HIGH COURT OF AUSTRALIA

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

WILSON v. THE QUEEN
(1992) 174 CLR 313
25 June 1992

Criminal Law

Criminal Law—Manslaughter—Death caused by unlawful and dangerous act—Reasonable person's foresight of risk of injury—Whether risk of serious injury or some harm—Battery manslaughter—Whether offence known to law.

Decisions

MASON C.J., TOOHEY, GAUDRON AND McHUGH JJ. The appellant was charged with the murder of Warren George Forsythe Ormsby. He was acquitted of that charge but was convicted of manslaughter. He stood trial jointly with Wayne Dennis Cumming who was found not guilty of murder and manslaughter. Both offences are dealt with in the Criminal Law Consolidation Act 1935 (S.A.) ("the Act") but neither is defined in the Act. Their elements are to be found in the common law.
The facts

2. The events giving rise to the charge against the appellant were as follows. On the evening of 15 September 1989 the appellant, his girlfriend Kerri Ann Bennier and Cumming were at the home occupied by Cumming's step-father and the appellant's mother. The appellant and Bennier walked to a hotel nearby to collect some alcohol from the appellant's mother who was at the hotel with Cumming's step-father. On the way they met the deceased, a middle-aged man, who was under the influence of liquor. The deceased exchanged words with the appellant and Bennier. The appellant thought that the deceased was "strange, a bit weird". The thrust of the appellant's evidence was that the deceased was rambling on and making it hard for him to pass. The appellant then told Bennier to go back home to get Cumming so, he said, that Cumming might go to the hotel and collect the alcohol. When Cumming arrived at the scene with Bennier, the appellant and the deceased were still there. The appellant claimed that the deceased had earlier pushed him and that, after Cumming arrived, the deceased "put his arm on the back of my neck and tried to kiss me". The deceased then "shouldered me". The appellant tried to walk away, saw that the deceased's fists were clenched at his side and thought that the deceased was going to hit him. This evidence followed:

> "Q. So what did you do. A. That's when I hit him. Q. How hard did you hit him. A. It wasn't really - I didn't think it was really that very hard. Q. It wasn't soft either. A. No. Q. Only the one time. A. Yes, I only hit him the once."

3. The blow was to the deceased's face, causing him to fall to the ground where his head "landed in that dirt part near the hedge". The appellant then walked off with Bennier. As he did, Cumming rolled the deceased on to his stomach, went through his pockets, rolled him on to his back and "smashed his head on the concrete ... twice". The cause of the deceased's death was brain damage, his injuries being consistent with one impact. The Crown's case, as presented in final address, suggested the fall from the appellant's punch as the more likely cause of death. The trial judge's direction seems to have left the fall from the appellant's punch or Cumming's later actions as likely to have caused the death. This aspect is not crucial to the questions now before this Court. The case against the appellant

4. The case against both accused was one of felony murder, it being alleged that they assaulted the deceased in the course of robbing him. In answer to this charge the appellant denied any participation in the robbery and any intention of causing serious harm to the deceased; he also relied on self-defence. This Court is not directly concerned with the trial judge's directions as to murder. But it may be noted that his Honour directed the jury that if the deceased was killed in the course of a joint enterprise between Cumming and the appellant or, if one aided or abetted the other in the killing, they should find both guilty of murder. The trial judge also directed the jury to consider whether either man, acting on his own, was guilty of murder. Since both were found not guilty of murder, it must be taken that the jury rejected an intention to kill or to do grievous bodily harm on the part of either.

5. On the alternative verdict of manslaughter, his Honour directed the jury in the following terms:
" In this case if you have not found murder proved, but had gone
on to consider manslaughter it would be manslaughter by an unlawful and dangerous act. The killing of a man in the course of committing a crime is manslaughter. The crime must be an act in serious breach of the criminal law. A serious assault - you may think the punch by Wilson or the hitting of the head on the concrete by Cumming to be serious assaults - would be an unlawful act for this purpose. Whether the particular act you are considering is a dangerous act is a matter for your judgment."

6. In the case of the appellant, the trial judge also left to the jury provocation as a possible basis for manslaughter. But, as King C.J. pointed out (1) Wilson (1991) 53 A Crim R 281, at p 282:
"(T)here was no suggestion of an intent to cause death or grievous
bodily harm and as the only available basis of a verdict of murder was felony murder, provocation could have played no part in the jury's deliberations".

7. While the appellant's main attack on the direction to the jury focused on the passage quoted above, he also complained that the direction on self-defence related only to the charge of murder and failed to relate self-defence to the requirement of unlawfulness, where manslaughter was open to the jury on the basis of death caused by an unlawful and dangerous act. King C.J. (with whom Cox J. agreed) rejected this complaint on the ground that (2) ibid., at p 283.
"(while) the directions on self-defence were primarily concerned
with murder and did not expressly relate self-defence to the assault which was alleged to be the unlawful act which could lead to a verdict of manslaughter(,) (t)he judge twice told the jury ... that if the appellant was acting in lawful self-defence he would not be 'guilty of anything'."

8. Although the complaint regarding self-defence and manslaughter is part of the grounds of appeal to this Court, it is hard to see how self-defence could have been a real issue at the trial. The appellant was free to walk away from the deceased at any time and the deceased could not have been thought by the appellant to represent a threat to him, particularly as Cumming was with him. The appellant's real complaint, to which we now turn, is the direction as to "an unlawful and dangerous act" as an element of manslaughter.

9. The question of manslaughter arising from an unlawful and dangerous act is an uncertain area of the law, reflecting a divergence between Australian and English authorities as to the degree of danger which must exist. It is useful to approach the question on an historical footing with a view to determining whether it is possible to spell out any clear principle from the relevant authorities. This involves looking first at the development of the law relating to culpable homicide.
Culpable homicide.

