

30/79

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v WARD**McInerney, Anderson and Brooking JJ****10 April 1979 — [1980] VicRp 25; [1980] VR 209**

CRIMINAL LAW – MURDER – LOCATION OF VICTORIAN BORDER – OFFENCE ALLEGEDLY COMMITTED AT ECHUCA, VICTORIA – FINDING BY JURY THAT WHEN OFFENCE COMMITTED BOTH ACCUSED AND DECEASED WERE IN VICTORIA – DECEASED SHOT DEAD WHILST FISHING FROM THE SOUTHERN BANK OF THE RIVER MURRAY – THE RIVER MURRAY WAS AT A NORMAL WATER LEVEL APPROX. ELEVEN METRES BELOW THE TOP OF THE BANK – WATERCOURSE OF THE RIVER MURRAY DEFINED.

HELD: Application for leave to appeal dismissed.

1. When the river overflows its banks and squanders itself over adjacent lands, the boundary line will not be the southern edge of the water, for the waters which have inundated the adjacent lands are not part of the stream of water which is the watercourse; the boundary will be a notional line drawn on the sheet of water and marking the edge of the stream as contained by the south bank immediately before the river overflowed that bank; in this way the continuous sheet of water is divided into watercourse and flood waters external to the watercourse.

2. On the proper construction of Act of 1855 the watercourse of the River Murray is the stream of water as it exists at the time and place in relation to which the question of boundary arises and that it is clear on the facts of the instant case that the crime was committed on land to the south of the southern edge of that stream.

[Ed note: A ruling as to the location of the border between Victoria and New South Wales was given by Marks J on 12th December 1978: see [1979] VicRp 19; (1979) VR 205. On 10th April 1979 the Court of Criminal Appeal upheld that ruling. After discussing the technical evidence adduced in the Appeal, the history of the Colonies, Acts of Parliament, official letters, reports of judicial committees, principles of International law, decided cases, the meaning of the word "watercourse" and such things as the "riparian states", the judgment concludes:]

THE COURT: ... The notion that the level of water as it exists from time to time as opposed to some relatively fixed line such as high or low water mark, should constitute a boundary may be thought a surprising one; the boundary will shift, not slowly, and imperceptibly, but, on occasions quickly and patently. There is no reason in principle, however, why the margin (in the sense of the fluctuating level) of a stream or body of water should not constitute a boundary, and there are in the present case considerations of convenience which make it not remarkable that the actual water level should have been preferred to some level, like high-water mark, fixed by reference, not to a transitory condition, but to a relatively permanent state of affairs.

Choosing the water line as the boundary has the advantages of affording a clear and readily discernible line and of avoiding the inconvenient result that one Colony is separated from the river by a narrow, irregular and shelving piece of alien territory. *Williams v Booth* [1910] HCA 12; (1910) 10 CLR 341, shows, if demonstration by authority be necessary that actual water level may be selected as the boundary of land; moreover, notwithstanding the reference at p35 to what a surveyor might have done on the day after the grant, the High Court appears to have regarded the water level from time to time as constituting the boundary except where some convulsion of Nature wrought a sudden change.

It may be objected that a boundary consisting of the water line of a river from time to time on one of its sides makes it difficult to ascertain the boundary in time of flooding. This is so; but the difficulty is no greater than that to which Mr Kelly's suggested boundary will give rise in time of flooding, for the south bank will be submerged and it will be difficult to say at any given place where the bank, which marks the boundary, ends.

On the construction which we accept, when the river overflows its banks and squanders

itself over adjacent lands, the boundary line will not be the southern edge of the water, for the waters which have inundated the adjacent lands are not part of the stream of water which is the watercourse; the boundary will be a notional line drawn on the sheet of water and marking the edge of the stream as contained by the south bank immediately before the river overflowed that bank; in this way the continuous sheet of water is divided into watercourse and flood waters external to the watercourse – cf *American Jurisprudence* (2nd edn) Vol 12, p569, para 28.

To dispose of the grounds of appeal now under consideration it is enough to say that on the proper construction of Act of 1855 the watercourse of the River Murray is as the learned Judge directed the jury the stream of water as it exists at the time and place in relation to which the question of boundary arises and that it is clear on the facts of the instant case that the crime was committed on land to the south of the southern edge of that stream...
