form of manslaughter which exists because of the importance which the law attaches to human life. It turns upon an objective test. The only relevant intent of the accused is an intent to do the act that was unlawful and dangerous and that inadvertently caused death. A description of an act as dangerous requires consideration of whether a reasonable person would have realised that he or she was exposing another to an appreciable risk of really serious injury. That does not necessarily involve indifference to human life or suffering, or reckless or wanton behaviour, unless those terms are given a meaning that renders the whole debate academic[20]. It would be wrong to distort the meaning of s 5, which applies to a wide range of offences, in order to give it a sensible application to manslaughter by an unlawful and dangerous act.

41 Another important part of the context of s 18 is the history of the legislation. In *Riddle v The King*[21], O'Connor J said:

> "The *Crimes Act* repeals and replaces all then existing statutory provisions, and there alone the Statute law on the subject is now to be

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20 As to the meaning of "reckless", see *R v G* [2004] 1 AC 1034.

21 (1911) 12 CLR 622 at 638.

found. But the repealed Acts may, of course, be looked at in determining the meaning of the measure which purports to consolidate them."

42 The *Criminal Law Amendment Act of 1883* (NSW) comprised 472 sections. It was enacted following a Report of a Royal Commission established in 1870 and presided over by the then Chief Justice of New South Wales, Sir Alfred Stephen. Legislation pursuant to the Report was introduced into Parliament in 1871, but it was not finally enacted until 1883. By that time Sir Alfred Stephen had ceased to be Chief Justice. In 1883, after the enactment of the legislation, Sir Alfred Stephen and Alexander Oliver, Parliamentary Draftsman, wrote their *Criminal Law Manual*, with an introduction and a commentary. The Manual was referred to by Windeyer J in *Parker v The Queen*[22], who doubted that it could properly be used in aid of the construction of the 1883 Act, warning that "parents do not always well understand their children". However, reference to the Manual is permissible for at least two purposes. First, it explains the genesis and legislative history of the 1883 Act. Secondly, it contains authoritative commentary on the common law of homicide as understood in New South Wales in 1883, and that common law is, in turn, part of the context in which the 1883 Act is to be understood. The exposition of the common law is entirely consistent with what has been said earlier in these reasons. In an Appendix to the Manual headed "On Murder and Manslaughter"[23], the authors refer to the 1883 Act's redefinition of malice aforethought in murder, and, after discussing the common law concept of malice, say[24]: "Malice aforethought, then, as expounded by the Courts, being the essential element in Murder, Manslaughter is defined to be unlawful homicide without malice." The parliamentary debates on the 1883 Act show that what the New South Wales Parliament thought it was doing was to substitute a statutory definition for malice aforethought in the case of murder, but otherwise to follow the scheme of the common law, as Windeyer J said.

43 The 1883 Act dealt with homicide in Pt 1, between ss 9 and 15. Section 9, which corresponds with s 18(1) of the Crimes Act, was in the following terms:

"Whosoever commits the crime of murder shall be liable to suffer death. And murder shall be taken to be where the act of the accused or thing by him omitted to be done causing the death charged was done or

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22 (1963) 111 CLR 610 at 656.

23 Stephen and Oliver, *Criminal Law Manual*, (1883) at 199-203.

24 Stephen and Oliver, *Criminal Law Manual*, (1883) at 201.

> 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 a crime punishable by death or penal servitude for life. Every other punishable homicide shall be taken to be Manslaughter."

44 The marginal note to s 9 was "Murder – the crime defined". It will be observed that the three forms of malice identified in s 9 correspond largely with the first three kinds of malice referred to by Sir James Fitzjames Stephen in 1877.

45 The other two provisions of Pt 1 of the 1883 Act of direct relevance are ss 13 and 14. Section 13 corresponds with s 24 of the Crimes Act. It contained, in particular, the proviso concerning cases of manslaughter where a nominal punishment would be adequate. Section 14, which corresponds with s 18(2) of the Crimes Act, provided:

> "No act or omission which was not malicious or for which the accused had lawful cause or excuse shall be within the aforesaid ninth section. And no punishment or forfeiture shall be incurred by any person who kills another by misfortune only or in his own defence."

46 Reference will be made below to the circumstances in which the first sentence of s 14 was inserted. The marginal note to s 14 was "Justifiable excusable homicide". The authors of the *Criminal Law Manual*, in their notes to ss 9 and 14, recount the legislative history of those provisions, and refer to the Report of the Royal Commission, and then to a revision of an original proposal for the purpose of achieving a legislative definition of malice as an ingredient of the capital crime of murder.

47 In the 1883 Act, as later in the Crimes Act, there were numerous offences of which acting maliciously was an ingredient. And in the 1883 Act, in the interpretation provisions, there was a definition of "maliciously" (s 7) in substantially the same terms as s 5 of the Crimes Act. It also applied to acts but did not refer to omissions. Furthermore, in the 1883 Act, there was a provision (s 318) as to the form of indictments for murder and manslaughter. Indictments for murder had to allege malice. Indictments for manslaughter did not.

48 The parliamentary debates[25] on the homicide provisions of the 1883 Act were concerned mainly with strong exception that was taken to the inclusion in s 9 of acts or omissions with reckless indifference to human life. Because of the death penalty for murder, objection was taken to the Bill on the ground that it was wrong to include in the definition of murder conduct that might involve only negligence. It was said that the death penalty "should be inflicted only in cases of malicious and intentional murder".[26] The objections do not appear to have been based on a sound understanding of the common law of homicide. It is clear, however, that the prospect of treating recklessness as a capital offence disturbed some members. The Minister for Justice responded by explaining the concept of malice at common law. Then he added that he proposed to insert in cl 14 of the Bill the words: "No act or omission which was not malicious or for which the accused had lawful cause or excuse shall be within the said ninth section."[27] Those words are the source of the problem with which we are now concerned.

49 What is evident is that the debate was all about cl 9 as a definition of murder. The argument was all about the proposed statutory formulation of malice aforethought. Not a word was said to suggest that it was proposed to alter the law as to involuntary manslaughter. The context strongly supports the conclusion that "within the said ninth section" was a reference to the definition of murder.

50 In 1887, in *R v Harvey*[28], Innes J, dealing with maliciously inflicting grievous bodily harm, described s 7 as a "praiseworthy" and "very correct" definition of malice. But s 9, in the context of unlawful homicide, contained its own and different definition of malice, although it did not use that term. The amendment to s 14, which is now reproduced in s 18(2)(a) of the Crimes Act, may have served the purpose of deflecting criticism of that part of s 9 which referred to reckless indifference to human life, by emphasising that malice was an ingredient of the capital offence of murder. It is impossible to accept that it was intended to serve the additional purpose, not referred to in any Report or

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25 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 March 1883 at 1095-1103.

26 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 March 1883 at 1096.

27 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 March 1883 at 1098.

28 (1887) 8 NSWLR 39 at 44.

parliamentary debate, or by the drafters, or by any commentator at the time, of altering the law of homicide by making malice an ingredient of involuntary manslaughter.

Conclusion on the principal issue

51 It appears that the Court of Criminal Appeal did not have the benefit of full argument from the appellant on this issue. Giles JA, after referring to the comments of Toohey and Gaudron JJ in *Royall v The Queen* noted above, said:

> "On one view the acts or omissions constituting a punishable homicide other than murder are 'within this section', although only because s 18(1)(b) takes up the excepted common law offences and ascribes to them the label of manslaughter. On another view the words 'within this section' do not go that far. The Crown's submissions did not dispute that s 18(2)(a) applies to the common law offences falling within s 18(1)(b), as Toohey and Gaudron JJ seem to have accepted. I proceed on that basis."

52 This Court was informed that some supplementary written submissions were filed on the point, but it is clear that the matters of context referred to in these reasons were not brought to notice.

53 Hulme J and Adams J proceeded on the same basis as Giles JA. Neither of them questioned the relevance of s 5 to involuntary manslaughter. All three members of the Court of Criminal Appeal addressed the task of relating the definition of "maliciously" in s 5 of the Crimes Act to that form of punishable homicide constituted by the second of the two forms of involuntary manslaughter identified in *Wilson v The Queen*. It is not surprising that they found the task difficult. They might have found the task even more difficult if they had attempted to relate s 5 to involuntary manslaughter by an unlawful and dangerous act.

54 On the true construction of s 18 of the Crimes Act, understood in context, the section did not alter the common law of unlawful homicide by involuntary manslaughter. The words "within this section" in s 18(2)(a), like the words "within the aforesaid ninth section" in s 14 of the 1883 Act, refer to the work done by the section in defining the crime of murder. In 1883, and again in 1900, it was the legislative purpose of re-formulating the element of malice in the crime of murder (but otherwise following the common law of punishable homicide) that was the focus of attention, and was the subject of reference.

55 On the principal issue, the primary argument of the appellant in this Court succeeds. It is unnecessary to deal with the alternative argument which supports

the reasoning of Giles JA, because the premise on which that argument proceeds is unfounded.

The subsidiary issues

56 On each of these issues, the conclusion of Giles JA in the Court of Criminal Appeal was correct.

57 The first issue concerns a point that was taken at trial by counsel for the respondent. In considering the issue, it is necessary to note the precise terms of counsel's submission to the trial judge. Reference has earlier been made to the five elements of manslaughter identified by the judge. Counsel said: "I would invite your Honour to add, in relation to the manslaughter, a sixth element, being that the accused did not hold an honest and reasonable belief that it was safe to proceed." The invitation was declined.

58 There are two reasons why it would have been erroneous and inappropriate to give the jury such a direction. The first reason is that, as the trial judge pointed out, the supposed sixth element of the offence was subsumed by the fifth element (as to which counsel made no objection). In order to satisfy the fifth element, the prosecution had to persuade the jury beyond reasonable doubt that the conduct of the respondent was not only unreasonable, but that it was "wickedly negligent". If the jury were not satisfied of that, the charge of manslaughter failed. If the jury were satisfied of that, how could they entertain the possibility that the respondent held an honest *and reasonable* belief that it was safe to proceed?