10. The common law of homicide began with the principle that all who cause death, whether intentionally or accidentally, are liable to conviction for murder (3)See, generally, Green, "The Jury and the English Law of

Homicide, 1200-1600", (1976) 74 Michigan Law Review 413; Kaye, "The Early History of Murder and Manslaughter: Part II", (1967) 83 Law Quarterly Review 569. Its history reflects a continuing effort to limit that liability (4) Speaking of the growth of the English law of homicide, Sir Owen Dixon said: "For eight centuries the course of its very gradual evolution has been from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act." "The Development of the Law of Homicide", (1935) 9 Australian Law Journal, Supp 64, at p 64. Fletcher (5) Rethinking Criminal Law, (1978), p 237. observes:
"The historic point of departure is the principle that unless a
killing is justified ... the party causing death is always accountable ... It was causing death, not the manner and culpability of acting, that determined liability. When the law of homicide came under the King's jurisdiction in the twelfth century and became a crime punished by death, the general principle of liability began to admit of exceptions."

11. By the time of Bracton (6) De Legibus et Consuetudinibus Angliae, (c.1256) and following the abolition of the distinction between botless or unemendable homicide and other homicides during the reign of Henry II, homicide was culpable if the death occurred during the commission of an unlawful act. However, it is important to note the basis of this liability.

12. By the thirteenth century, a charge of homicide arising from an accidental death could be met by the plea of per infortunium or misadventure (7)Together with homicide committed in self-defence, this formed the category of excusable homicide. A finding of excusable homicide did not result in acquittal. Rather, the defendant could seek a royal pardon (subject to the possibility of the victim's relatives bringing a private prosecution), which issued as a matter of course in cases of misadventure. By the late fourteenth century, the judges frequently entered an acquittal without requiring that a royal pardon be secured, a trend reversed in the sixteenth and seventeenth centuries. See Green, op.cit., at p 444 et seq. Death occurring in the course of an unlawful act was culpable by reason of the unavailability of the per infortunium or misadventure plea; Hawkins (8) A Treatise of the Pleas of the Crown, 6th ed. (1777), vol.1, Ch 29, pp 111-113 (first published in 1716), Hale (9) History of the Pleas of the Crown, (1800), vol.1, p 475 (first published in 1736) and Coke (10) The Third Part of the Institutes of the Laws of England, (1797), p 56 (first published in 1644) consider the matter in that context. The excuses of accident, self-preservation and insanity marked the beginning of the move to bring homicide back to the category of cases in which the offender had a fair opportunity of avoiding the death of the victim (11) Fletcher, op.cit., p 237.

13. Even as late as the sixteenth century, culpable homicide was thought of as a single undivided offence and the judges were more concerned with distinguishing between (12) Kaye, op.cit., at pp 571-572:
"what was culpable homicide and what was covered by such defences
as self-defence and misadventure, than with making distinctions based on differing degrees of culpability".
However, in that century manslaughter was used from time to time as a term mitigating murder in cases in which the killing had been accidental or unintended or, though deliberate, involved an element of provocation or self-defence (13) ibid., at pp 574- 575. But the distinction between murder and manslaughter was not precisely formulated. The earliest reported verdict of manslaughter was recorded in Salisbury's Case (14) (1553) 1 Plowd 100 (75 ER 158) where co-conspirators, intending to ambush and kill Ellis, by mistake killed his servant. John Salisbury, a servant of one of the conspirators, having no part in the conspiracy, joined the affray and wounded the deceased.

14. The emergence of manslaughter as a separate and lesser offence than murder marks the beginning of an approach that causing death is innocent unless additional factors (such as an intent to kill or the taking of an excessive risk) are present. The grounds for rejecting an excuse become the grounds for liability, and killing in the course of an unlawful act, in the absence of the requisite intent for murder, is recognised as constituting manslaughter.

15. Even after the emergence of manslaughter as a separate and lesser offence, Coke (15) op.cit., p 56. maintained that the unavailability of the plea per infortunium meant that the killing was murder. Logically this was so. The fact that Coke's view was not adopted indicates how attractive was the culpability/dangerousness approach. Hale did not follow Coke's view. Unlike Coke, he classified the killing of a boy when shooting at a deer in another's park as manslaughter, evidently treating the shooting in the park as unlawful (16) op.cit., p 474.

16. In the early eighteenth century, Hawkins, in his chapter on per infortunium, appears to place the unavailability of the plea not so much on the fact of the unlawfulness of the act as on the level of risk involved (17) op.cit., pp 112-113.:
"Sect. 9. But if a person kill another by shooting at a deer, etc.
in a third person's park, in the doing whereof he is a trespasser; or by shooting off a gun, or throwing stones in a city or highway, or other place where men usually resort; or by throwing stones at another wantonly in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at handsword without the king's command; or by parrying with naked swords covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter. Sect. 10. And if a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; as by committing a riot, robbing a park, etc. he shall be adjudged guilty of murder. ... Sect. 12. Neither shall he be adjudged guilty of a less crime, who kills another, in doing such a wilful act, as shews him to be as dangerous as a wild beast, and an enemy to mankind in general; as by going deliberately with a horse used to strike, or discharging a gun, among a multitude of people, or throwing a great stone or piece of timber from a house into a street, through which he knows that many are passing; and it is no excuse that he intended no harm to anyone in particular, or that he meant to do it only for sport, or to frighten the people, etc." (in each case, emphasis added)

17. Thus, an unlawful and dangerous act was not a rationale or basis for liability, but a factor negativing a defence which otherwise was available to cut down what approached strict liability for causing death. Though expressed in that way, the grounds for negativing the defence were easily transformed into grounds of liability (18) See Fletcher, op.cit., p 240.

18. This transformation began to occur with the publication of Foster's Discourse of Homicide in 1762 (19) Report and Discourses, 1st ed. (1762), p 258. Beginning with per infortunium as a concept of excuse, Foster then discussed the unlawful act as a standard for gauging the gravity of the killing. However, he adopted the felony murder rule so that a killing in the course of an act with intent to commit a felony amounted to murder. The rule ascribes malice aforethought to the accused when he kills in the perpetration of a felony. The doctrine of transferred felonious intent and its analytical consequence, the crime of felony murder, not only were regarded by Stephen (20) A History of the Criminal Law of England, (1883), vol.III, pp 74-76 as the only blot on Foster's work, but also marked the end of the possibility of matching moral culpability to legal liability in homicide. Liability contingent on such a fortuity as the lawfulness of the accused's intended act, with only limited relation to its foreseeable consequences, is precisely the kind of rule that "'erodes the relation between criminal liability and moral culpability'" (21) Fletcher, op.cit., p 298, quoting People v. Washington (1965) 402 P 2d 130, per Traynor C.J. at p 134.

