35/74

SUPREME COURT OF VICTORIA

R v DAWSON, TEMPO and LOVETT

Harris J

31 July 1974

CRIMINAL LAW – UNLAWFUL AND MALICIOUS WOUNDING – INTENT – WHAT IS REQUIRED TO BE PROVED BY THE PROSECUTION: *CRIMES ACT* 1958, S19A.

The three defendants were presented on a presentment in which the first count was wounding one Magro with intent to do grievous bodily harm. The presentment contained a second count in which Lovett only was presented – that of unlawfully and maliciously inflicting grievous bodily harm upon Magro. When arraigned, the accused Dawson and Tempo pleaded guilty to the first count, Lovett pleaded not guilty to the first count but guilty to the second count.

Magro had been wounded by a bullet fired by Dawson. Dawson, Tempo and Lovett had driven together to the house where Magro was sleeping. Lovett remained in the car while Dawson and Tempo went to the door of the house. When Magro came to the window Dawson fired and seriously wounded Magro.

As it was submitted by Mr Lopez counsel on behalf of Lovett, that Lovett did not himself actually inflict grievous harm on Magro, that he did not intend Dawson to shoot Magro and cause him grievous bodily harm but only intended some lesser harm should be done to Magro, the question arose as to what admissions were implied by Lovett's plea of guilty.

HELD:

1. The law is that, where a person is charged under s19A of the *Crimes Act* 1958 with unlawfully and maliciously inflicting grievous bodily harm, the effect of the word 'maliciously' is to require the prosecution to prove that the accused foresaw that some physical harm, but not necessarily really serious bodily harm, might result to some person.

2. The requisite foresight can be established either by proof that the accused actually intended to cause some physical harm to some person, or by proof that, foreseeing that some physical harm to some person might result, he acted recklessly, indifferent to whether such harm was caused or not.

3. Having reached that conclusion on the law, it followed that the most that could be implied from the admissions contained in Lovett's plea of guilty was that he acted in concert with Dawson intending that some physical harm should be done to Magro by Dawson, or that, foreseeing that some physical harm might result to Magro from Dawson's conduct, he acted recklessly, indifferent to whether Dawson caused such harm or not. In substance, this was what Mr Flanagan submitted should be implied from the plea.

HARRIS J: ... I was disposed to say that the plea of guilty contained in an admission that Lovett had intended that Dawson should fire his pistol and inflict grievous bodily harm on Magro or that he foresaw that Dawson was likely to fire his pistol and cause grievous bodily harm and acted recklessly notwithstanding, and I referred to *R v Smyth* [1963] VicRp 97; [1963] VR 737. I had, in fact, on the day before the plea directed a jury on a charge of unlawfully and maliciously inflicting grievous bodily harm under s19A of the *Crimes Act* 1958 in accordance with *R v Smyth*, after hearing argument on the law from counsel in that case. *R v Smyth* dealt with a charge of unlawfully and maliciously wounding, but it seemed to me that the reasoning in that case was equally applicable to a charge of unlawfully and maliciously inflicting bodily harm.

Mr Lopez submitted that, on a charge of unlawfully and maliciously inflicting grievous bodily harm, it was not necessary for the prosecution to prove that the accused had intended to cause the particular type of harm in fact done, or foreseeing that such harm might be done, must recklessly have taken the risk of it.

Mr Flanagan, who appeared to prosecute for the Queen, assisted the Court by referring

to a case decided by the Court of Appeal in 1967 (i.e. subsequently to *R v Smyth*). This was *R v Mowatt* [1967] EWCA Crim 1; [1968] 1 QB 421; [1967] 3 All ER 47; (1967) 51 Cr App R 402; [1967] 3 WLR 1192; 131 JP 463. (It may be noted this case is not cited in Bourke's *Criminal Law (Victoria)* 2nd edn, 1969 but that *R v Smyth* is cited as authority for the intent is required on a charge of unlawfully and maliciously wounding inflicting grievous bodily harm — see page 152.)

The decision of the Court of Appeal in *R v Mowatt* makes it necessary to re-examine *R v Smyth* in the light of the explanation given by the Court of Appeal in that case about the earlier decision of the Court of Criminal Appeal in *R v Cunningham* [1957] 2 QB 396; [1957] 2 All ER 412; (1957) 41 Cr App R 155; [1957] 3 WLR 76, which had been the basis upon which Mr Justice Sholl had proceeded in *R v Smyth.*

I begin by referring to the practice which prevailed in Victoria for many years before 1957. The practice was to direct juries that an unlawful and malicious wounding was committed by a man who in fact did an unlawful act which caused a wound, intending to do that act, and in the knowledge that it was unlawful. It was not the practice to add a further direction that the accused must have intended to cause the wound or to have had a foresight of the likelihood of a wound and acted recklessly notwithstanding. (*R v Smyth* (*supra*) at p739).