59 The second reason is that the principle on which counsel based his argument, which applies in other contexts, is a principle relating to honest and reasonable mistake of fact. The principle was recently discussed in this Court in *Ostrowski v Palmer*[29]. As the decision in that case illustrates, the principle concerns mistakes of fact. The belief concerning which counsel sought a direction was a (supposed) "belief that it was safe to proceed". Such a state of mind involves an opinion. It might be based upon certain factual inferences or hypotheses (the respondent did not give evidence, so the jury were not told by him exactly what facts or circumstances were operating in his mind), but it necessarily involves an element of judgment. Indeed, it involves a conclusion by the respondent that his conduct was reasonable. The direction sought would be inconsistent with what has been described as the objectivity of the test for

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29 (2004) 78 ALJR 957; 206 ALR 422.

involuntary manslaughter. The respondent's opinion that it was safe to act as he did was not a relevant matter. If there had been some particular fact or circumstance which the respondent knew, or thought he knew and which contributed to that opinion, and the jury had been informed of that, and counsel had asked for a direction about it, then it may have been appropriate to invite the jury to take that into account[30].

60 Counsel for the respondent in this Court attempted to persuade the Court that *Nydam v The Queen* should not be followed, and that manslaughter by criminal negligence requires a subjective appreciation by the offender that the conduct engaged in is unsafe. This would bring this form of involuntary manslaughter into disconformity with the other form of involuntary manslaughter dealt with in *Wilson v The Queen*. Furthermore, it is erroneous in principle. This branch of the criminal law reflects the value placed by the law upon human life. Giles JA was right to say, in the present case, that "appreciation of risk is not necessary for a sufficiently great falling short of the objective standard of care, and ... the law would be deficient if grossly negligent conduct causing death could not bring criminal punishment unless the accused foresaw the danger."

61 The second issue concerns a point not taken at trial. The fact that it was not taken is significant, because it involves giving the trial judge's directions a strained interpretation, an interpretation inconsistent with what he had previously said, an interpretation that was clearly unintended, and an interpretation that did not occur to trial counsel at the time.

62 The relevant directions are set out earlier in these reasons. As has been noted, the trial judge repeatedly told the jury to take account of the facts and circumstances known to the respondent when he was driving the front end loader near the boys. The judge also told the jury that it was not necessary for the prosecution to prove that the respondent appreciated that he was acting negligently. In the course of saying those things (both of which were orthodox) he "reiterate[d]" that it was immaterial what the accused believed to be the case at the time. That is now said to be an error. In the next sentence the judge again directed the jury to take account of what was within the knowledge of the accused. Plainly, the reiteration was not intended, as is now submitted, to contradict what was said earlier, and what was said again in the very next sentence. In the context of what went before and after, the judge was reiterating

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30 What was said in *Jiminez v The Queen* (1992) 173 CLR 572 at 584 must be understood in the light of what appears at 583, and the reference to an honest and reasonable mistake *of facts*.

that the respondent's view, at the time, as to whether his conduct was negligent, was immaterial. The jury were told to make their own judgment of the reasonableness of the respondent's conduct, taking account of what he knew at the time. They were told that his opinion, at the time that his conduct was safe, and therefore reasonable, was irrelevant. Those propositions are not contradictory. The reiteration of the second did not involve a withdrawal of the first, especially when the first proposition was repeated in the next sentence.

63 The appellant succeeds on the subsidiary issues.

Orders

64 The Court of Criminal Appeal allowed the respondent's appeal against conviction, quashed the conviction and sentence, and entered a judgment and verdict of acquittal. Those orders cannot stand.

65 The prosecution cross-appealed against what was said to be the leniency of the sentence. That cross-appeal was dismissed, and has not been pursued in this Court.

66 The trial of the respondent was a third trial. At the first trial there was a jury disagreement. The second trial came to an end when a case was stated on a point of law about a matter that is not of present relevance. The respondent, in view of the time that has elapsed and the events that have occurred, would seek an opportunity, in the event that this appeal is upheld, to seek the leave of the Court of Criminal Appeal to appeal against his sentence, which has not been fully served. It seems fair to allow the respondent that opportunity. Furthermore, there are possible difficulties resulting from the form of the sentence that was pronounced, and the subsequent history of the case. The appellant submitted that, in the event that the appeal is allowed, the matter should be remitted to the Court of Criminal Appeal to deal with any questions of sentence. The problem is that, since the only appeal to this Court concerns the question of conviction, once that appeal is resolved there appears to be no extant matter to be remitted. The appropriate course is to postpone the effect of the orders in this Court for 28 days to enable the parties to approach the Court of Criminal Appeal on the matter of sentence.

67 The appeal should be allowed. The orders of the Court of Criminal Appeal on the appeal against conviction should be set aside. In place of those orders it should be ordered that the appeal to the Court of Criminal Appeal be dismissed. These orders should take effect 28 days from the date of their publication.

68 KIRBY J. This is a prosecution appeal from orders of the Court of Criminal Appeal of New South Wales[31]. The principal point in issue concerns the legal effect of s 18(2)(a) of the *Crimes Act* 1900 (NSW) ("the Crimes Act"). More specifically, it is whether that paragraph, read in its context and with the aid of such material as is available to cast light on its purpose, grafts malice onto the common law definition of involuntary manslaughter in New South Wales.

69 For me, the arguments of statutory construction, legislative history and legal principle and policy, advanced by the parties for and against the disposition of the court below, are more evenly balanced than they have seemed to the other members of this Court. This fact presents a larger obstacle to my acceptance of the conclusion reached by the Court that the application of s 18(2)(a) is limited to murder. I ultimately come to the same result only because that outcome is less unsatisfactory than the alternative would be. In this sense, the appeal illustrates once again the highly contestable nature of statutory interpretation[32]. It also illustrates the importance of consistency of approach to such problems, so that it cannot be said that the courts pluck out considerations of "context", "purpose" and "history" arbitrarily, so as to sustain the outcomes of interpretation at which they arrive in some, but not other, cases[33].

The facts and the decisional history

70 *The facts*: Mr Wayne Lavender was tried and convicted in a third trial in the District Court of New South Wales on a charge that he "did feloniously slay" the victim, a boy aged 13 years. No malice was alleged in the indictment. It took the standard form of a count of common law manslaughter.

71 The circumstances of the collision between the front-end loader driven by the respondent and the victim are described in the reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ ("the joint reasons")[34]. It was not alleged that the respondent had intended to cause death or grievous bodily harm to the victim or that he was guilty of homicide in the sense of having been recklessly indifferent to human life[35]. Instead, the prosecution case was that the

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31 *R v Lavender* (2004) 41 MVR 492.

32 *Deredge Pty Ltd v Sinclair* (1993) 30 NSWLR 174 at 175; *Hornsby Shire Council v Porter* (1990) 19 NSWLR 716 at 718.

33 Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95 at 110.

34 Joint reasons at [6]-[8].

35 In that event, the proper count of the indictment would have been murder: see Crimes Act s 18(1)(a).

circumstances of the driving justified the conclusion that the respondent was guilty of such a serious degree of negligence as to warrant conviction of that form of homicide called manslaughter.

72 *The summing up to the jury*: The trial judge directed the jury in accordance with the test enunciated by the Full Court of the Supreme Court of Victoria in *Nydam v The Queen*[36]. That formulation was cited with approval by Mason CJ, Toohey, Gaudron and McHugh JJ in *Wilson v The Queen*[37] (albeit in the context of manslaughter by dangerous and unlawful act). It has been applied on many occasions[38]. The trial judge's summing up is extracted, in part, in the joint reasons[39]. It is important to observe that the summing up did not refer to malice as a feature of manslaughter. Further, the trial judge did not accede to a request by counsel for Mr Lavender to direct the jury that they had to be satisfied that Mr Lavender did not hold an honest and reasonable belief that it was safe to operate the front-end loader in the fashion which he did before they could convict.

73 Upon the jury's verdict of guilty of manslaughter, the respondent was convicted and sentenced to imprisonment for four years with a non-parole period of 18 months. He served part of that custodial sentence before being granted bail pending the outcome of an appeal against conviction[40]. There was no application by the respondent for leave to appeal against the sentence imposed on him on the ground of severity. However, the prosecution appealed against the sentence on the ground that it was too lenient.

74 *The Court of Criminal Appeal*: The Court of Criminal Appeal, by majority[41], upheld the respondent's appeal against conviction and entered a judgment of acquittal in his favour. A majority of that Court made it clear that they would have rejected the prosecution appeal on sentence[42]. The differing

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36 [1977] VR 430 at 445.

37 (1992) 174 CLR 313 at 333.

38 See, eg, *R v Buttsworth* [1983] 1 NSWLR 658 at 675; *R v Taktak* (1988) 14 NSWLR 226 at 250; *R v Vukic* (2003) 38 MVR 475 at 478 [11]; *R v Do* [2001] NSWCCA 19 at [17]-[18]; *R v Davies* [2005] NSWSC 324 at [114]; *R v Tomac* (1996) 67 SASR 376 at 382; *R v Osip* (2000) 2 VR 595 at 603 [30].

39 Joint reasons [12]-[15].

40 *Bail Act* 1978 (NSW) ss 30(a), 30AA.

41 Hulme J and Adams J; Giles JA dissenting.

42 (2004) 41 MVR 492 at 527 [159] per Giles JA, 576 [353] per Adams J.

opinions in the Court of Criminal Appeal are briefly described in the joint reasons[43]. For present purposes it is helpful to note two points.