19. The felony murder rule was kept within confined bounds by insisting that the felonious act be "known to be dangerous to life, and likely in itself to cause death" (22) The Queen v. Serne (1887) 16 Cox CC 311, at p 313.

20. By the mid-eighteenth century, Blackstone (23) Commentaries, 17th ed. (1830), vol.IV, pp 200-201 (first published in 1765) was able to say that killing another "amounts to murder, unless where justified ...; excused on the account of accident or self-preservation; or alleviated into manslaughter".

21. In the nineteenth century the English courts applied the rule that, if a death occurred in the course of an unlawful act not amounting to a felony, the killing should be treated as manslaughter. Stephen, in A Digest of The Criminal Law (24) (1877), Arts 222-223, states it as the common law rule. As thus expressed, the rule was harsh because it involved liability for manslaughter in the case of an unlawful act which was not dangerous. In other words, causing death in the course of performing a mere unlawful act does not supply the level of culpability appropriate to manslaughter as an instance of culpable homicide.
Manslaughter by an unlawful and dangerous act

22. The rigour of the common law was softened by a number of decisions. In The Queen v. Franklin (25) (1883) 15 Cox CC 163, at p 165. Field J. spoke of his "great abhorrence of constructive crime" and held that

the requirement of unlawfulness was not met by the act in question being no more than a civil wrong (26) See also The Queen v. Lamb (1967) 2 QB 981, at p 988; The Queen v. Bush (1970) 3 NSWR 500, at p 503; Boughey v. The Queen (1986) 161 CLR 10, at p 35. In The King v. Larkin (27) (1943) 1 All ER 217, at p 219; (1942) 29 Cr App R 18, at p 23. This aspect of the judgment does not appear in (1943) KB 174, or in (1943) WN 13. the Court of Criminal Appeal required that the unlawful act be dangerous and that it be "likely to injure" (28) See also Hall (1961) 45 Cr App R 366, at p 372; Pemble v. The Queen (1971) 124 CLR 107, at p 122. In The Queen v. Church (29) (1966) 1 QB 59, at p 69 the Court of Criminal Appeal rejected as erroneous a direction that:

"amounted to telling the jury that, whenever any unlawful act is committed in relation to a human being which resulted in death there must be, at least, a conviction for manslaughter". In the view of the Court (30) ibid., at p 70:

> "For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

> 23. In D.P.P. v. Newbury (31) (1977) AC 500 the House of Lords examined the matter afresh. It affirmed the test adopted in Larkin and Church. It held that an accused was guilty of manslaughter if he intentionally did an act that was unlawful and dangerous and the act inadvertently caused death; that it was unnecessary to prove that the accused knew that the act was unlawful or dangerous; and that the test was still the objective test, namely whether all sober and reasonable people would recognise that the act was dangerous in the sense of carrying with it the risk of some harm, not whether the accused recognised its danger. As King C.J. observed in the present case (32) Wilson (1991) 53 A Crim R, at p 284.:

> "In the course of a discussion of the judgment of Lord Denning MR in Gray v. Barr (33) (1971) 2 QB 554, Lord Salmon, who delivered the leading judgment, appears to imply that the test is also met if there is an actual intention to cause harm or an actual realisation that harm is likely, although that is not necessary if the act is objectively dangerous."

And, as King C.J. pointed out, Larkin, Church and Newbury were not cases of intentional infliction of harm. There are however decisions of English courts which suggest that the intentional infliction of harm by means of an unlawful act may be sufficient to constitute manslaughter (34) The Queen v. Garforth (1954) Crim L R 936; The Queen v. Sharmpal Singh (1962) AC 188; see also Smith and Hogan, Criminal Law, 6th ed. (1988), p 350. The question of battery manslaughter is considered later in this judgment. The Australian decisions

24. A convenient starting point for a review of the Australian authorities is the decision of this Court in Mamote-Kulang v. The Queen (35) (1964) 111 CLR 62. It will be necessary to refer to that case again in the context of battery manslaughter. The appellant struck the deceased a blow with the back of his hand to the side of her abdomen, intending to hurt her and to cause her pain but not further injury. He was convicted of manslaughter. The judgments were concerned mainly with the meaning of the term "accident" in the relevant legislation of Papua New Guinea but it seems that, in the view of Taylor, Owen and Windeyer JJ., death resulting from the intentional infliction of pain by an unlawful blow would constitute manslaughter at common law (36).See ibid., per Taylor and Owen JJ. at p 64 and in particular per Windeyer J. at p 79: "There is, however, no doubt that at common law a man is guilty of manslaughter if he kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm."

25. The Queen v. Holzer (37) (1968) VR 481 required consideration of a question which had not arisen in Mamote-Kulang but which was at the heart of some of the English decisions to which reference has been made. The question was as to the application in Australia of the notion that, in the case of manslaughter by an unlawful and dangerous act, the test of recognition of danger was objective. In dealing with that aspect Smith J. said (38) ibid., at p 482.:

"The better view, however, is I think that the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury. ... I(t) is not sufficient, as it was held to be in R. v. Church ... to show there was a risk of some harm resulting, albeit not serious harm". (emphasis added)

26. As can be seen from this passage, Smith J. imposed a stricter test than had been applied in Church and in

some other decisions, by requiring that the Crown establish an appreciable risk of "really serious injury". There is a respectable body of later authority which tends to support the approach taken by Smith J. in Holzer. That approach was expressly approved by the Court of Criminal Appeal of Victoria in The Queen v. Wills (39) (1983) 2 VR 201, at pp 211-213, though the Court was concerned primarily with the objective nature of the test to be applied. In Crusius (40) (1982) 5 A Crim R 427, at p 428. the Court of Criminal Appeal of Victoria referred to Holzer with apparent approval though the Court was concerned only with "one limb" of that case, namely, "specific intent to commit a battery". It may be that Holzer was tacitly approved by the Court of Criminal Appeal of New South Wales in Coomer (41) (1989) 40 A Crim R 417, at p 423. This was not the view taken by Cox J. in the instant case, his Honour being of the opinion that a "passing reference" to Holzer in Coomer did not signify approval of that decision: Wilson (1991) 53 A Crim R, at p 297, by the Court of Criminal Appeal of Western Australia in Ward v. The Queen (42) (1972) WAR 36, at p 40. Again, Cox J. declined to regard a "passing reference" to Holzer as significant: Wilson (1991) 53 A Crim R, at p 298 and by judges at first instance in The Queen v. McCallum (43) (1969) Tas SR 73, at pp 87-88. The Queen v. Brown (44) (1984) 58 ACTR 33, at p 35 and The Queen v. Jones (45) (1988) 144 LSJS 58, at pp 61-62.

