It is worth mention, also, that such a case as the present, through its exceptional circumstances, leaves virtually no defence open to the defendant. A distressing angle of this is that those responsible for the defendant's conduct can offer no evidence of contributory negligence of the plaintiff such as the plaintiff's distraction of the driver. This is admittedly conjecture, but it is perhaps little more arbitrary than the learned Judge's inference of primary negligence.

Whatever his reasons for reaching it, the decision of Reed J. is no doubt an illustration *par excellence* of the current attitude being shown by the Courts to victims of one of the greatest hazards of our time.

CLIVE TADGELL

CRIMINAL LAW — INDICTMENT FOR MURDER OF WOMAN — RAPE ALLEGED AND IMMEDIATE DEATH — DIRECTION TO JURY — THAT MANSLAUGHTER OPEN — DIRECTION ERRONEOUS — CRIMES ACT 1901-1951 (N.S.W.) ss. 5, 18 — CRIMINAL APPEAL ACT 1912 (N.S.W.) s. 6.

Mraz v. The Queen[1]

The appellant was tried before the Supreme Court of New South Wales on an indictment for murder, it being alleged that the deceased, a woman, had died from shock after being ravished by the appellant. Upon appeal to the New South Wales Court of Criminal Appeal,[2] it was held[3] that the direction of the trial judge that rape is not necessarily a malicious act within the meaning of ss. 18 (2) (a) and 5 of the Crimes Act 1901-51 (N.S.W.)[4] was wrong, but the appeal was dismissed on the ground that no substantial miscarriage of justice had occurred.[5] The High Court affirmed the

[1] [1955] A.L.R. 929. High Court of Australia, McTiernan, Williams, Webb, Fullagar, Taylor JJ.

[2] Street C.J., McLelland, Herron JJ.

[3] Herron J. *dubitante.*

[4] Crimes Act 1901-51 (N.S.W.) provides: s. 18 (1) (a) 'Murder shall be taken to have been committed where the act of the accused, or the thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life.'

s. 18 (1) (b) 'Every other punishable homicide shall be taken to be manslaughter.'

s. 18 (2) (a) 'No act or omission which was not malicious, or for which the accused had lawful cause or excuse shall fall within this section.'

s. 5 defines 'maliciously': 'Every act done of malice . . . or done without malice but with indifference to human life or suffering, or with intent to injure some person. . . 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 of the crime.'

[5] Criminal Appeal Act 1912 (N.S.W.) s. 6: 'the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might

decision of the Court of Criminal Appeal in so far as it concerned the erroneous direction, but held that the case did not fall within the scope of the proviso to s. 6 of the Criminal Appeal Act 1912 (N.S.W.) because the appellant's chances of obtaining an acquittal had been seriously prejudiced by the direction. The conviction was quashed.

At the date of the trial, rape was an offence punishable by death in New South Wales.[6] Therefore, a death caused by acts in the course of committing rape was within the definition of murder in s. 18 (1) (a) of the Crimes Act, provided the act of the accused was 'malicious' within the meaning of s. 5. Nield J. directed the jury that rape is not necessarily a malicious act, because it is in some circumstances not an act directed towards the injury of another person: 'the normal matter . . . of rape is not a matter of design to injure the woman, but more towards the gratification of the desires of the man. You would not speak of it in the ordinary sense as malicious.'[7] Commenting that the definition of 'malice' in s. 5 was question-begging, Fullagar J. was of the opinion that the trial judge's direction was based upon a misunderstanding of two meanings of the word 'malice' which may be, on the one hand, the intentional doing of a wrongful act, and on the other, spite or ill-will or a desire to injure.[8] In s. 18 (2) (a), His Honour said, the word is used in the former sense. It is submitted that this is the correct interpretation of the sub-section; if a 'design to injure' is essential to establish 'malice', the distinction in s. 5 between 'an act done of malice' and an act 'done without malice but . . . with intent to injure some person' becomes meaningless.

The common law concept of implied malice has had a long and slow historical development. Judicial acceptance of Coke's statement that death must result from an *unlawful* act to constitute murder[9] was a slight alleviation of the ancient doctrine of strict liability,[10] and this was further qualified by Foster who, following a dictum of Holt C.J.,[11] thought that the act must also be *felonious*.[12] Despite strong criticism by H. M. Commissioners on Criminal Law,[13] by Stephen,[14] and by Bramwell B.,[15] Foster's statement of the law was applied in the courts until *D.P.P. v. Beard*[16] in 1920, although in

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be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

[6] Crimes Act 1901-51 (N.S.W.) s. 63. [7] [1955] A.L.R. 929, 939.