75 First, while each of the participating judges agreed that the language of s 18(2)(a) of the Crimes Act was intractable, they unanimously held that it applied to the common law offence of manslaughter as defined in s 18(1)(b)[44]. Moreover, according to Giles JA, the prosecution did not dispute this proposition in that Court[45]. Rather, debate in that Court was about the result that followed, namely, whether s 18(1)(b) added anything to the common law definition of manslaughter by criminal negligence. Giles JA was of the view that a person who conducts himself or herself with the degree of negligence needed to constitute manslaughter will necessarily have acted maliciously as that term is defined in s 5 of the Crimes Act[46]. Thus, for Giles JA, s 18(2)(a) covered identical terrain to the common law definition of manslaughter. Conversely, Hulme J[47], with whom Adams J[48] substantially agreed on this point, thought that that paragraph added an additional ingredient to the definition of manslaughter.

76 Secondly, the Court unanimously held that the trial judge was correct not to direct the jury that the absence of an honest and reasonable mistake of fact was an element of manslaughter by criminal negligence[49]. Essentially, that conclusion was reached on the basis that an accused who is found guilty of negligent manslaughter must, by definition, not have made an honest *and reasonable* mistake of fact.

77 *The appeal to this Court*: Special leave to appeal to this Court was granted to the prosecution to reconsider the outcome which was said to have disturbed the assumptions of the "legal fraternity" as to the relevance of malice as an ingredient of the offence of manslaughter in New South Wales[50]. This Court was

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43 Joint reasons at [17].

44 (2004) 41 MVR 492 at 523 [139] per Giles JA, 544 [231] per Hulme J, 569 [331] per Adams J.

45 (2004) 41 MVR 492 at 523 [139].

46 (2004) 41 MVR 492 at 524 [145]-[146].

47 (2004) 41 MVR 492 at 544 [231].

48 (2004) 41 MVR 492 at 569 [331] and 573 [342].

49 (2004) 41 MVR 492 at 507 [64]-[65], 514 [89] per Giles JA, 550 [267] per Hulme J, 573-574 [344]-[345] per Adams J.

50 cf Yeo, "Case Note on *Lavender*", (2004) 28 *Criminal Law Journal* 307 at 309.

not invited to review the common law of involuntary manslaughter. The prosecution did not pursue the separate ground of appeal suggesting that the sentence imposed on the respondent was inadequate. No cross-appeal by the respondent himself propounded the issue of an alleged excess in the sentence.

78 *The legislation and its amendment*: The terms of s 18 of the Crimes Act appear in the joint reasons[51]. I shall not repeat the section. The joint reasons demonstrate[52], as was earlier noted by this Court in *Parker v The Queen*[53], that s 18(2)(a) of the Crimes Act can be traced directly to provisions enacted by the New South Wales Parliament in the *Criminal Law Amendment Act of 1883* (NSW) ("the 1883 Act"). That Act was an attempt in colonial times to clarify, modernise, and to some extent, reform elements of criminal law and procedure. It drew on English and local endeavours to rid that branch of the law of some of the irrational excrescences, complexities and obscurities that had accumulated over time.

79 In 1877, in London, Sir James Fitzjames Stephen wrote *A Digest of the Criminal Law*. The author declared that "[m]anslaughter is unlawful homicide without malice aforethought. Murder is unlawful homicide with malice aforethought"[54]. However, he acknowledged that this definition addressed "one of the most difficult problems presented by the criminal law"[55]. He declared that the reason for the difficultly lay in the "intricacy, confusion, and uncertainty of this branch of the law"[56] and the unsatisfying attempts by earlier writers on the English law to explain precisely the *discrimen* between murder and manslaughter. Thus, Coke's analysis was condemned by Stephen as "bewildering", full of "loose rambling gossip"[57]. Hale's analysis was condemned as "exceedingly confused"[58]. Stephen concluded that such confusion could

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51 Joint reasons at [23].

52 Joint reasons at [26].

53 (1963) 111 CLR 610 at 657 per Windeyer J. See also *Ryan v The Queen* (1967) 121 CLR 205 at 238.

54 Stephen, *A Digest of the Criminal Law*, (1877) at 144.

55 Stephen, *A Digest of the Criminal Law*, (1877) at 354.

56 Stephen, *A Digest of the Criminal Law*, (1877) at 355.

57 By reference to 3rd Inst 55: see Stephen, *A Digest of the Criminal Law*, (1877) at 356.

58 1 Hale PC 451: see Stephen, *A Digest of the Criminal Law*, (1877) at 356.

ultimately be traced to Tudor legislation introducing fictitious notions of malice into the law of homicide in order to take away benefit of clergy in the more serious instances where that immunity was judged specially inappropriate and unacceptable[59].

80 On the other side of the world, in Sydney, the then recently retired Chief Justice of New South Wales, Sir Alfred Stephen[60], proposed reforming legislation that ultimately became the 1883 Act. Later, he co-authored a text, *Criminal Law Manual*[61], providing commentary on that Act. A comparison of ss 7, 9 and 14 in the 1883 Act with s 18 of the Crimes Act demonstrates the legislative origins of the definitions of murder and manslaughter and the provision, in that connection, of a definition of malice. However, a close study of the two Acts also reveals differences that appeared as the legislation was developed, re-expressed and re-enacted. It is the significance of those similarities and differences that have become important in this appeal.

81 In more restrained language than had been used by Sir James Stephen, Sir Alfred Stephen acknowledged the existence of "occasionally nice distinctions", depending on "the degree of carelessness or negligence" that differentiated "involuntary" homicide from mere misadventure[62]. The aim of his draft, which became the basis for the 1883 Act, was to simplify the New South Wales law, drawing upon Imperial investigations undertaken for that purpose and penal codes adopted to that time in India, New York and France[63]. When the Crimes Act was enacted in New South Wales in 1900, it did not attempt (as was elsewhere ventured in Australia[64]) to codify criminal law and procedure. Instead, whilst the Act was a comprehensive statement of the applicable penal law, it contemplated the continuation of the common law to the extent compatible with

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59 Stephen, *A Digest of the Criminal Law*, (1877) at 355.

60 Sir Alfred Stephen and Sir James Stephen were related. They were first cousins once removed.

61 With Alexander Oliver.

62 Stephen and Oliver, *Criminal Law Manual*, (1883) at 202.

63 Stephen and Oliver, *Criminal Law Manual*, (1883) at 203.

64 In particular in Queensland (see *Criminal Code Act* 1899 (Qld)). See also the *Criminal Code Act* 1913 (WA) and the *Criminal Code Act* 1924 (Tas). In submitting the draft Criminal Code to the Attorney-General of Queensland in 1897, Sir Samuel Griffith explained that throughout its text he had avoided use of the terms "malice" and "maliciously": see Shanahan, Irwin and Smith, *Criminal Law of Queensland*, 14th ed (2004) at 223.

its provisions. Indeed, this is evident from the fact that s 18(1)(b) of the Crimes Act, which proscribes manslaughter, gives no guidance as to its definition other than providing that it falls outside the offence of murder, which is expressly defined in s 18(1)(a).

The issues

82 *Four issues in the appeal*: Against this background, the following issues arise for decision in this appeal:

(1) *The statutory construction issue*: Whether, having regard to the language of s 18(2)(a) of the Crimes Act, the prosecution must, in order to establish the punishable homicide of manslaughter, prove that any act or omission relied upon was "malicious" as mentioned in s 18(2)(a) and as defined in s 5 of the Crimes Act? Or does the offence of manslaughter, as was widely assumed, operate in a relatively statute-free zone?

(2) *The effect of the statutory construction issue*: Whether s 18(2)(a) of the Crimes Act imposes an additional element to the common law definition of manslaughter?

(3) *The relevance of the respondent's beliefs issue*: Whether, the trial judge erred in declining to direct the jury that they could not convict unless they were satisfied that the respondent did not hold an honest and reasonable belief that it was safe to operate the front-end loader in the manner that he did?

(4) *The disposition issue*: Whether, having regard to the acquittal entered by the Court of Criminal Appeal, the three trials to which the respondent was subjected, the unfortunate circumstances of the case and the fact that the respondent has served part of his custodial sentence, any consideration arises in this appeal as to the restoration of the balance of the sentence in the respondent's case? Whether this Court should say anything in respect of such sentence? Whether it may, and should, reserve to the respondent an opportunity, in the Court of Criminal Appeal, to challenge the now suggested severity of the sentence[65]?

83 *Narrowing the issues for decision:* I agree in what is said in the joint reasons concerning the effect of the statutory construction issue[66]. That issue becomes irrelevant once the principal (statutory construction) issue is decided

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65 See joint reasons at [66].

66 See joint reasons at [55].

against the respondent. I also agree with the joint reasons that the trial judge was correct to refuse to instruct the jury that they could only convict the accused of manslaughter if they found that the accused did not hold an honest and reasonable belief that it was safe to manoeuvre the front end-loader as he did[67]. Consequently, there is no basis in this case to disturb the outcome of the trial on grounds of misdirection.

84 However, with respect, I am not persuaded (as Callinan J[68] and Heydon J[69] are) that the sentence imposed on the respondent at trial calls for observations by this Court favourable to a reduction of the aggregate term. Disturbance of the substance of the sentence has yet to be established. True, the case is a tragic one[70]. However, by far the greatest burden of the tragedy fell upon the victim and his family and community.

85 Nevertheless, I agree with the proposal in the joint reasons that the respondent should be afforded an opportunity, if so advised, to move the Court of Criminal Appeal, in the circumstances that have occurred, to seek belated leave to appeal against his sentence[71]. For my own part, I do so without any suggestion of error in the sentence imposed, but simply because the restoration of a custodial sentence after an acquittal, the effluxion of much time whilst the respondent has been on bail and the consequential need to re-express the commencing and expiry dates of the sentence[72], may raise fresh issues for sentence that require judicial consideration.

86 The foregoing confines the remainder of these reasons to the statutory construction issue. I have not found it an easy one to resolve. The arguments contrary to those that ultimately find favour seem stronger to me than to the other members of this Court. I shall explain why this is so before expressing the reasons that bring me to my eventual conclusion. However, before doing so, it is necessary to consider the proper approach which this Court should take to interpreting legislation classified as penal.