27. Finally, there is the decision of this Court in Pemble but, as King C.J. pointed out in the present case (46) Wilson (1991) 53 A Crim R, at p 286:
"In that case ... the unlawful act, namely the brandishing or
pointing of a rifle was so obviously capable of causing grievous bodily harm that the question of the degree of potential harm required to render an act dangerous, did not arise for consideration."

28. Faced with this conflict of authority, King C.J. concluded that the Court of Criminal Appeal of South Australia "should adopt the Holzer test" (47) ibid. In the event, King C.J., while holding that there had been a defect in the trial judge's summing up, concluded that there had been no miscarriage of justice (48) ibid., at p 288. Cox J. considered that the English authorities, in particular Larkin and Church, should be followed in preference to Holzer (49) ibid., at pp 304-305. Matheson J. also favoured the English approach. His Honour was influenced by the fact that Newbury was decided at a time when appeals lay from Australia to the Privy Council and that therefore a decision of the House of Lords was "very persuasive" (50) ibid., at p 307. This, with respect, is a tenuous basis on which to resolve the conflict of authority.
Unlawful and dangerous act

29. The jury must be taken to have convicted the appellant of manslaughter by reason of an unlawful and dangerous act causing death. This was not a case of death resulting from criminal negligence and, for reasons already given, provocation afforded no basis for a verdict of manslaughter. The question is whether the trial judge's direction relevantly erred and, if it did, whether the proviso may properly operate so as to sustain the conviction (51)Section 353(1) of the Act empowers the Full Court, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, to dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred".

30. Whether the "act" in question was the punch by the appellant to the deceased's face or the hitting of the deceased's head on the concrete by Cumming, it was an unlawful act. In view of Cumming's acquittal, only the punch arises for consideration. In view of what has been said about self-defence, the punch must be treated as an unlawful act. Before the Court of Criminal Appeal the appeal was conducted as if only the punch was in issue so far as the appellant was concerned. And that is how the appeal was conducted before this Court. Whatever may be said of the consequences of that act, there was no suggestion that it was accidental (52)cf. Mamote-Kulang. The references by Lord Salmon in Newbury to intention as an element of manslaughter were severely criticised by Glanville Williams in Textbook of Criminal Law, 2nd ed. (1983), pp 272-274. This aspect is discussed later in this judgment.

31. Thus the area of inquiry narrows further and, in the end, focuses on the question: was the act of the appellant in punching the deceased dangerous? That question in turn gives rise to another: was it enough that the appellant (that is, a reasonable person in his position) appreciated the risk of some injury to the deceased from the act or did the jury have to be satisfied that he appreciated the risk of really serious injury?
Resolving the authorities

32. There are good reasons why the test in Holzer should be preferred to that in Newbury; the reasons are those advanced by King C.J. in the present case. One is the development of the law "towards a closer

correlation between moral culpability and legal responsibility" (53) Wilson (1991) 53 A Crim R, at p 286. Another is that the scope of constructive crime "should be confined to what is truly unavoidable" (54) ibid. A further reason advanced by King C.J. is that the persuasive authority of a decision of the Full Supreme Court of an Australian State in this area of the law is greater than decisions of courts of other countries "which may reflect different community attitudes and standards" (55) ibid., at p 287. The decision to which his Honour referred was, no doubt, a reference to Wills.

33. It is not possible to resolve this conflict of authority and assert a proposition in general terms without first considering another category of manslaughter envisaged by Smith J. in his direction to the jury in Holzer. He said (56) (1968) VR, at p 483:
"(T)he blow, the assault and battery, was given or committed by the
accused with the intention of doing Harvey some physical injury, not merely of a trivial or negligible character. The intended injury need not be a serious injury. Indeed, if it were a serious injury that was intended we would be in the field of murder, not manslaughter. The injury intended may be of a minor character but it must not be merely trivial or negligible." Battery manslaughter

34. Although Smith J. did not use the term, effectively he was speaking of battery manslaughter. This additional category of manslaughter (if it exists) involves a subjective test of intention and a low degree of harm. Because of the low degree of requisite harm, it has been suggested that there is significant congruity between the English test for unlawful and dangerous act manslaughter and Smith J.'s identification of a third category of manslaughter, although the latter imports a subjective intention (57) See Willis, "Manslaughter by the Intentional Infliction of Some Harm: A Category that should be Closed", (1985) 9 Criminal Law Journal 109.

35. The idea of such a category as battery manslaughter does nothing to advance the law in what is, in any event, a somewhat clouded area. In particular, it tends to confuse intent with a willed act. The actus reus here is the unlawful and dangerous act which causes the death. Questions of causation will of course arise but they do not arise here. The mens rea required relates to the unlawful and dangerous act; that act must be willed and not accidental. 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.

36. In two decisions of this Court Windeyer J. lent some support to the idea of manslaughter resulting from a blow intended to hurt. He did so in Mamote-Kulang (58) (1964) 111 CLR, at p 79. when he said, in the passage quoted earlier:
"There is, however, no doubt that at common law a man is guilty of
manslaughter if he kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm."

37. This statement has been criticised (59) Willis, op.cit., at p 117. because the only authority offered by Windeyer J. for the proposition was Hale's History of the Pleas of the Crown. Again, the criticism continues, it is not clear if Windeyer J. was in truth referring to manslaughter by an unlawful and dangerous act, whether he had in mind reckless negligence, or whether the assertion "was a vestige of the old common law principle that all killings caused by any unlawful act were at the least manslaughter". Later, in Timbu Kolian v. The Queen (60) (1968) 119 CLR 47, at pp 59-60, 67-68, Windeyer J. spoke somewhat obliquely in terms which might be thought to affirm what he had said in Mamote-Kulang.

