**52/87**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v WELSH and FLYNN*

**Crockett, King and Tadgell JJ**

**16 October 1987**

**CRIMINAL LAW – INTENTIONALLY CAUSING SERIOUS INJURY – VICTIM SUFFERED CUTS, BRUISING AND BROKEN TOOTH – WHETHER "SERIOUS INJURY": *CRIMES ACT* 1958, SS15, 16, 18.**

Section 15 of the *Crimes Act* 1958 provides:

"In this sub-division—
'Injury' includes unconsciousness, hysteria, pain and any substantial impairment of bodily function.
'Serious injury' includes a combination of injuries."

Section 16 of the *Crimes Act* 1958 provides:

"A person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence.
Penalty: Imprisonment for fifteen years."

**Where a victim suffered cuts, a swollen inner lip, bruising of both eyes and the left forearm and a broken upper left tooth, no error was shown on the part of the trial judge in leaving to the jury the determination as a fact (which it did so find) whether the injuries were "serious" injuries for the purposes of sections 15 and 16 of the *Crimes Act* 1958.**

**CROCKETT J:** *[After setting out the nature of the charges, the facts surrounding the offences and grounds of appeal not relevant to this Report, His Honour continued]*: … **[9]** The second ground upon which the applicant Welsh relies bears on count 4. That was the count of intentionally causing serious injury. It was said with regard to that count that it was not open to the jury to have returned a verdict of guilt in respect of a count which required as one of its components that the injury shown to the satisfaction of the jury beyond reasonable doubt was serious. The injuries which the evidence showed were suffered by the victim were cuts, a swollen inner lip, bruising of both eyes, bruising the left forearm and, perhaps most importantly, a broken upper left tooth.

**[10]** The submission was made to the Judge at the trial that that evidence was insufficient to justify the jury's concluding that the injuries were "serious". The Judge rejected the submission. It has been repeated before this Court, and, in my view, must fail. There is no exclusive definition of the word "serious" in the Act. It was left to the jury to determine as a matter of fact what injury or injuries in combination might properly be categorised as being serious having regard to the fact that the word "serious" is an ordinary English word, the meaning of which must be taken as well understood by the members of the jury. This accordingly required that it be left to the jury to determine as a fact whether the injuries as it found them to have been should have been properly treated as "serious" injuries.

There must, of course, be a stage in which it would be impossible having regard to the ordinary meaning to be given to the word, for any tribunal of fact to find that an injury proved to have occurred could be classified as serious. If the stage were reached where it could not be so categorised then, of course, there would be insufficient evidence for the jury to make a finding of an injury as being serious in such an instance. In that case, it would be for the Judge to remove the matter from the jury's consideration. In my opinion this was not such a case. The Judge was correct in leaving the matter to the jury and his ruling in that Regard cannot now be successfully impugned. *[His Honour then dealt with matters not relevant to this Report].*

**TADGELL J: [15]** I also concur. I should like to add a few words myself about the conviction of Welsh on the fourth count, namely that without lawful excuse he intentionally caused serious

injury to Mathew Dopel. That charge was laid pursuant to s16 of the *Crimes Act* 1958, a section which was inserted by Act 10233 in 1985. Mr Tehan, on behalf of Welsh, was disposed to be critical of the Judge's instruction to the jury on the charge and submitted that in any event the Judge's ruling that the charge should be left to the jury was wrong.

His Honour rejected out of hand a submission that the injuries which had been inflicted upon Dopel could not on any reasonable view be categorised as serious injuries. In particular, His Honour took the view that to break off the left front tooth of the victim could itself constitute **[16]** serious injury in terms of s16. When instructing the jury, His Honour said:

> "Now, what is serious injury? Well, you know an injury can be any hurt or injury, physical or mental or both. Now, we are not here talking about mere injury. Nothing less than serious injury will here suffice, although it does not have to be a permanent injury, nor one that was necessarily dangerous to life. And, of course, it includes a combination of injuries, hurt and pain. Now, it is for you to say, did Dopel suffer serious injury? If not, the accused must be not guilty on this charge, for proof of serious injury, nothing less, as you will appreciate, is an essential element of this charge."