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67 See joint reasons at [56]-[61]. See also *R v Osip* (2000) 2 VR 595 at 601-608 [26]-[40].

68 Reasons of Callinan J at [145]-[146].

69 Reasons of Heydon J at [150]-[151].

70 Reasons of Callinan J at [146].

71 Joint reasons at [66].

72 Reasons of Heydon J at [150].

Construing penal legislation

87 *A rule of strict interpretation*: The Crimes Act is the principal penal statute of New South Wales. Section 18 provides for the definition of serious offences of homicide, conviction of which will often carry (including in the case of conviction of manslaughter) heavy penalties, frequently including sentences involving prolonged deprivation of personal liberty.

88 In the past, including in this Court, it has been conventional to say that, where one has been left in real doubt as to the meaning of a penal provision, that provision will be construed strictly and in favour of the person potentially affected by the provision[73]. This rule was originally conceived in the seventeenth century as a means of mitigating the harshness of penal legislation, breach of which often attracted the death penalty[74]. Since that time, the rule has been transplanted and applied in various other legislative contexts, such as legislation purporting to impose taxation[75], or to interfere with the enjoyment of, or to take away rights to, private property[76].

89 The rule was conventionally justified on several grounds. First, it was suggested that because of the inequality between the resources of the state and accused persons, the rule played an important function in levelling the field of combat. In this sense, the rule was closely related to principles that are designed, among other things, to achieve an equilibrium between the state and accused

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73 *Tuck & Sons v Priester* (1887) 19 QBD 629 at 638; *The King v Adams* (1935) 53 CLR 563 at 567-568; *R v Ottewell* [1970] AC 642 at 649; *Marcotte v Deputy Attorney General for Canada* [1976] 1 SCR 108 at 115; *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139; *Piper v Corrective Services Commission (NSW)* (1986) 6 NSWLR 352 at 361; cf *Scott v Cawsey* (1907) 5 CLR 132 at 154-157.

74 Hall, "Strict or Liberal Construction of Penal Statutes", (1935) 48 *Harvard Law Review* 748 at 750; Ashworth, "Interpreting Criminal Statutes: A Crisis of Legality?", (1991) 107 *Law Quarterly Review* 419 at 432.

75 *Partington v Attorney-General* (1869) LR 4 HL 100 at 122; *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 at 25-26; *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 59-60; cf at 80; *Liquor Administration Board of New South Wales v Wolfe* (1993) 32 NSWLR 328 at 329.

76 *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 at 559; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414-416 [28]-[31]; *Wilson v Anderson* (2002) 213 CLR 401 at 457-458 [140].

persons, such as the presumption of innocence, the "right to silence", the requirement that the prosecution prove the elements of an offence to the criminal standard of proof and the common law requirement that jury verdicts be unanimous[77].

90 Secondly, it was sometimes asserted that the rule reflected the ideal that it is unfair to convict a person unless they have had fair warning of the reach of the criminal law concerned. This argument was explained by Holmes J delivering the opinion of the Court in *McBoyle v United States of America*[78]. "[I]t is reasonable that a fair warning should be given to the world ... of what the law intends to do if a certain line is passed". In this respect, the rule of strict construction was closely allied with the presumption that Parliament did not intend statutes creating liabilities to have retrospective operation[79].

91 This second justification has been criticised on the basis that "[t]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in"[80]. However, such an argument, if accepted, could condone careless drafting practices. Because the criminal law is the most coercive instrument which the state possesses and because its application has potential implications for the loss of personal liberty, the legislature would normally be obliged to spell out with sufficient clarity the conduct that attracts criminal liability.

92 Thirdly, the rule of strict interpretation has sometimes been justified as upholding the separation of the respective roles of the legislature and the judiciary in determining the content of the criminal law. Courts have now relinquished the power to create new categories of criminal offences[81].

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77 See New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986) at [9.1]-[9.11]. Contra the position in South Australia (*Juries Act* 1927 (SA) s 57), Tasmania (*Jury Act* 1899 (Tas) s 48), Victoria (*Juries Act* 2000 (Vic) s 46) and Western Australia (*Juries Act* 1957 (WA) s 41).

78 283 US 25 at 27 (1931).

79 *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Rodway v The Queen* (1990) 169 CLR 515 at 518; *Smith v The Queen* (1994) 181 CLR 338 at 349; *Nicholas v The Queen* (1998) 193 CLR 173 at 203 [59].

80 *Knuller (Publishing, Printing & Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435 at 463 per Lord Morris of Borth-y-Gest.

81 *R v Rogerson* (1992) 174 CLR 268 at 304; *Isaac, Tajeddine & Elachi* (1996) 87 A Crim R 513 at 523-524. Regarding the role of the courts in this connection see

(Footnote continues on next page)

Interpreting penal statues narrowly preserves this power exclusively for the legislature; but on terms of fairness to potential accused[82].

93 *Confinement of the rule to a last resort*: In recent times the rule of strict interpretation has "lost much of its importance"[83], and is now generally regarded as a rule of "last resort"[84]. It comes into operation when the normal principles of interpretation have "run out",[85] if "all other indicia [have] failed"[86] to provide guidance. It applies "if [there is] genuine doubt as to the intention of the legislature and if there are no considerations indicating the desirability of a wide interpretation of the statute"[87].

94 The ordinary rules of construction are now first applied, including in the ascertainment of the meaning of penal[88] and taxing[89] legislation. In such categories, as much as anywhere else, it is the duty of a court to ascertain, and give effect to, the purpose of the legislature as expressed in the language enacted by Parliament. To some extent the demise in the attractiveness of the former rule of construction has followed the recognition by courts of the legitimacy of

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Smith, "Judicial Law Making in the Criminal Law", (1984) 100 *Law Quarterly Review* 46.

82 Kloepfer, "The Status of Strict Construction in Canadian Criminal Law", (1983) 15 *Ottawa Law Review* 553 at 571.

83 *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

84 *Waugh v Kippen* (1986) 160 CLR 156 at 165.

85 *Capral Aluminium Ltd v Workcover Authority of New South Wales* (2000) 49 NSWLR 610 at 630 [41].

86 *Chew v The Queen* (1992) 173 CLR 626 at 632.

87 Williams, "Statute interpretation, prostitution and the rule of law" in Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (1981) 71 at 72. See also *Barker v The Queen* (1983) 153 CLR 338 at 355.

88 *Attorney-General's Reference (No 1 of 1988)* [1989] AC 971 at 991-995; cf *R v Hasselwander* (1993) 81 CCC (3d) 471 at 476-478.

89 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 144-146 [79]-[84]; *Deputy Commissioner of Taxation v Chant* (1991) 24 NSWLR 352 at 356-358; cf Hill, "A Judicial Perspective on Tax Law Reform", (1998) 72 *Australian Law Journal* 685 at 688-690.

modern Parliaments, elected as they now are by universal suffrage[90]. Artificial categories and exceptions are now less in favour than they formerly were. Nevertheless, somewhat like the *contra proferentem* rule[91] (the occasionally useful principle of construction of insurance and like documents) the principle suggesting a stricter approach to the interpretation of penal legislation may sometimes prove useful when ambiguity seems intractable.

95 In the present case, a strict approach to interpretation of the contested provisions of the Crimes Act is of limited use. This is so because it is clear that Parliament provided for the offences of murder and of manslaughter and attached penal consequences to conviction. The debate about the meaning of s 18 of the Crimes Act is not advanced very far by incantations about the penal character of such a provision. This is especially so when the history of the offence of homicide is remembered, including the confusion and inconsistencies in that history, and the fact that an offence of manslaughter of broad ambit was deliberately preserved. Disputes over the detailed elements of that crime are unlikely to be resolved at this level of generality. Nevertheless, to the extent that the principle governing the interpretation of ambiguous provisions of penal statutes is available, the respondent invoked it to support the interpretation favoured by the majority in the Court of Criminal Appeal, pursuant to which he had been acquitted. So it is a rule to be kept in mind – but probably at the back of the mind leaving more pressing arguments to command the foreground.

The statutory construction issue: respondent's arguments

96 *The textual arguments*: The respondent's proposition was that s 18(2)(a) of the Crimes Act, according to its terms, clearly applied to the crime of manslaughter in New South Wales; that it was the duty of the courts to uphold and insist upon its application; and that it followed that the directions of the trial judge to the jury concerning the manslaughter with which the respondent had been charged had to conform with the statute law in order to be adequate and lawful. For default of such conformity, the directions were erroneous and the trial of the respondent had miscarried in a fundamental respect.

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90 Other and different features of contemporary Parliaments, including Government and party dominance, have replaced concerns over representativeness as potential reasons for close scrutiny of legislation by courts.

91 *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 274 [19.4]; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 602 [74.4]; *Rich v CGU Insurance Ltd* (2005) 79 ALJR 856 at 859-860 [24], 870 [71]; 214 ALR 370 at 375-376, 389.

97 The starting point for these arguments must be the text of the Crimes Act. Section 18 appears in Pt 3 of that Act. That Part is titled "Offences against the Person". The section appears under a common subheading "Homicide". To this extent, like the original common law, the Crimes Act subsumes murder and manslaughter in the one criminal category of "homicide". The fact that, in this Part of the Crimes Act, provision was made for common requirements of that category (originally called "Provisoes" in the marginal note to s 18(2)(b)) should occasion no surprise. For a common generic infraction against the criminal law, it would not be unusual for the New South Wales Parliament to provide common incidents as (the respondent submitted) it had done by enacting s 18(2) in its chosen terms as a provision of application to both forms of homicide.