38. There is nothing in the earlier cases, and only Stephen among the text-writers, to provide explicit support for the intentional harm category. In Mamote-Kulang (61) (1964) 111 CLR, at p 79. Windeyer J. relied on Hale's History of the Pleas of the Crown (62) op.cit., p 472 which reads:
" Regularly he that voluntarily and knowingly intends hurt to the
person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least; as if A. intends to beat B. but not to kill him, yet if death ensues, this is not per infortunium, but murder or manslaughter, as the circumstances of the case happen." The passage is equivocal because it does not seek to distinguish between an intent to cause grievous bodily harm and an intent to inflict a lesser degree of harm. Section 10 of the passage quoted from Hawkins earlier in this judgment is inconsistent with the concept of battery manslaughter. According to Hawkins, the intention to cause some hurt would result in murder. It may be thought that s.9 of the passage provides justification for what was said

in Mamote-Kulang but only on the footing that the doctrine of transferred malice does not apply. That doctrine achieved recognition subsequently in consequence of Foster's work.

39. However, Stephen provides support for Windeyer J.'s view. He gives the following illustrations (63) A Digest of the Criminal Law, op.cit., p 145:
" (1) A, knowing that B is suffering from disease of the heart,
and intending to kill B, gives B a slight push, and thereby kills B. A commits murder. (2) A in the last illustration pushes B unlawfully, but without knowledge of his state of health or intention to kill him, or do him grievous bodily harm. A commits manslaughter. If A laid his hand gently on B to attract his attention, and by doing so startled and killed him, A's act would be no offence at all." These illustrations obviously cover the factual situation faced by Windeyer J. in Mamote-Kulang. It should, however, be noted that Stephen footnotes each illustration with the comment (64) ibid.:

> "I know of no direct authority for these illustrations, but they follow directly from the principles stated in the note."

Two further illustrations by Stephen are apposite (65) ibid:

> " (4) A waylays B, intending to beat, but not intending to kill him or do him grievous bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death. (5) A strikes at B with a small stick, not intending either to kill or to do him grievous bodily harm. The blow kills B. A commits manslaughter."

This time Stephen cites authority (66) Foster, Report and Discourses, 2nd ed. (1776), p 259 for illustration (4); Rowley's Case, discussed in (1611) 12 Co Rep 87 (77 ER 1364) and in (1727) 2 Ld Raym 1485, at p 1498 (92 ER 465, at p 473) and in Foster, ibid., pp 294-295, for illustration (5).

40. An examination of Foster does not bear out Stephen's examples. Foster (67) Foster, ibid., pp 258-259 first distinguishes different types of unlawful acts. If death results from an act which is malum in se (inherently wrong, or wrong in itself), it may be murder or manslaughter, "as circumstances may vary the nature of it" (68) ibid., p 258. If death results from an act which is merely malum prohibitum (wrong under the law), it will be manslaughter. Foster then sets out Hale's statement that if A intends to beat B, but not to kill him, and death ensues, it is murder or manslaughter depending on the circumstances. Foster interprets this to mean that if A intends to beat B "in anger or from preconceived malice" and death ensues, it will be murder, because his act was malum in se (69) ibid., p 259. Foster, therefore, provides no reason for drawing a distinction between intent to do grievous bodily harm and intent to do some lesser harm.

41. Likewise, Rowley's Case, relied upon by Stephen (70) A Digest of the Criminal Law, op.cit., p 145 for his illustration (5), fails to make the distinction clear. Two boys were fighting and one, bloodied, ran home to his father. The father, on seeing his son, ran three-quarters of a mile and struck the other boy on the head with a small cudgel, of which blow the boy died. The father was convicted of manslaughter. Foster interprets the verdict as arising from the fact that a stroke with "a cudgel" was "not likely to kill" (71) ibid., p 295. Other reports of the case cite provocation as the reason for the manslaughter verdict, which Foster doubts: p 294. The report in (1727) 2 Ld Raym 485, at p 1498 92 ER 465, at p 473 gives both reasons.

42. Rowley's Case does not state that the nature of the father's intention was to hurt the boy to an extent less than grievous bodily harm. It may have been to do grievous bodily harm or a lesser hurt. The decisive factor leading to a manslaughter verdict was that the blow was "not likely to kill", that is, an objective test rather than an inquiry into subjective intent.

43. Another early case, similar to Rowley's Case, is Turner's Case (72) (1727) 2 Ld Raym 1485, at p 1498 (92 ER 465, at p 473). The case also appears at (1697) Comberbach 406, at p 407 (90 ER 557, at p 558). There, a master struck a servant with a clog and the boy died. The master was convicted of manslaughter on the basis that (73) ibid., at p 1499 (p 473 of ER):< "because the clog was so small, there could be no design to do any great harm to the boy, much less to kill him; and a master may correct a servant in a reasonable manner for a fault".

44. In the same category is The King v. Wiggs (74) (1784) 1 Leach 378 (168 ER 291). The victim was a shepherd boy who negligently allowed some sheep to escape. His employer, seeing this, picked up a stake that was lying on the ground and threw it at the boy. The stake, which hit the boy on the head, fractured his skull, causing his death soon after. The report is short, and is a mixture of references to provocation, the right of a master to correct his servant and the degree of dangerousness of the act. As to the latter factor, the judge's direction to the jury is reported as (75) ibid. p 292 of ER:
"For the using a weapon from which death is likely to ensue, imports
a mischievous disposition, and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore if you should think the stake was an improper instrument, you will further consider whether it is probable that it was used with an intent to kill. If you think it was, you must find the prisoner Guilty of Murder. But on the contrary, if you are persuaded that it was not done with an intent to kill, the crime will then amount at most to manslaughter." The verdict was manslaughter.

45. Lastly, in this regard, there is The King v. Oneby (76) (1727) 2 Ld Raym 1485 (92 ER 465). The accused was convicted of murder when he killed the deceased in a fight. The court found that the accused had malice towards the deceased for some time before the fight, thus negating the defence of provocation. In its deliberations, the court discussed murder and manslaughter, saying (77) ibid., at pp 1488-1489 pp 467-468 of ER murder is the proper verdict where the accused:
"strikes at him B., the deceased with any dangerous weapon, as a
pistol, hammer, large stone, etc. which in probability might kill B. or do him some great bodily hurt ... this will be murder ... since in all probability it might have occasioned B.'s death, or done him some great bodily harm, the law implies malice prepense". And, further (78) ibid., at p 1489 (p 468 of ER):

> " Malice express, is a design formed of taking away another man's life, or of doing some mischief to another, in the execution of which design death ensues."