[8] *Ibid.* [9] 3 *Inst.* 36.

[10] See *Kenny's Outlines of Criminal Law* (16th ed., 1952) 126; *Russell on Crime* (10th ed., 1950) I, 533 ff.

[11] *R. v. Keate* (1697) Comb. 406. [12] *Crown Cases*, 258.

[13] See H. M. C. C. L. Reports (1839) [168] –XIX–235, 24 ff.; (1843) [448] –XIX–1, 23; (1846) [709] –XXIV–107, 17.

[14] *Hist. Crim. Law*, III, 75. [15] *R. v. Horsey* (1862) 3 F. & F. 287.

[16] [1920] A.C. 479.

cases in which death occurred during an abortion operation,[17] juries had been directed since *R. v. Whitmarsh*[18] that if the prisoner could not have contemplated that death would ensue, he should be convicted of manslaughter only. In *D.P.P. v. Beard,* the House of Lords stated that the act causing death must be a violent one 'done in the course of or in furtherance of a crime of violence'. This was subsequently taken to include an act of violence in an unsuccessful attempted rape, a misdemeanour.[19] The law in Australia was complicated by the decision of the High Court in *R. v. Ross,*[20] which reaffirmed Foster. However, the Supreme Court of Victoria has felt itself justified by the observations of the High Court in *Piro v. W. Foster & Co. Ltd.*[21] in following the English case of *R. v. Lumley* to the extent to which *R. v. Ross* is inconsistent with it,[22] and it is submitted that the law as propounded in *D.P.P. v. Beard* will be followed in Victoria in preference to the stringency of *R. v. Ross.*

The Crimes Act 1901-51 (N.S.W.) s. 18 (1) (a), as interpreted by the High Court in the instant case, appears to adopt a test of implied malice different from the common law. If death results from the intentional commission of a crime punishable by death or penal servitude for life, it is of no account that the act was not a violent act in furtherance of a felony involving violence. It is to be hoped that the New South Wales legislature will amend the Act, if only to bring it into line with the common law. In the meantime, the comment of H. M. Commissioners in 1839[23] that 'it may be very questionable whether, in point of principle, an effect wholly unexpected or unconnected with the intention and act of the party, except by accident, can properly be made the foundation of criminal responsibility' retains its pertinence.

The second issue of the case was whether the appeal ought to have been dismissed on the ground that no substantial miscarriage of justice had occurred.[24] The New South Wales Court of Criminal Appeal and McTiernan J., the dissentient in the High Court, thought that Nield J.'s direction was favourable to the accused, and that the case therefore fell within the proviso to s. 6 of the Criminal Appeal Act. The majority of the High Court felt that in the circumstances there was no certainty that, properly directed, the jury would have convicted the accused of murder.

[17] s. 58 of the Offences against the Person Act (1861) made the performance of an abortion operation a felony.

[18] (1896) 62 J.P. 711, Bingham J. See also *R. v. Bottomley* (1903) L.T. 88; *R. v. Lumley* (1911) 22 Cox 635.

[19] *R. v. Stone* (1930) 53 T.L.R. 1046. See criticism by P. H. Dean, 54 L.Q.R. 22.

[20] (1922) 30 C.L.R. 246, 252, following *R. v. Radalyski* (1899) 24 V.L.R. 687 (Supreme Court of Victoria).

[21] (1943) 68 C.L.R. 313.

[22] *R. v. Brown and Brian* [1949] V.L.R. 177.

[23] (1839) [168] –XIX–235, 28.

[24] Criminal Appeal Act 1912 (N.S.W.) s. 6. See note 5. Crimes Act 1928 (Victoria) s. 594 (1) is similarly worded.

The burden of proof upon the Crown before the proviso will be applied is, not unnaturally, a high one. In *R. v. Dyson,*[25] Lord Alverstone C.J. was of the view that the proviso was intended to apply only to a case in which the evidence is such that the jury *must* have found the prisoner guilty had they been properly directed. Four years later in *R. v. Stoddart,*[26] His Lordship modified his dictum by substituting 'would' for 'must'. However, in the same year, Channell J. followed *R. v. Dyson,* with the substitution of 'come to the same conclusion' for 'found the prisoner guilty'.[27] This was approved by the House of Lords in *R. v. Stirland.*[28]

It must be emphasized that Nield J. did not instruct the jury about their powers under s. 23 (2) of the Crimes Act (N.S.W.),[29] and so the verdict was not the result of the exercise of jury privilege. Had the jury been so instructed, a verdict of manslaughter could not have been set aside, although it would have been incumbent upon the judge to express his opinion as to the applicability of the section in the circumstances.[30]

In support of his conclusion that the proviso to s. 6 should be applied, McTiernan J. argued that the inference to be drawn from the jury's verdict was that the jury was satisfied beyond reasonable doubt that the accused committed rape involving acts of violence causing death. Accordingly, in the absence of the erroneous direction, they would have convicted the accused of murder.