98 Secondly, whereas originally the marginal note to s 18 read "Murder defined", this was later enlarged to the present text of the section heading: "Murder and manslaughter defined". A marginal note had originally appeared beside s 18(1)(b) reading "Manslaughter defined". Although, by the law of New South Wales, marginal notes (now section headings) are not part of the Act[92], the fact that the State Parliament troubled to re-enact, consolidate and expand the former marginal notes suggests deliberate care on its part. In any case, the note now appearing accurately describes the content of s 18. That, therefore, so the respondent submitted, was the subject matter of "this section", as referred to in s 18(2)(a) of the Crimes Act. It was a section defining *both* murder and manslaughter for the purposes of that Act.

99 Thirdly, the language of s 18(2)(a) certainly appears comprehensive in its terms. For example, it is not stated that acts or omissions which are not malicious are excluded from s 18(1)(a) (with its definition of "murder"). On the contrary, states of mind specifically relevant to murder are set out in s 18(1)(a) itself. It must therefore be assumed that s 18(2)(a) is intended to perform additional work. This is the work addressed to "this section". As such, it more naturally concerns the other offence provided for in the section, namely manslaughter. True, the other incidents of that offence are left to the common law. But, if it had been intended to exclude the application of s 18(2)(a) from operation in the case of manslaughter, as a matter of ordinary drafting, the reference in the paragraph to "within this section" was singularly ill-chosen. It is a proviso, so described, to the definitions contained in the section. But these are the definitions both of "murder" and of "manslaughter".

100 Fourthly, the opening words of the definition of murder in s 18(1)(a) refer to "the act of the accused, or thing by him or her omitted to be done". If it had been intended to restrict s 18(2)(a) to *such* "acts or omissions", it would have been a simple task of drafting to say so. In that event, the words "within this

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92 *Interpretation Act* 1987 (NSW), s 35(2)(c).

section" could have been replaced by "within par (a) of s 18(1)". Yet the wider language was chosen. The respondent therefore insisted that s 18(2)(a) had to be given meaning according to its terms.

101 Fifthly, it is not suggested that the residue of s 18(2)(a), which relevantly prescribes that "[n]o act or omission ... for which the accused had lawful cause or excuse" shall be within s 18, or s 18(2)(b), which excludes "punishment or forfeiture" for the killing of another "by misfortune only", are inapplicable to manslaughter. However, if s 18(2)(a) is read so as to exclude malice as an element of manslaughter, should it not follow that the remainder of s18(2)(a) and s 18(2)(b) are likewise confined to murder, especially considering the more emphatic language used in s 18(2)(a)? That the legislature could have intended such a result is obviously unthinkable. Section 18(2)(a) and s 18(2)(b) can ultimately be traced to Bracton's treatise *De Legibus et Consuetudinibus Angliae*. It reflects the mollification in England, as long ago as the middle of the thirteenth century, of the harsh rule that all homicide was unlawful and punishable. This original view was softened by application of "the King's Grace", where an inquest found that the death had been caused by misadventure (*per infortunium*) or in self-defence (*se defendendo*).[93] This is therefore most ancient law applicable, as such, to murder.

102 Sixthly, when originally enacted, the Crimes Act included s 376 which rendered it "not … necessary" in framing an indictment for the crime of manslaughter to charge the accused for acting "maliciously", whereas that averment was "sufficient" for a count of murder[94]. The respondent submitted that such a provision was scarcely conclusive as to the applicable substantive law and did not amount to an erasure of the words "within this section" from s 18(2)(a). According to the respondent, it was no more than an enactment on a particular matter of criminal pleading. In any case, it had been repealed as inessential in 1951[95]. That repeal left the terms of s 18(2)(a) untouched. And s 376 had only ever been expressed in permissive terms. It was not, as such, concerned with the substance and definition of the offences. The comprehensive application of s 18(2)(a) remains to be explained.

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93 Such mollification did not then result in an acquittal. However, it did prevent the forfeiture of chattels: see Dixon, "The Development of the Law of Homicide", (1935) 9 *Australian Law Journal* Supplement 64 at 64-65; Woodbine (ed), *Bracton on the Laws and Customs of England*, (1968), vol 2 at 340-341.

94 See terms of Crimes Act, s 376 set out in joint reasons at [31]. The section derived from the 1883 Act, s 318.

95 *Crimes (Amendment) Act* 1951 (NSW), s 2(bb).

103 *Historical arguments*: As mentioned above, s 18(2)(a) had its genesis in s 14 of the 1883 Act[96]. That section relevantly stated that "[n]o act or omission which was not malicious or for which the accused had lawful cause or excuse shall be within the aforesaid ninth section." The ninth section was the provision of the 1883 Act defining the crime of "murder". However, as in the Crimes Act, this definition appeared under the sub-heading "Homicide". And the ninth section also included a sentence at its close in the same terms as s 18(1)(b) of the Crimes Act, dealing with manslaughter[97]. The respondent therefore submitted that the same requirement that is contained in s 18 of the Crimes Act appeared in ss 14 and 9 of the 1883 Act, the source of the present provision.

104 To the extent that, by the organisation of the provisions of the Crimes Act, the meaning had been altered by the incorporation of the substance of s 14 in the substantive provisions of s 18 (as occurred in 1900), the respondent argued that the legislative change had reinforced and clarified his interpretive argument. According to the respondent, it made it clear that malice was essential to the definition *both* of murder and manslaughter. That was so because of the undoubted subject matter of s 18 in which both crimes were defined and to which the requirement of malice was now added.

105 In answer to the complaint that the importation of the requirement of "malice" into the definition of manslaughter for the purposes of the Crimes Act, as suggested by s 18(2)(a), represented a radical change from previous understandings of the law of manslaughter in New South Wales, the respondent relied on the history of the law of homicide. The gradual emergence, over eight centuries in the development of English criminal law, of concern "with the mind of the man who did the act", and not just with the "external act which occasioned death", was identified by Sir Owen Dixon[98] as one of the chief features in the evolution of this branch of the law[99]. Viewed in this way, the grafting onto the common law of manslaughter, of a statutory requirement addressed to issues of malice, caused no surprise for the respondent. In other words, the respondent submitted that the alarm voiced by the prosecution about the requirement

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96 See these reasons at [80].

97 See generally Stephen and Oliver, *Criminal Law Manual*, (1883) at 9, 11.

98 Dixon, "The Development of the Law of Homicide", (1935) 9 *Australian Law Journal* Supplement 64 at 64.

99 This movement away from the idea that "a man acted at his peril" and towards the notion of "no liability without fault" was not limited to the criminal law. It occurred simultaneously in the context of tort: see Fleming, *The Law of Torts*, 9th ed (1998) at 9.

inherent in what he said were the plain terms of s 18(2)(a) of the Crimes Act was misplaced and exaggerated.

106 *Previous interpretations*: The foregoing were the essential textual and historical arguments of the respondent. Particularly as a matter of textual analysis, they constitute a formidable submission. However, emphasis was also placed upon the fact that what little judicial consideration of the meaning of s 18(2)(a) existed[100] supported what was said to be the requirement of the plain terms of the paragraph. Thus in *Royall v The Queen*[101], Toohey and Gaudron JJ stated:

> "On the face of [s 18] a homicide, punishable at common law, is no longer punishable if the act or omission constituting the homicide (be it murder or manslaughter) was not malicious or was an act or omission for which the accused had lawful cause or excuse."

Their Honours remarked that this produced "a rather unsatisfactory mix of statutory definition coupled with retention of the common law, the operation of which is at the same time qualified by the terms of the section"[102]. But they did not appear to doubt that such a "mix" was necessitated by the language in which s 18 was expressed.

107 *Adhering to the statute*: In any case, if the Act applied and was valid, it was the duty of the courts (as the respondent insisted) to give it effect. This was so no matter how radical was the change of the previous law of manslaughter. So much was inherent in the constitutional obligation of obedience to the written law made by an elected Australian Parliament[103] and the priority accorded to such written law over judge-made law, which had in any case been less than perfect or clear. Where Parliament had spoken, it was not for courts to resuscitate, or adhere to, earlier common law notions of criminal offences or to invent new

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100 Several judges have noted the problem posed by s 18(2)(a) but did not engage with it: see, eg, *Ryan v The Queen* (1967) 121 CLR 205 at 234.

101 (1991) 172 CLR 378 at 429-430. See also at 428.

102 (1991) 172 CLR 378 at 430.

103 *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1033 [92]; 197 ALR 297 at 316; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian Workcover Authority v Esso Australia Limited* (2001) 207 CLR 520 at 544-545 [62]-[64]; *Allan v Transurban City Link Limited* (2001) 208 CLR 167 at 184-185 [54]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249].

common law crimes[104]. The common law always adjusts to inconsistent laws made by a Parliament within its law-making powers. The written law prevails.

108 The respondent also argued that, where the text of a law was sufficiently clear, it was impermissible for judges to struggle against giving effect to that text merely because it introduces new notions; is seen to be inconvenient; or may not have been fully understood when adopted. Legislatures speak to those affected by the laws they make. Their commands are expressed in terms of the written texts that they adopt. The history, purpose, legislative speeches and background documents may sometimes be useful in construing such laws, particularly in resolving ambiguities appearing on their face. But the respondent submitted that courts have to be careful in the use of extrinsic aids lest they produce outcomes for the meaning of the written law that defy the text that is usually all that ordinary people have available to them[105].

109 Context, which is invoked in the joint reasons in the present case to explain a reading of s 18(2)(a) of the Crimes Act narrower than the words might otherwise suggest, is indeed an important ingredient in the interpretation of statutes[106]. But it is one that must be used consistently, not intermittently, selectively or idiosyncratically. Despite extremely powerful considerations of context militating against a strict textual construction, this Court was persuaded in *Palgo Holdings Pty Ltd v Gowans*[107] to adopt a literal interpretation of the word "pawn" that prevented the attainment of the fairly obvious purpose of the New South Wales Parliament. If a narrow and literal approach is taken in one case, but rejected in another, in the name of "context", those affected by the law

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104 *R v Knuller (Publishing, Printing & Promotions) Ltd* [1973] AC 435 at 479; *Beckwith v The Queen* (1976) 135 CLR 569 at 576; *R v Rogerson* (1992) 174 CLR 268 at 304; *R v Young* (1999) 46 NSWLR 681 at 686; *Lipohar v The Queen* (1999) 200 CLR 485 at 563 [198]; *Regie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491 at 542-544 [143]-[147].