46. Rowley's Case, Turner's Case and Wiggs are all consistent with the Stephen/Windeyer J. battery manslaughter doctrine. But the three cases are also consistent with reasoning directed to the doing of an unlawful and dangerous act resulting in death. If anything, that seems to be the more likely explanation since the distinction between the degrees of intent to cause harm was not mentioned in the judgments. In these circumstances, there is no authority which should constrain this Court to accept the correctness of the battery manslaughter doctrine.

Conclusion

47. The notion of manslaughter by the intentional infliction of some harm carries with it the consequence that a person may be convicted of manslaughter for an act which was neither intended nor likely to cause death. In this context we do not think it is helpful to speak in terms of reasonable foreseeability; the concept is one likely to cause confusion (79) See, in a different context, Royall v. The Queen (1991) 172 CLR 378, at pp 390, 412-413, 424-425. But it is appropriate to observe that in such a case a person may be held guilty of manslaughter for a death that was quite unexpected, whether the test applied in that respect is subjective or objective. It may be said that the same is true of unlawful and dangerous act manslaughter. But the criticism loses its force if the test in Holzer is applied so that, before a conviction may ensue, a reasonable person would have realised that he or she was exposing another to an appreciable risk of really serious injury.

48. However, the utility of a qualifier such as "really" is very questionable. "Serious" and "really serious" may have quite different connotations in some situations (80) See The Queen v. Perks (1986) 41 SASR 335, at p 337, as to the use of "serious bodily harm" instead of "grievous bodily harm" in directions as to murder. While the Holzer direction does not seem to have given rise to difficulties in this regard, the emphasis on really serious injury brings manslaughter perilously close to murder in this respect. The distinction between the two may easily be blurred in the minds of the jury. It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of serious injury. A direction in those terms gives adequate recognition to the seriousness of manslaughter and to respect for human life, while preserving a clear distinction from murder. The approach in Holzer takes away the idea of unexpectedness to a large extent. It does not remove it entirely but then we are not in the area of murder (and its relevant intent) but in the area of manslaughter.

49. Manslaughter by an unlawful and dangerous act (in the Holzer sense) is a relevant and appropriate category of manslaughter. Manslaughter by the intentional infliction of some harm answers neither

description. It continues the rigour of the early common law and ought to play no part in contemporary law. This approach leaves 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. There have been suggestions that these two categories should be replaced by one (81) See, for example, Law Reform Commission, Victoria, Discussion Paper No.13, Homicide, (1988), p 68. But, as the law stands, there are differences between them. In the case of manslaughter by criminal negligence, it is unnecessary to prove that the accused's act was unlawful (82) Andrews v. D.P.P. (1937) AC 576. And the tests of dangerousness are different. An appreciable risk of serious injury is required in the case of manslaughter by an unlawful and dangerous act. For manslaughter by criminal negligence, the test is "a high risk that death or grievous bodily harm would follow" (83) Nydam v. The Queen (1977) VR 430, at p 445. As the question of criminal negligence was not relied on in the present appeal, we need say no more as to the appropriateness of the distinctions that presently exist between this category of manslaughter and manslaughter by an unlawful and dangerous act (84) The approach taken in this judgment does not necessarily conflict with the concept of manslaughter under the Criminal Codes. Notwithstanding the existence of an unlawful and dangerous act, the "accident" provision of the Codes may operate to relieve an accused of responsibility for a consequential death: The Queen v. Martyr (1962) Qd R 398. But, it would still be open to an accused, charged with manslaughter at common law, to argue that his or her unlawful and dangerous act did not cause the death.

50. Adoption of the test in Holzer as to the level of danger applying to manslaughter by an unlawful and dangerous act and abolition of battery manslaughter do not create a gap in the law. Cases of death resulting from a serious assault, which would have fallen within battery manslaughter, will be covered by manslaughter by an unlawful and dangerous act. Cases of death resulting unexpectedly from a comparatively minor assault, which also would have fallen within battery manslaughter, will be covered by the law as to assault (85) See Willis, op.cit., at pp 120, 124. A conviction for manslaughter in such a situation does not reflect the principle that there should be a close correlation between moral culpabilility and legal responsibility, and is therefore inappropriate.

The direction and the proviso

51. In the present case the trial judge's direction to the jury fell short of what is required by Holzer in two respects.

52. First, the jury were not invited directly to resolve for themselves whether the punch administered by the appellant constituted an assault and therefore an unlawful act. But, as suggested earlier in this judgment, it is hard to conceive of the punch as being other than an assault in the circumstances. As King C.J. pointed out (86) Wilson (1991) 53 A Crim R, at p 287:

"The only suggested justification, however, was self-defence and
that was negatived by the verdict of the jury."

53. There remains the further question: were the jury sufficiently directed to assess whether a reasonable person, in the appellant's position, would have realised that, in punching the deceased, he was exposing him to an appreciable risk of serious injury? The trial judge spoke of a "dangerous act" without identifying what that meant. The jury might well have thought that if the punch carried a risk of injury to the deceased, not necessarily an appreciable risk of serious injury, that was enough to constitute manslaughter. In applying the proviso, King C.J. said (87) ibid., at p 288:

"A deliberate blow to the face of the kind described by the
appellant gives rise to an inescapable inference that he intended to cause some harm. If that issue had been left to the jury the answer would have been inevitable." The first sentence in the passage is logically supportable, though it has overtones of battery manslaughter. It is the second sentence that causes problems. In the end the jury had to determine whether the appellant's act in punching the deceased was, from the standpoint of a reasonable person, an act carrying with it an appreciable risk of serious injury to the deceased. They were not so directed; they were told to consider whether it was a dangerous act. The distinction is not merely semantic. An act may be dangerous without carrying with it an appreciable risk of serious injury and, unless the two elements are brought to the minds of the jury, there is a real danger that they may wrongly convict of manslaughter. The answer the jury may have reached in the present case, had they been adequately directed, cannot be assumed.