The majority contended that it was wrong to attempt to justify the verdict of manslaughter returned in the circumstances of the case by the observation that the jury, upon an issue of manslaughter which they were invited to consider, must have reached conclusions on issues of fact which would have required them, if properly instructed, to return a verdict of murder. Following the dicta of Knox C.J. and Higgins J. in *R. v. Ross,*[31] they felt that a direction on manslaughter in a case which was 'murder or nothing' prejudiced the accused's chances of acquittal if the jury were not satisfied that the full offence had been committed. Moreover, Fullagar J. added that he felt a very real doubt whether a jury, correctly directed, would have found that a rape had been committed. He referred to the equivocal nature of the medical evidence, of the long friendship

[25] [1905] 2 K.B. 454, 457. [26] [1909] 2 Cr. App. R. 217, 245.

[27] *Cohen and Bateman v. The King* [1909] 2 Cr. App. R. 197.

[28] [1944] A.C. 315, 321 per Viscount Simon. See also *R. v. Haddy* [1944] K.B. 442, 445, explaining observations by Viscount Sankey in *D. P. P. v. Woolmington* [1935] A. C. 462; Archbold, *Pleading, Evidence and Practice* (33rd ed., 1954) 348.

[29] Crimes Act (N.S.W.) s. 23 (2) states: 'Where at any [trial of a person for murder] it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter.'

[30] *Beavan v. The Queen* [1954] A.L.R. 775; *Brown v. The King,* 17 C.L.R. 570; *R. v. Simpson* (1924) 24 S.R. (N.S.W.) 517, 524.

[31] (1922) 30 C.L.R. 246.

between the accused and the deceased, and of the disparity between their ages – she was some eight years older than he. It is submitted, with respect, that it is not the proper function of an appellate court to differ from a jury's finding of facts, if it is clear what the jury's findings were. It is the regrettable but inevitable consequence of general verdicts that no one knows by what tortuous paths the jury have come to their verdict, but in applying the dicta of Channell J. in *Cohen and Bateman v. The King*, the appellate court is not entitled to substitute its own interpretation of the facts for that of the jury. As Nield J. told the jury that they were to acquit Mraz if they were satisfied that no rape had been committed, and as his direction as to what constitutes rape was not incorrect[32] – the error related only to whether death resulting from the act of rape is murder or manslaughter – it is submitted that the jury were satisfied that rape had been committed, and in the circumstances of the case the erroneous direction was in the appellant's favour. Against this view, it may be said that the jury may not have properly considered the matter of rape, and may have brought in a verdict of manslaughter as a 'middle course' expedient. The case illustrates the difficulty an appellate court has in predicting the verdict of 'a jury of sensible persons anxious to do their duty'.[33]

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[32] See, however, the judgment of Fullagar J., *loc. cit.*, 941.
[33] *R. v. Haddy* [1944] K.B. 442, 445.

BANKRUPTCY — REPUTED OWNERSHIP — MOTOR CAR IN POSSESSION OF BANKRUPT — FOR PURPOSES OF SALE BY HIM — AND BELIEVED BY OWNER TO HAVE BEEN SOLD — POSSESSION NOT WITH OWNER'S CONSENT

National Discounts Ltd. v. Jacques[1]

A bankrupt at the commencement of his bankruptcy had in his possession a motor car which had been placed in his hands for sale, and which was believed by the owners to have been sold by him. The Federal Court of Bankruptcy held that the car was not in the possession order or disposition of the bankrupt with the consent and permission of the true owner under such circumstances that he was the reputed owner thereof.[2] On appeal, the High Court affirmed this decision.[3]

[1] [1955] A.L.R., 879. High Court of Australia; Williams, Fullagar and Taylor, JJ.
[2] The Bankruptcy Act 1924-54 provides:
'Section 52. A debtor commits an act of bankruptcy in each of the following cases:
(d) If with intent to defeat or delay his creditors he . . . departs from his dwelling house or usual place of business, or otherwise absents himself . . .'
'Section 91. The property of the bankrupt divisible amongst his creditors . . . shall not include . . .
(e) except as provided in paragraph (iv) of this section . . . chattels in