105 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 340; *Pyramid Building Society (In liq) v Terry* (1997) 189 CLR 176 at 211; cf *Acts Interpretation Act* 1901 (Cth) s 15AB(3); *Interpretation Act* 1987 (NSW) s 34(3).

106 *River Wear Commissioners v Adamson* (1877) 2 AC 743 at 763; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312-313, 315; Mason, "Changing the Law in a Changing Society", (1993) 67 *Australian Law Journal* 568 at 569; Bell and Engle, *Cross on Statutory Interpretation*, 3rd ed (1995) at 49.

107 (2005) 79 ALJR 1121 at 1127 [28]; 215 ALR 253 at 261.

are entitled to have the reasons for the change of approach[108]. If context is important for statutory construction[109], why is it not always important?

Interpretation: the preferable approach to s 18(2)(a)

110 *Section 18(2)(a)*: *textual aspects:* It will be obvious that I see considerable force in the respondent's arguments for upholding the conclusion unanimously reached in the Court of Criminal Appeal that s 18(2)(a) applies not only as a required element in the definition of murder but also of manslaughter. However, there are a number of difficulties in adopting this approach. Ultimately, such difficulties bring me to the same conclusion as that reached by the other members of this Court.

111 The first difficulty derives from the fact that, despite the marginal note(s), the Crimes Act did not proceed to define specifically the elements of the crime of manslaughter. In a statute not intended to be a code, that Act generally left that content to be defined by the common law. Manslaughter was to be the residuum of "punishable homicide" that did not fall within the specific definition of "murder". Once it is accepted that s 18 proceeds upon the basis that murder and manslaughter are part of the one felony of homicide and that it is left to the common law to define manslaughter, it would require very clear statutory language in the Act to justify a most radical change to the components of the common law crime of manslaughter as it had come to be recognised by 1900.

112 Secondly, save for the references to an "act" or "omission" in the definition of murder in s 18(1)(a), no "act" or "omission" whatever is specified as part of the offence of manslaughter, to which the words of s 18(2)(a) referring to malice could attach. Thus, the application of that paragraph to the elements of murder is understandable. This is particularly so when it is remembered that, when the 1883 Act was enacted, the penalty applicable upon a conviction of murder was death. Concern had been expressed, including in the New South Wales colonial Parliament, about the exaction of that penalty for cases of unintended homicides[110].

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108 Curtin, "'Never Say Never': *Al-Kateb v Godwin*", (2005) 27 *Sydney Law Review* 355 at 369. The author describes the majority approach in *Al-Kateb v Godwin* (2004) 78 ALJR 1099; 208 ALR 124 as one of "ruthless literalism".

109 cf joint reasons at [33].

110 See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 March 1883 at 1098.

113 Thirdly, the penalty upon conviction of manslaughter, under the 1883 Act and originally under the Crimes Act, ranged from the maximum penalty of penal servitude for life, falling to imprisonment for a term not exceeding three years[111]. It was also open in such a case for a judge to discharge the jury, which order would operate as an acquittal[112]. It is extremely difficult, or impossible, to reconcile the statutory provisions providing such modest punishment, or no punishment at all, with the posited presence of homicide with malice, as defined, so as to constitute the offence in every case. To discharge and acquit, or to sentence a prisoner to a relatively trivial term of imprisonment for homicide, necessarily committed with malice, appears inconsistent with ordinary sentencing principles. Yet such a sentence is contemplated by the Crimes Act on the respondent's interpretation, thereby presenting a serious internal inconsistency for that approach.

114 Fourthly, and whilst by no means conclusive, the presence in the original legislation of provisions mandating a pleading of "maliciously" for a count of murder, but omitting that adverb from the pleading of a count of manslaughter[113], sits oddly with the suggested interpretation of s 18(2)(a) of the same Act requiring that malice should be a universal ingredient of manslaughter.

115 Fifthly, if it is held that malice is a necessary ingredient for the offence of manslaughter, the content of the expression "malicious" in s 5 of the Crimes Act[114] would need to be determined. It is not surprising that this was an issue upon which the judges of the Court of Criminal Appeal divided in this case. Section 5 is very obscure. It has been variously described as "poorly constructed"[115], "not a happily drafted one"[116], and offering no more than a "question-begging definition"[117]. In particular, it is not at all clear whether, if the definition in s 5 were to apply to manslaughter as a universal requirement, it

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111 1883 Act, s 13; Crimes Act, s 24.

112 1883 Act, s 13; Crimes Act, s 24.

113 1883 Act, s 318; Crimes Act, s 376 (repealed 1951).

114 Originally, 1883 Act, s 7.

115 Yeo, "Case Note on *Lavender*", (2004) 28 *Criminal Law Journal* 307 at 312.

116 *R v Coleman* (1990) 19 NSWLR 467 at 472.

117 *Mraz v The Queen* (1955) 93 CLR 493 at 510. See also *Ryan v The Queen* (1967) 121 CLR 205 at 213.

contemplated an objective test or required a subjective test involving intentional infliction of harm or at least foreseeability of the possibility of physical harm[118].

116 Thus, far from rationalising, and clarifying, the law of manslaughter, the injection into it of a universal ingredient of "malice" would introduce the very doubts and uncertainties evident in the opinions of the court below. The differences would have to be reconciled without any assistance from the original lawmakers. Neither the second reading speeches nor Sir Alfred Stephen's commentary published on the 1883 Act[119], give the slightest hint that such a radical alteration of the law of manslaughter was intended. There is no suggestion there of a legislative purpose to introduce the element of malice as a universal, common element of both forms of homicide where hitherto that element had been the very feature that marked off murder from manslaughter as concerned with the most serious instances of felonious homicide[120].

117 Although, therefore, it is true that read literally s 18(2)(a) appears to apply both to the definition of murder and manslaughter, and although its second part ("lawful cause or excuse") may indeed so apply, the first part ("malicious") is to be taken to be confined by the opening words "act or omission". Those words are a reference to the "acts" and "omissions" contained in s 18(1)(a) of the Crimes Act, as there more specifically identified. The preferable construction of s 18(2)(a) is thus that the requirement of malice does not apply to the common law crime of manslaughter referred to in s 18(1)(b). This is so although the definition of manslaughter, to the limited extent that it is provided, appears within "this section", that is within s 18. No other way exists to read s 18(2)(a) in a manner that accords with its text but also avoids the grossly inconvenient and anomalous results that would follow the adoption of a literal approach to its meaning.

118 *Consistency with history*: The foregoing conclusion is reinforced by a more detailed reflection on the history of the law of homicide as it stood before the enactment of the 1883 Act and the Crimes Act in New South Wales.

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118 Contrast the views expressed at (2004) 41 MVR 492 at 524 [144]-[146] per Giles JA, 553 [290] per Hulme J.

119 Stephen and Oliver, *Criminal Law Manual*, (1883).

120 Perkins, "A Re-Examination of Malice Aforethought", (1934) 43 *Yale Law Journal* 537; Foster, "Of the Distinction between Manslaughter and Murder according to the old Writers, and of Benefit of Clergy", (CC and CL 302, 303) quoted in Turner, *Russell on Crimes*, 12th ed (1964), vol 1 at 563.

119 The presence of malice, variously described, in the acts or omissions comprising felonious homicide was significant in England at least by 1389[121]. It was then enacted that, unless specifically extended to such a case, no pardon could be recommended by the King's justices if it was found that the homicide was by ambush, assault or premeditated malice. The patent rolls of Henry III indicate that, by the middle of the thirteenth century, the absence of malice aforethought had become one of the common factors in the grant of Royal pardons to those convicted of homicide where death was found to have been caused by misfortune or self-defence[122]. The law at that time also provided that a general pardon would not be available, despite circumstances of misfortune or self-defence, if malice aforethought was found by the inquest. Later, this point of differentiation was invoked to exclude from benefit of clergy, the most serious homicides, being those committed with malice aforethought[123].

120 By the end of the fifteenth century this point of distinction was well entrenched in the English law of homicide. As Sir Owen Dixon explained[124]:

> "It is upon these statutes that the distinction between murder and manslaughter rested. They did not provide a new crime. What they did was, in effect, to make capital the felony of homicide when committed with a particular kind of *mens rea*. The description of *mens rea* was taken from ancient sources, and … was no new conception. But it was given a new legal consequence. It became the criterion of the capital nature of the felony."

121 Thus, manslaughter, being homicide *without* the existence of malice aforethought, remained "clergiable". Homicide committed *with* malice aforethought was not clergiable but liable to punishment by death[125]. When such an important distinction had endured for more than three hundred years, had it been the intention of the New South Wales Parliament in 1900, by s 18(2)(a) in

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121 13 Rich II St 2 c 1.

122 Perkins, "A Re-Examination of Malice Aforethought", (1934) 43 *Yale Law Journal* 537.

123 Discussed in NSW Law Reform Commission, Discussion Paper 31, *Provocation, Diminished Responsibility and Infanticide*, (1993) at [2.3].

124 Dixon, "The Development of the Law of Homicide", (1935) 9 *Australian Law Journal* Supplement 64 at 66.

125 The punishment of death was not formally abolished in New South Wales until the passage of the *Crimes Amendment Act* 1955 (NSW), which inserted s 431 into the Crimes Act.

the Crimes Act (and by its predecessor in the 1883 Act) to abolish it in one blow, it might have been expected that it would have been done in a way devoid of doubt. Moreover, one would have anticipated that the change would have been noticed at the time, and thereafter, by the legislators and commentators observing the statutory amendments in 1883 and 1900. Lawyers do, it is true, sometimes overlook things. But oversight of an alteration supposedly so radical appears improbable. The mind therefore searches for a different hypothesis.