54. It is not possible to conclude that no substantial miscarriage of justice occurred and it is therefore not

appropriate to apply the proviso in s.353(1) of the Act. The appeal should be allowed, the conviction for manslaughter quashed and a new trial on that charge ordered.

BRENNAN, DEANE AND DAWSON JJ. This appeal raises the question of the proper direction to be given to a jury in a case where manslaughter by an unlawful and dangerous act is alleged. More particularly, the focus is upon what is meant in this context by a "dangerous act", for there are conflicting decisions which need to be resolved.

2. There is now no difficulty about what constitutes an unlawful act for the purpose of this offence. An unlawful act is one which is contrary to the criminal law. Criminal negligence in the performance of an act which is otherwise lawful is not an "unlawful act". Where an act of that kind is involved, the case is one of manslaughter by criminal negligence, not manslaughter by an unlawful and dangerous act.

3. The conflict of authority may be simply stated. In England it is said that an act which is likely to injure another person is a dangerous act (88) Larkin (1942) 29 Cr App R 18, at p 23. This simple test has been elaborated by the proposition that the act "must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm" (89) Reg. v. Church (1966) 1 QB 59, at p 70; see also D.P.P. v. Daley (1980) AC 237, at p 246. On the other hand, in Victoria in Reg. v. Holzer (90) (1968) VR 481. Smith J. said that an act is a dangerous act for these purposes if it is an act such that "a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury" (91) ibid., at p 482.

4. Upon any view the test is an objective one. The prosecution does not need to prove that the accused intended to commit a dangerous act; it merely has to prove that he committed an unlawful act and it is sufficient that, viewed objectively, it is a dangerous act. Of course, in proving the unlawful act the prosecution must establish any mental element which is an ingredient of its unlawfulness.

5. There is a significant difference between, on the one hand, an act involving the risk of some harm, albeit not serious harm, and, on the other hand, an act involving an appreciable risk of really serious injury. The latter involves a risk of grievous bodily harm (to use the older, but perhaps more telling, expression) which, if it were intended, would support a conviction of murder rather than manslaughter. It may be that Smith J. in Holzer recognized that he was setting the sights somewhat high in propounding the test which he did for a dangerous act, because in that case he recognized a third category of involuntary (in the sense that the death was unintended) manslaughter in addition to manslaughter by criminal negligence and manslaughter by an unlawful and dangerous act. This third category was something which has become known as battery manslaughter. It is said to occur where there is an intentional and unlawful application of physical force resulting in death, the force being applied with the intention of doing some physical injury which may be of a minor character although not merely trivial or negligible injury (92) ibid., at p 483. Therefore, for battery manslaughter, if it exists, the act need not be intended to cause serious injury but may involve something less than that. It may be surmised that in Holzer, where the accused punched the deceased causing him to fall backwards and to strike his head on the road, the manslaughter of which the accused was found guilty was more likely to have been battery manslaughter than manslaughter by an unlawful and dangerous act. At all events the accused's actions clearly fulfilled the test laid down in that case for battery manslaughter more readily than they fulfilled the test there laid down for manslaughter by an unlawful and dangerous act.

6. In England, the courts have not recognized so-called battery manslaughter as a third category of involuntary manslaughter. Battery manslaughter is embraced by manslaughter by an unlawful act which "all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm". Battery manslaughter appears in its modern setting to be a peculiarly Australian conception, stemming largely, if not wholly, from the view expressed by Windeyer J. in two cases in this Court. The first is Mamote-Kulang v. The Queen (93) (1964) 111 CLR 62 where, after quoting from Hale's Pleas of the Crown, he said (94) ibid., at p 79:
"If death is a consequence, direct not remote, of an unlawful act
done with intent to do grievous bodily harm, it is murder. If it is a consequence, direct not remote, of an unlawful act done with intent to hurt but not to do grievous bodily harm, it is manslaughter. To prevent misunderstanding, I should add at this point that, whatever may have been the position in earlier times, it is not now enough to constitute manslaughter at common law that a man is killed in the course of an unlawful

act of any kind. To make an unintended and unexpected killing a crime at common law, it must now be, generally speaking, the result of an unlawful and dangerous act, or of reckless negligence. There is, however, no doubt that at common law a man is guilty of manslaughter if he kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm." Windeyer J. reiterated this view in Timbu Kolian v. The Queen (95) (1968) 119 CLR 47, at p 68.

7. The passage from Hale upon which Windeyer J. relied was as follows (96) Hale, The History of the Pleas of the Crown, (1736), vol.I, p 472.:
"he that voluntarily and knowingly intends hurt to the person of a
man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least, as if A. intends to beat B. but not to kill him, yet if death ensues, this is not per infortunium, but murder or manslaughter, as the circumstances of the case happen". The "intention" of which Hale speaks is not a specific intent by A to cause harm as the result of his beating B, but merely deliberateness in inflicting the beating. Hale's meaning appears more clearly in his Pleas of the Crown: A Methodical Summary, where Hale said (97) Hale, Pleas of the Crown: A Methodical Summary, (1678) (1972 reprint), pp 57-58:

> "What unlawful act, whereupon death ensuing will make Manslaughter? If the unlawful act be deliberate, and tend to the personal hurt of any immediately, or by way of necessary consequence, death ensuing, is Murder. But if either such deliberation or intent of personal hurt be wanting, Manslaughter. Two play at Foils, and one kills the other, Manslaughter. ... A man throws a stone at another, which glanceth and killeth another, Manslaughter; and not Murder, because no malicious intent to hurt; not per infortunium, because doing an unlawful act." (underlining added)

The distinction made by Hale appears to be between the deliberate and accidental infliction of personal hurt (98) In D.P.P. v. Newbury (1977) AC 500, at p 507, Lord Salmon clearly uses "intentionally" with the meaning "deliberately". and appears to be a step in the gradual tempering of the rigour of a law which at first regarded any unlawful act causing death as murder. There is little point to be served in tracing the steps in that process which resulted in the emergence of unintentional homicide as a crime distinct from murder. It is sufficient that by the time Larkin was decided in England it was accepted that (99) (1942) 29 Cr App R, at p 23:

> "Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter."