In 1957, the Court of Criminal Appeal decided *R v Cunningham* (*supra*). In that case the appellant had been charged with unlawfully and maliciously causing a certain person to take a noxious thing, i.e. coal gas, so as thereby to endanger that person's life. This charge was laid under the *Offences against the Person Act* 1861 s23.

The facts in the case were that the appellant went into the cellar of a house, wrenched the gas meter from the gas pipes and stole it. He did not turn off the gas and a considerable volume of gas escaped from the open pipes, Some of the gas seeped through the wall of the cellar and partially asphyxiated a woman who was asleep in her bedroom next door, with the result that her life was endangered. The accused was found guilty at the trial and he appealed to the Court of Criminal Appeal on the ground that the jury had not been properly directed. One of the submissions made on behalf of the appellant was that not only was *mens rea* required but that the accused person must intend to do the particular kind of harm that was done or alternatively that he must foresee that that harm may occur, yet nevertheless continue recklessly to do the act.

The Court of Criminal Appeal in a joint judgment said that they had considered the various cases and that they had also considered in the light of those cases a principle which was propounded by the late Professor CS Kenny in the first edition of his *Outlines of Criminal Law* and repeated in later editions.

The principle was in these terms:

> 'In any statutory definition of a crime malice must be taken not in the old vague sense of wickedness in general but as requiring either
> 1. An actual intention to do the particular kind of harm that was in fact done;
>
> 2. Recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any towards the person injured.'

The Court of Criminal Appeal said that they thought that that was an accurate statement of the law and added, 'In our opinion the word "maliciously" in a statutory crime postulates foresight of consequence'. The Court also held that the word 'maliciously' in a statutory crime did not merely mean wicked, as the trial Judge had directed the jury. The Court said that

> "In our view it ought to have been left to the jury to decide whether even if the appellant did not intend the injury to Mrs Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it."

The appeal was allowed and the conviction quashed. In 1959 Mr Justice Hudson tried *R v Whitehead* [1960] VicRp 3; [1960] VR 12. In that case the accused was charged under s197 of the

Crimes Act 1958 with having unlawfully and maliciously set fire to a dwelling-house any person being therein. The learned Judge said at p13:

> "As I mentioned during argument, the word "maliciously" of course involves proof by the Crown that the accused did the act or acts which resulted in setting fire to the house with the intention of bringing about this result, or that he did such act or acts foreseeing that they would probably produce this result, but was reckless as to the consequence of his acts. I will direct the jury accordingly. This is in accordance with the fairly recent decision of the Court of Criminal Appeal in *R v Cunningham* (1957) 2 QB 396."

In 1961 the High Court in *Vallance v R* [1961] HCA 42; (1961) 108 CLR 56; 35 ALJR 182 made reference to the significance of the word 'maliciously' in an appeal from Tasmania which dealt with the provision in the Criminal Code of that State which stated that no person should be responsible for a criminal act unless it was voluntary and intentional (s13(1)). Some members of the Court referred to Professor Kenny's statement of principle with approval, but their Honours were not considering the point which now arises (see per Dixon CJ at p59; per Menzies J at p73; and per Windeyer J at p77, where the learned Justice also referred to *R v Cunningham* (*supra*)).

In 1963 Mr Justice Sholl tried *R v Smyth* (*supra*). The accused was presented on charges of wounding with intent to murder, wounding with intent to do grievous bodily harm and unlawful and malicious wounding. One of the matters argued was the direction which should be given to the jury on the charge of unlawful and malicious wounding. After the passage where the learned Judge stated the old practice in Victoria, he said at p739:

> "However, in *R v Cunningham* (1957) 2 QB 396; (1957) 2 All ER 412, the Court of Criminal Appeal in England had held, with respect to the offence of unlawfully and maliciously administering a noxious thing, that the word maliciously in a statutory crime postulates foresight of consequences. The Court held that the accused person, in order to be guilty under the section there in question, must either intend to do the particular type of harm in fact done, or, foreseeing that harm might be done, must recklessly have taken the risk of it. Hudson J in *R v Whitehead* [1960] VicRp 3; [1960] VR 12, applied *Cunningham's case* to the offence of setting fire unlawfully and maliciously to a dwelling house. Indeed, in stating the way in which he proposed to apply *Cunningham's Case*, he may be thought to have gone somewhat further than did the Court of Criminal Appeal in that case, because he said at p13:
>
> > 'The word "maliciously" of course involves proof by the Crown that the accused did the act or acts which resulted in setting fire to the house with the intention of bringing about the result, that they would probably produce the result, but was reckless as to the consequence of his acts."
>
> As Mr Neesham pointed out, the word 'probably' may be thought to go further than the language of the Court of Criminal Appeal in *Cunningham's Case*. What I propose to adopt as to the law in the present case is the law as stated in *Cunningham's Case*. I think it is sufficient if the jury is satisfied that this accused by pre-concert drove Pizaro, either knowing that Pizaro intended to fire a gun and wound somebody, or knowing that Pizaro intended to fire the gun, or was likely to fire the gun, and foreseeing that if Pizaro did so, harm might result to some person in the way of wounding. I think there is evidence here on which a jury, apart from the question of duress which I have already discussed, might reasonably come to the conclusion that this accused drove Pizaro knowing or expecting that Pizaro would probably fire the gun. I think there is evidence on which the jury might reasonably conclude that the accused must have anticipated that if Pizaro fired the gun in the direction of the house where people were, a wound might well result to some person. I think finally that the jury might reasonably conclude that in those circumstances, to drive Pizaro past the house with the gun in readiness to fire, involved a recklessness as to consequences foreseen as possible or probable, That, I think, would be sufficient to justify a conviction on the third count."

In 1967, the Court of Appeal decided *R v Mowatt* (*supra*). There were a number of points involved in the appeal. These included a question relating to the direction which had been given to the jury on the elements of a charge of 'unlawful wounding'. The appellant had been charged with, *inter alia*, wounding with intent to do grievous bodily harm contrary to s18 of the *Offences against the Person Act* 1861. By virtue of s5 of the *Prevention of Offences Act* 1851 it was open to the jury to return an alternative verdict of unlawful wounding on this charge. The jury had not been directed on this alternative charge as to the meaning of the word 'maliciously'. The Court held that, where a verdict of 'unlawful wounding' was returned under s5, the ingredients of the offence were the same as those under s20 of the *Offences against the Person Act* 1861. Under s20 of that Act the offence was described in the words, 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person ... shall be guilty of a misdemeanour.'

In delivering the judgment of the Court, Diplock LJ, as he then was, after observing that 'unlawfully and maliciously' was a fashionable phrase of parliamentary draftsmen in 1861 and that it ran as a theme with minor variations throughout the *Malicious Damage Act* 1861 and the *Offences against the Person Act* 1861, went on to refer to *R v Cunningham* (*supra*). His Lordship referred to the terms of s23 of the *Offences against the Person Act* 1861 under which the charge had been laid in that case and the facts of the case and then said, at page 425:

> "No doubt upon these facts the jury should be instructed that they must be satisfied before convicting the accused that he was aware that physical harm to some human being was a possible consequence of his unlawful act in wrenching off the gas meter. In the words of the court,"maliciously in a statutory crime postulates foresight of consequence", and upon this proposition we do not wish to cast any doubt. But the court in that case also expressed approval *obiter* of a more general statement by Professor Kenny, (Kenny's *Outlines of Criminal Law*, 18th ed. (1962), p202)'.

and the learned Lord then set out the quotation which I have set out earlier in these reasons. Diplock LJ continued, by saying, at page 426:

> "This generalisation is not, in our view, appropriate to the specific alternative statutory offences described in sections 18 and 20 of the *Offences against the Person Act* 1861, and section 5 of the *Prevention of Offences Act* 1851, and if used in that form in the summing-up is liable to bemuse the jury. In section 18 the word 'maliciously' adds nothing. The intent expressly required by that section is more specific than such element of foresight of consequences as is implicit in the word 'maliciously' and in directing a jury about an offence under this section the word 'maliciously' is best ignored.
>
> "In the offence under section 20, and in the alternative verdict which may be given on a charge under section 18, for neither of which is any specific intent required, the word "maliciously" does import upon the part of the person who unlawfully inflicts the wound or other grievous bodily harm an awareness that his act may have the consequence of causing some physical harm to some other person. That is what is meant by "the particular kind of harm" in the citation from Professor Kenny. It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section, i.e., a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result."