122 *Keeping the criminal law in harmony*: This Court has repeatedly said that, wherever possible, the basic principles of the criminal law, applicable throughout Australia, should be kept in broad harmony[126]. The crime of manslaughter is one of common application throughout the nation. If possible, s 18 of the Crimes Act should be interpreted to uphold in New South Wales the basic elements of the offence at common law that have been expressed as applicable to other States where the common law definition prevails. At least, this should be done unless the provisions of s 18 clearly require another outcome[127].

123 The notion that s 18(2)(a) grafts onto the common law definition of manslaughter in New South Wales (unlike all other parts of Australia) a universal requirement to establish malice, introducing elements of subjective intent in all or most such cases, would revolutionise the offence in that State. It would take it out of step with the common law definition.

124 *Practical considerations*: The application of malice as defined by s 5 to manslaughter would create not only doctrinal difficulties for that branch of the law but also practical difficulties of an acute kind for trial judges obliged to instruct juries about cases of homicide. Were s 5 to apply both to murder and manslaughter, it would mean that malice was an essential element of both crimes. It would create the greatest problems of identifying and explaining the already complex distinction between murder and manslaughter[128]. Choosing differentially parts of the definition of "maliciously", for application in the case

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126 *R v Barlow* (1997) 188 CLR 1 at 32; *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665.

127 Yeo, "Case Note on *Lavender*", (2004) 28 *Criminal Law Journal* 307 at 312.

128 See *Andrews v Director of Public Prosecutions* [1937] AC 576 at 581. The difficulty in determining the location of the boundary between murder and manslaughter was one of the reasons why, at common law, as it developed, the jury on a count of murder always had available the alternative verdict of guilty of manslaughter: 1 Hale PC 448. See *Gammage v The Queen* (1969) 122 CLR 444 at 449-500; *R v Downs* (1985) 3 NSWLR 312 at 318-329. For a time this facility was expressly recognised by the Crimes Act, s 23(2).

of manslaughter fails to address the problem that, importing malice into manslaughter would mean that malice would become an element of both crimes.

125 The retention of a real differentiation between murder and manslaughter, by reference to the element of culpability, normally reflecting the presence or absence of intention on the part of the accused, is critical to the subdivision of the offence of homicide. As the joint reasons in this Court in *Wilson v The Queen*[129] observed:

> "At common law (and, indeed, under the Criminal Codes) manslaughter is not generally an offence requiring a particular intention; in that respect it is sharply distinguishable from the offence of murder."

Observing such a distinction wherever possible was regarded in *Wilson* as an important policy objective of the criminal law[130].

126 *Objective manslaughter is justifiable*: The evolution of the basic notions of the criminal law, including in the century after the enactment of the Crimes Act in 1900, has encouraged contemporary judges to look more sympathetically at statutory interpretations said to favour a subjective over an objective test for the existence of a serious crime[131]. Does this movement in basic concepts, and especially in crimes such as manslaughter that potentially carry heavy penalties, alter the approach to the meaning of s 18 of the Crimes Act, read today with a new focus on the actual terms of s 18(2)(a)? The difficulty with this reasoning is that it is contrary to the established authority of this Court[132], of the House of Lords[133] and of the Supreme Court of Canada[134] confirming that an objective, and not a subjective, test is applicable to the offence of manslaughter by criminal negligence.

127 Even in today's society, where death has resulted from aggravated negligence (variously called '"culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,'

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129 (1992) 174 CLR 313 at 328.

130 (1992) 174 CLR 313 at 334.

131 See, eg, *He Kaw Teh* (1985) 157 CLR 523 at 528-529, 549, 565-566, 590-591.

132 *Wilson v The Queen* (1992) 174 CLR 313 at 323-324.

133 *R v Adomako* [1995] 1 AC 171 at 187-189.

134 *R v Creighton* [1993] 3 SCR 3 at 53 per McLachlin J (with whom l'Heureux Dubé, Gonthier and Cory JJ agreed).

'complete'"[135]) holding the individual criminally liable has been justified. Subjective intention does not enjoy a monopoly on moral culpability. Professor H L A Hart concluded that people of ordinary capacity who negligently cause an undesirable outcome may be open to blame notwithstanding the absence of a subjective intention to produce that outcome[136]. The claim of a person who causes harm that he or she did not mean to do it or did not stop to think as excusing them of wrongdoing is commonly treated as unpersuasive, especially where death or serious injury ensue. A person who intends to bring about an undesirable outcome or who is reckless as to the possibility of that outcome but proceeds anyway is more culpable than a person who negligently causes the same outcome. This is because the former is aligned with that outcome while the same cannot be said of the latter. But this is not to say that the latter is always undeserving of moral condemnation and punishment. In some circumstances, the opposite is the case.

128 It is true that, in extreme situations, a person may be exposed to criminal liability for being objectively at fault in circumstances where no one would regard that person as culpable. For instance, it would not be rational to impute blame to a person who is physically or mentally incapable of achieving the standard of care expected by the criminal law[137]. However, this, and related objections to justifying objective criminal liability on the basis of moral blameworthiness, are largely grounded in theoretical arguments. In the overwhelming majority of cases, a person who causes death by aggravated criminal negligence will be regarded as extremely blameworthy. The criminal law, by fixing liability only on those who act with aggravated negligence confines liability to cases of very serious wrongdoing in circumstances of moral blame. In *Wilson*[138], Mason CJ, Toohey, Gaudron and McHugh JJ stated that there must "... be a close correlation between moral culpability and legal responsibility [for manslaughter]". Notwithstanding that manslaughter is defined by reference to an objective test, this correlation is assured by the degree of negligence required.

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135 *Bateman* (1925) 19 Cr App R 8 at 11.

136 Hart, "Negligence, *Mens Rea* and Criminal Responsibility" in *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) 136 at 150-153. See also Simester, "Can Negligence be Culpable?" in Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series*, (2000) 85 at 89-91.

137 However, if that person enters in a situation cognisant of their incompetence to deal with that situation then they may well be properly blamed for harm that they cause: see Honoré, "Responsibility and Luck: The Moral Basis of Strict Liability", (1988) 104 *Law Quarterly Review* 530 at 535-537.

138 *Wilson v The Queen* (1992) 174 CLR 313 at 334.

129 Where a person has culpably caused the death of another there is a clear expectation that the criminal law will be activated[139]. Unless the law responds to the death of a human being caused by aggravated negligence, the risk of retaliation, and thus of an escalation of violence in society, is real[140].

130 The justification for rejecting the introduction into the crime of manslaughter in New South Wales of an element of malice, as a matter of legal policy, is well stated in the Canadian context by McLachlin J in *R v Creighton*[141]. That decision involved an analogous attempt to demand a universal element of intention for the crime of manslaughter. Rejecting this, McLachlin J stated:

> "Properly applied, [the crime of manslaughter] … will enable the conviction and punishment of those guilty of dangerous or unlawful acts which kill others. It will permit Parliament to set a minimum standard of care which all those engaged in such activities must observe. And it will uphold the fundamental principle of justice that criminal liability must not be imposed in the absence of moral fault."

All of these conditions are fulfilled in the interpretation of the Crimes Act urged on this Court by the appellant. They are undermined by the interpretation of the respondent.

131 *Manslaughter and law reform*: The foregoing is not to deny the existence of a continuing debate about the need for reform of the law of manslaughter. Lord Kilbrandon in *Hyam v Director of Public Prosecutions*[142] called for the abolition of the distinct crimes of murder and manslaughter, the substitution of a single crime of unlawful homicide; and a gradation of punishments to reflect the individual gravity of the case. This proposal gained some support in New Zealand[143]. However, it has not been accepted in Australia, where the moral opprobrium of conviction of murder and the public understanding attaching to the labels of murder and manslaughter have repeatedly led to recommendations

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139 *Wilson* (1991) 53 A Crim R 281 at 286.

140 cf 1 Hale PC 471.

141 [1993] 3 SCR 3 at 74.

142 [1975] AC 55 at 98.

143 New Zealand Criminal Law Reform Committee Report on Culpable Homicide, (1976) at 28 [48].

that the distinction be retained[144].Law reform and other bodies overseas[145] have consistently reached identical conclusions.

132 Some knowledgeable writers continue to suggest the need for greater precision in the definition of the offences involved in causing death by negligent acts[146]. There is force in their suggestions. However, this is not an occasion to evaluate them. The fact that they exist and that they have proved controversial affords an additional reason, where there is any doubt, why this Court should adhere to the time-honoured view of the operation of s 18 of the Crimes Act, and to the elements of manslaughter, which long preceded the decision of the Court of Criminal Appeal in the present case. That decision disturbed settled law. It disrupted the general uniformity of the criminal law on this subject throughout Australia.

Conclusion and orders

133 Although, therefore, a very persuasive textual argument has been advanced by the respondent, within the language of s 18(2)(a) of the Crimes Act, for importing into the definition of manslaughter, as well as of murder, a universal element of malice, a closer examination of the text of that Act and of the other arguments advanced by the appellant results in a conclusion adverse to the interpretation accepted below.

134 That interpretation is fundamentally inconsistent with the common law of manslaughter as it has developed over many centuries, which s 18(1)(b) of the Crimes Act ostensibly contemplated would continue to operate in New South Wales. It is inconsistent with the reasons of principle and policy that sustain the maintenance of a crime of manslaughter by negligent act as an offence

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144 New South Wales Law Reform Commission, Report 82, *Partial Defences to Murder: Diminished responsibility*, (1997) at [2.23]; Law Reform Commission of Victoria, Report 40, *Homicide*, (1991) at 52-53; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper – Model Criminal Code* (June 1998) at 4-5.