In this Court Mr Tehan submitted that the amendments to the *Crimes Act* by Act 10233, including the insertion of the present s16, could not have been intended to do away with the concept of what used to be described in the Act as grievous bodily harm. So much may be presumed or conceded, although I think it is now unnecessary to decide it. The use of the word "serious" injury in place of the expression "grievous bodily harm" is the use, in my view, of an ordinary English word which it was for the jury to apply to the facts as found by them. Clearly, it was a jury question for decision as a matter of fact whether the injuries that had been inflicted on Dopel were serious injuries.

This Court in *R v Rhodes*, unreported, a judgment delivered on 14th November 1984, had occasion to consider whether causing asphyxiation to a victim amounted to inflicting grievous bodily harm in the context of proof of an intention sufficient to sustain a charge of murder. Brooking J, in speaking for the Court, said:

> **[17]** "Once the jury has been given the usual short definition of grievous bodily harm, it is not the practice, and would indeed be unwise .... to attempt a more elaborate exposition of the meaning of that phrase."

That statement by His Honour was in accord with the long-standing decision of this Court in *R v Miller* [1951] VicLawRp 49; (1951) VLR 346 at p357; [1951] ALR 749. The *dictum* of Martin J there was expressly adopted by the House of Lords in the ill-fated case of *DPP v Smith* (1961) AC 290 at p335; [1960] 3 All ER 161; [1960] 3 WLR 546. Although *Smith's case* has been criticised in other respects, that aspect of it stands, in my respectful view, as good law.

Continuing, Brooking J in the case of *Rhodes* said:

> "The law gives only very general assistance to juries in this regard." (That is to say, on the question whether particular harm involves grievous bodily harm) "While some injuries are manifestly too slight and some injuries clearly sufficient to answer the legal test, there remains an infinite variety of situations in which a jury might reasonably take either view. *R v Weeding* is in this respect, no more than a judgment on its own facts."

*R v Weeding* [1959] VicRp 50; (1959) VR 298l; [1959] ALR 749 was a case in which the Court decided that the production in a victim of a temporary unconsciousness was insufficient in the circumstances to constitute grievous bodily harm. Finally, in the passage to which I have referred, Brooking J concluded:

> "The question is one of fact and no principle of law emerges from *Weeding* that can be used as a fetter in later cases, other than the obvious principle that a finding of fact cannot stand where there is insufficient evidence to support it."

It is, of course, for the Judge in any given case to decide on which side of the line a particular injury falls **[18]** in making a decision whether to leave to the jury a count of the nature which was charged here in count 4. It is not possible, and it is therefore not useful to try to define where the threshold lies. A determination whether a given injury or series of injuries can be characterised

as "serious injury" in terms of s16 of the *Crimes Act* will, no doubt, involve a value judgment. That judgment will, in turn, involve a comparison between the injury or injuries in question alleged to be serious injury and an injury or injuries which would, according to ordinary human experience, be commonly regarded as slight, superficial or trifling, and therefore falling short of being serious injury.

The particular surrounding circumstances will or might also be relevant. The age, the sex, state of health and physical and mental circumstances of the victim might well require consideration. Obviously, a particular injury to a very young baby or to a very elderly and frail woman might be differently characterised than an injury of the same kind to a robust, young man in the prime of life.

The range of penalties prescribed, on the one hand, under s16 for the offence of intentionally causing serious injury and, on the other, under s18 for the offence of intentionally or recklessly causing injury *simpliciter* might also assist the Judge in determining whether to leave the jury the graver charge in any given case. Having made up his mind to leave it, the Judge should, I think, express the notion in terms sufficient to bring home to the jury the dichotomy which s16 and s18 of the *Crimes Act* clearly intend **[19]** to draw.

Mr Tehan was critical of the Judge for not adopting the time-honoured expression which has, for many years, been used in defining grievous bodily harm: really serious injury. Here, the learned Judge referred to serious injury and said that nothing less than serious injury would here suffice. In my respectful view, the absence of the adverb "really" was neither here nor there, having regard to the context in which His Honour's remarks were expressed. It seems to me that he did sufficiently point up the dichotomy for the jury's consideration and that he properly left the injuries which had been inflicted upon Dopel for the consideration of the jury on the question whether they were serious or not. For these and the reasons which have been expressed by Crockett J, I concur with the orders which His Honour has proposed.

---