Diplock LJ went on to say that, in many cases under s20 or under s18, it may be unnecessary to refer specifically to the word 'maliciously'. Included in what the learned Lord Justice said at page 426 was:

> "But where the evidence for the prosecution, if accepted, shows that the physical act of the accused which caused the injury to another person was a direct assault which any ordinary person would be bound to realise was likely to cause some physical harm to the other person (as, for instance, an assault with a weapon or the boot or violence with the hands) and the defence put forward on behalf of the accused is not that the assault was accidental or that he did not realise that it might cause some physical harm to the victim, but is some other defence such as that he did not do the alleged act or that he did it in self-defence, it is unnecessary to deal specifically in the summing-up with what is meant by the word 'Maliciously' in the section. It can only confuse the jury to invite them in the summing-up to consider an improbability not previously put forward and to which no evidence has been directed, to wit – that the accused did not realise what any ordinary person would have realised was a likely consequence of his act, and to tell the jury that the onus lies, not upon the accused to establish, but upon the prosecution to negative that improbability and to go on to talk about presumptions. To a jury who are not jurisprudents that sounds like jargon. In the absence of any evidence that the accused did not realise that it was a possible consequence of his act that some physical harm might be caused to the victim, the prosecution satisfy the relevant onus by proving the commission by the accused of an act which any ordinary person would realise was likely to have that consequence. There is no issue here to which the jury need direct their minds and there is no need to give them any specific directions about it."

In the light of these and other observations, the Court of Appeal held that it was unnecessary in that case for the Judge to have given the jury any instructions upon the meaning of the word 'maliciously'.

Since the Court of Appeal has further explained the meaning of Professor Kenny's statement of the meaning of 'maliciously' in a criminal statute, in my opinion, it has become apparent that the view of the law taken by Mr Justice Sholl in *R v Smyth* (*supra*) placed too high a burden on the prosecution where the charge is unlawfully and maliciously wounding contrary to s19 of the

Crimes Act. In my opinion it also follows from *R v Mowatt* (*supra*) that the law is that, where a person is charged under s19A of the *Crimes Act* 1958 with unlawfully and maliciously inflicting grievous bodily harm, the effect of the word 'maliciously' is to require the prosecution to prove that the accused foresaw that some physical harm, but not necessarily really serious bodily harm, might result to some person.

It may be added that this view of the law results in a satisfactory balance between s17, s19 and s19A of the Act. Offences under s17 are felonies punishable by a maximum term of fifteen years' imprisonment. In these cases the Act expressly requires that the accused must have acted with intent to do grievous bodily harm to any person (or with intent to resist or prevent the lawful apprehension or detainment of any person).

Here, as the Court of Appeal said, in *R v Mowatt* (*supra*) at page 426, 'the word "maliciously" adds nothing'. Offences under s19 and s19A of the Act are misdemeanours, punishable by maximum terms of five and seven years' imprisonment respectively. In those cases the Act does not expressly state what intent is required to be shown. It is the presence of the word 'maliciously' in the sections that imports the need to prove, as an element of the offences, that the accused acted with the less specific intent of an awareness or foresight of the consequence of causing some harm to some person. (I interpolate that Mr Flanagan referred me to an unreported decision of the Full Court in *R v Neofytou*, decided on 9th August 1969; I have perused a copy of the reasons for judgment in that case, but it dealt with a direction under s17.)

The requisite foresight can be established either by proof that the accused actually intended to cause some physical harm to some person, or by proof that, foreseeing that some physical harm to some person might result, he acted recklessly, indifferent to whether such harm was caused or not.

Having reached that conclusion on the law, it follows that the most that can be implied from the admissions contained in Lovett's plea of guilty is that he acted in concert with Dawson intending that some physical harm should be done to Magro by Dawson, or that, foreseeing that some physical harm might result to Magro from Dawson's conduct, he acted recklessly, indifferent to whether Dawson caused such harm or not. In substance, this was what Mr Flanagan submitted should be implied from the plea.

It is therefore necessary to examine what Mr Lopez put to the Court with respect to his instructions as to his client's intention in the matter. Mr Lopez said that his client said that if there was an agreement to shoot Magro that agreement was abandoned somewhere along the line and that by the time they got to the house at Braybrook he was not involved in any agreement for the use of the firearm.

Mr Lopez said his instructions were that what his client was agreeing to was that some harm would be done but not harm of a serious nature. The man was to be 'roughed up' a bit and no more. Lovett remained in the car and the other two went to see if the man was there. There must have been, said Mr Lopez, a separate agreement between the other two prisoners when the wounding took place.

The distinction between them and his client was that, as far as the other two were concerned there was a specific intent to do grievous bodily harm whereas, as far as Lovett was concerned, there was no such intent but that because serious harm had in fact been caused, Lovett had pleaded guilty. No evidence was called to substantiate the submissions put. What the accused is now putting is an entirely different account of events from the one he gave police...