145 New Zealand, Crimes Consultative Committee, *Report Crimes Bill 1989*, (1991) at 46-47; Law Reform Committee (Ireland), *Consultative Paper on Homicide – The Mental Element in Murder* (2001) at [9]; House of Lords Select Committee on Murder and Life Imprisonment (Nathan Committee), *Report of the Select Committee on Murder and Life Imprisonment* (HL Paper 78, 1989) at 27; England, Criminal Law Revision Committee, *Offences Against the Person* (Report 14, Cmnd 7844, 1980) at 33.

146 Yeo, *Fault in Homicide,* (1997) at 206-216.

objectively, and not subjectively, determined. It is inconsistent with the considerations of legal policy that support the continuance of such a crime where the death of a person has ensued. It is incompatible with numerous law reform and other reports that have recommended the continued differentiation between murder and manslaughter. In such circumstances, only the clearest possible language in the statutory text would justify a significant change in the law of manslaughter, and the previous understandings of that law.

135 Whilst there is an undeniable measure of difficulty in explaining precisely what was the purpose of the first sentence of s 18(2)(a) of the Crimes Act, the paragraph can be adequately confined to application to the "acts and omissions" expressly referred to in s 18(1)(a), dealing exclusively with the definition of murder. So confined, the first sentence of s 18(2)(a) has no application to the statutory definition of manslaughter in s 18(1)(b). That definition remains to be provided by the common law. At least, this is so until clear legislation of the Parliament of New South Wales introduces altered criteria.

136 Approached in this way, the previous understandings of the common law of manslaughter expressed by the Full Court of the Supreme Court of Victoria in *Nydam v The Queen*[147] (approved by this Court in *Wilson v The Queen*[148]) applied to the crime of manslaughter charged in the indictment presented against the respondent in the present case. The trial judge was correct to give effect to that exposition in his charge to the jury. The Court of Criminal Appeal erred in disturbing the conviction that followed the jury's guilty verdict based upon accurate legal directions about the meaning of manslaughter in the circumstances.

137 It follows from what I have said earlier[149] that no ground arises for the intervention of this Court on the directions given by the trial judge to the jury. Nor, within the grounds before it, is this Court called upon to correct any error of sentencing, assuming there to have been one. No matter being before this Court in the appeal concerned with the sentence imposed on the respondent, we may not properly pass upon it. However, in the events that have now occurred and having regard to the form of the sentence as it was passed, it is proper to reserve to the parties and the Court of Criminal Appeal the opportunity to reconsider what should follow from this appeal for the disposition of the sentence[150].

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147 [1977] VR 430 at 445.

148 (1992) 174 CLR 313 at 333.

149 See these reasons at [83].

150 Joint reasons at [66]; cf *Griffiths v The Queen* (1994) 69 ALJR 77 at 82; 125 ALR 545 at 552.

138 I therefore agree in the orders proposed in the joint reasons.

139 CALLINAN J. I agree with the construction of ss 5 and 18 of the *Crimes Act* 1900 (NSW) ("the Act") proffered in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ and that the appeal should be allowed. There are some additional and different matters however which I will state.

140 In the Court of Appeal, Hulme J said that the "trial judge was correct in refusing to put to the jury a suggested belief on the part of the appellant 'that it was safe to proceed'"[151]. It was his opinion however that the trial judge erred in saying that the accused's beliefs were immaterial[152].

141 Fact, opinion and belief are discrete concepts. A person's state of mind may, indeed, is likely to consist at any one time of many components: facts or circumstances objectively true and known by the person; matters assumed, some of which may be true, and others not; facts unknown to a person, that is to say, gaps in the person's knowledge which, if filled, might counterbalance or negative assumed matters; and a motivation, a belief or an opinion based upon some or all of those matters. With respect to the two categories, of assumed facts and unknown facts, a further subdivision may be made, as to the reasonableness or unreasonableness of the assumption, or the state of ignorance.

142 In his judgment in the Court of Criminal Appeal[153], Hulme J pointed out that there was evidence that the respondent believed that the boys were not in his path. Although that belief was also an assumption, it was based upon a number of facts, the noise, the size, and the slow pace of the machine that he was driving, and that the boys, including the one who was struck were old and nimble enough to keep out of the path of the machine, and could reasonably be expected to do so. Another way of putting this is that the respondent reasonably believed or assumed that the boys were not in his path and would keep out of it. Counsel for the appellant did not seek a direction at the trial in these terms. Had he done so, having regard to the matters to which I have referred, in my view it would have been appropriate for it to have been given. Such a direction would have been entirely consistent with the joint judgment of six judges of this Court in *Jiminez v The Queen*[154]:

> "If, in a case based on tiredness, there is material suggesting that the driver honestly believed on reasonable grounds that it was safe for him

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151 *R v Lavender* (2004) 41 MVR 492 at 551 [276].

152 *R v Lavender* (2004) 41 MVR 492 at 552 [280].

153 *R v Lavender* (2004) 41 MVR 492 at 552 [281].

154 (1992) 173 CLR 572 at 584 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

> to drive, the jury must be instructed with respect to that issue. In particular, they must be told that if they conclude that the driving was a danger to the public, they must also consider whether the driver might honestly have believed on reasonable grounds that it was safe for him to drive. And, of course, they must be instructed in appropriate terms that the onus of negativing that defence rests with the prosecution. That did not happen in this case, presumably because neither counsel nor the trial judge appreciated the real nature of the issue raised."

143 The key words in that passage are "believed on reasonable grounds", the grounds being the relevant factors giving rise to, or indeed even merely contributing to the relevant belief, motivation or opinion.

144 Unlike Hulme J however I do not think that the failure to give the direction as it was requested had the consequence, in the circumstances of this case, that the respondent should have had his conviction quashed. This is so because the trial judge did tell the jury that they could not convict the respondent of manslaughter unless they were satisfied that he had been "wickedly negligent". It is difficult to see how a genuine belief or assumption reasonably held or made, could be compatible with "wicked negligence", which it must be assumed the jury found.

145 Having said that, I am bound to say that on the facts, I respectfully disagree with the trial judge's sentencing remarks (and in consequence, the lengthy sentence that he imposed) that the respondent "in effect drove blind" and that the "assumption [of the awareness of the approach of the machine and the boys' capacity readily to avoid it was one that] no person in his position was entitled to make".

146 On the facts, I would have thought that a rational jury would not have been able to find the respondent guilty of manslaughter rather than of dangerous driving occasioning death only, the alternative charge levelled against him. Neither in this Court nor the Court of Criminal Appeal was it argued however that the verdict was unsafe or unsatisfactory having regard generally to the facts of the case, and in any event, it is not for me to substitute my opinion for the verdict of the jury. I cannot help observing however that I think it would be to compound the tragedy which this case represents to have the respondent returned to prison, he having been subjected now to the great hardship and uncertainty of three trials, two hearings in the Court of Criminal Appeal, an application for special leave to this Court and the appeal to this Court. As Dixon J told the jury in *The King v Porter*[155]:

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155 (1936) 55 CLR 182 at 186.

> "The purpose of the law in punishing people is to prevent others from committing a like crime or crimes. Its prime purpose is to deter people from committing offences. It may be that there is an element of retribution in the criminal law, so that when people have committed offences the law considers that they merit punishment, but its prime purpose is to preserve society from the depredations of dangerous and vicious people."

A vicious person this respondent clearly was not.

147 I agree with the orders proposed by Gleeson CJ, McHugh, Gummow and Hayne JJ.

148 HEYDON J. The appeal should be allowed, and the respondent's appeal to the Court of Criminal Appeal should be dismissed, for the reasons stated by Gleeson CJ, McHugh, Gummow and Hayne JJ. The respondent should be allowed an opportunity to seek the leave of the Court of Criminal Appeal to appeal against his sentence for the reasons given by Gleeson CJ, McHugh, Gummow and Hayne JJ and for the reasons given in the last two paragraphs of Callinan J's reasons for judgment. To those considerations might be added the fact that the need for the Crown's application for special leave to appeal to this Court, and for the appeal itself, and the consequential delays in achieving finality, arose because of the unsatisfactory way in which the Crown conducted the argument before the Court of Criminal Appeal[156].

149 Late in the oral argument counsel for the respondent proposed that the orders be stayed for 28 days in order to enable the respondent to approach the Court of Criminal Appeal for leave to appeal against the severity of the sentence.

150 The Crown has since pointed out in written submissions that even if there were no application for leave to appeal against the severity of the sentence, it would have to be readjusted in view of the following facts: the respondent was sentenced to four years' imprisonment on 23 May 2003; the non-parole period of 18 months was to expire on 22 November 2004; the respondent was released on 17 April 2004 when his appeal to the Court of Criminal Appeal succeeded; he has been at liberty for the better part of 18 months; and his four year sentence will expire on 22 May 2007. Hence, said the Crown, the original sentence, fixed as it was by reference to specific commencement and expiry dates, and interrupted as it has been, will have to be readjusted. The process of readjustment will result essentially in the imposition of a new sentence. In imposing the new sentence any circumstances relating to the respondent's health, family and employment which have changed since the original sentence was imposed and which are established by evidence (which this Court cannot receive) will have to be considered. Questions of double jeopardy also arise. Accordingly the Crown favours remittal of the proceedings to the Court of Criminal Appeal for the determination of a new sentence, and accepts that it is open to the respondent to lodge an application for leave to appeal against the severity of the initial sentence by reason of the changed conditions. In oral argument the Crown accepted that, since its appeal against sentence to the Court of Criminal Appeal had been dismissed, it would not be seeking an increase in sentence.

151 Even if there were no weighty evidence of changed circumstances, it is desirable to adopt a course which would leave it open to the respondent to seek

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156 See joint reasons at [16] and [51]-[52].

leave to appeal against the severity of the initial sentence viewed in the light only of the material before Coolahan DCJ. In oral argument the Crown said it would not object to the late filing of any application by the respondent for leave to appeal against sentence. The proposal by Gleeson CJ, McHugh, Gummow and Hayne JJ that the orders not take effect until 28 days after the date of their publication, with which I agree, will permit this. It will also permit the respondent to seek bail pending the resolution of questions about sentence.