The emergence of this doctrine was previously discernible in cases such as Reg. v. Franklin(100) (1883) 15 Cox CC 163. and Reg. v. Senior(101) (1899) 1 QB 283. It was accepted in Victoria in Reg. v. Turner where the Full Court said (102) (1962) VR 30, at p 34:

> " The correct statement of law is that a man is prima facie guilty of manslaughter if he, without having any intention to kill or do grievous bodily harm, kills another by an act which is both unlawful and dangerous."

8. It was in Reg. v. Church (103) (1966) 1 QB, at p 70. that Edmund Davies J. introduced the gloss of "the risk of some harm resulting therefrom, albeit not serious harm" upon the simpler test of what was a dangerous act laid down in Larkin, namely, an act "likely to injure". In D.P.P. v. Newbury (104) (1977) AC, at p 507. Lord Salmon said that Edmund Davies J. "did not intend to differ from or qualify anything which had been said in Rex v. Larkin". That being so, we think the simpler test conveys more nearly the sense in which the word "dangerous" is used in the context of an unlawful and dangerous act, although it cannot be said that any act likely to injure, however slight the injury which is likely to occur, is a dangerous act. After all, what amounts to a dangerous act is a matter of degree and is a question ultimately for the jury. The question whether the unlawful act of the accused was dangerous must be answered by reference to the degree of risk and the nature of the possible injury. It is, we think, supererogation to attempt any further elaboration of the term.

9. It is difficult to discern the origin of the test which Smith J. posed in Holzer. He said (105) (1968) VR, at p 482:
"Authorities differ as to the degree of danger which must be
apparent in the act. The better view, however, is I think that the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury." We are unaware of the differing authorities to which Smith J. referred. Moreover, we are unable to see why, in assessing an act as dangerous, it is necessary to disregard the risk of any injury which does not fall within the category of grievous bodily harm. As we have said, the nature of the injury as well as the degree of risk is a matter to be taken into account and a risk of injury where either the risk or the injury is merely trivial or negligible will not suffice to make the relevant act dangerous. But the definition of "dangerous" is not clarified by a more detailed analysis.

10. Perhaps Smith J. in Holzer wished to achieve some approximation between the formulation of criminal negligence which he adopted for the purpose of manslaughter by criminal negligence and his definition of a dangerous act. In relation to criminal negligence he said (106) ibid:
"the accused must be shown to have acted not only in gross breach of
a duty of care but recklessly, in the sense that he realized that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk". In so defining criminal negligence, Smith J. brought the concept of manslaughter by criminal negligence to a point where it was very difficult to separate it from murder by reckless indifference as explained by this Court in Reg. v. Crabbe (107) (1985) 156 CLR 464; cf. Nydam v. The Queen (1977) VR 430.

11. Alternatively, perhaps, the reference in Holzer to "an appreciable risk of really serious injury" is derived from the judgment of Sholl J. in Reg. v. Longley (108) (1962) VR 137, at p 141 where he observed that there is authority for the view that, for the purposes of manslaughter by an unlawful and dangerous act, the assault "must be of a character such that the accused must have realized that it involved an appreciable danger of death or serious injury". There seems to be no authority to support what Sholl J. said in posing a subjective rather than an objective test.

12. In Australia there has been no clear adoption of the test for manslaughter by an unlawful and dangerous act laid down in Holzer other than in Victoria(109)(109) See in Victoria, Reg. v. Wills (1983) 2 VR 201; Crusius (1982) 5 A Crim R 427. See elsewhere, Reg. v. Croft (1981) 1 NSW LR 126; Coomer (1989) 40 A Crim R 417; Ward v. The Queen (1972) WAR 36; Reg. v. McCallum (1969) Tas SR 73. In Pemble v. The Queen (110) (1971) 124 CLR 107, at p 134. Menzies J. quoted from the judgment of Smith J. in Holzer, apparently without disapproval. On the other hand, Barwick C.J.(111) ibid., at p 122. viewed the test laid down in Larkin - an act which is likely to injure another person - as "presently appropriate". McTiernan, Windeyer and Owen JJ. did not deal with the precise point.

13. In Boughey v. The Queen (112) (1986) 161 CLR 10. Brennan J., being in dissent, was the only member of the Court who found it necessary to consider the question of death following "an unlawful act" causing unintended bodily harm. He observed that s.156(2)(c) of the Tasmanian Criminal Code, which declares that homicide is culpable when it is caused by any unlawful act, "states the common law in conventional terms and is to be construed accordingly"(113)ibid., at p 35. He said(114) ibid., at p 36:
" The common law as laid down in Newbury is imported into the Code
by par. (c) of s. 156(2). The Code offers no other definition of the term 'unlawful'. However, there is at least a verbal difference between the statement of the principle by Humphreys J. in Larkin and the statement of the principle by Edmund Davies J. (as he then was) in Church (115) (1966) 1 QB, at p 70, though it is clear that both of their Lordships propound an objective test. Humphreys J. speaks of the act as 'an act which is likely to injure another person' (116) (1942) 29 Cr App R, at p 23; Edmund Davies J. describes the act as one which, objectively considered, 'must subject the other person to, at least, the risk of some harm ... albeit not serious harm'. But what was said in Church marked no new departure. Indeed, in Newbury neither Lord Salmon nor Lord Edmund Davies (117) (1977) AC, at p 509 saw any novelty in Church. It seems, then, that in relation to manslaughter by unlawful and dangerous act (criminal negligence apart), the test of likelihood of injury to another person is no higher than or different from the test of subjecting another to a risk of bodily harm. That is the risk which, if foreseeable by sober and reasonable people, makes an unlawful act dangerous so that death which is caused thereby is manslaughter."

14. Once it is accepted that the test in a case of manslaughter by an unlawful and dangerous act is that of the existence, objectively determined, of a likelihood or risk of injury such that it can be said that the act in question was dangerous, there is no function for the so-called battery manslaughter doctrine. If the test were to be set at the higher level suggested by Smith J. in Holzer, then there would be a gap in the law which could be filled only by some such doctrine. One principle which stands higher than all others in the criminal law is the sanctity of human life. If manslaughter by an unlawful and dangerous act were limited to cases where the act in question exposed another or others to grievous bodily harm, there would be a need for the law to hold at the same time that, where a person deliberately and without lawful justification or excuse causes injury to another which is not trivial or negligible and that other dies as a result, the crime of manslaughter is committed. There would be a need because the law does and should regard death in those circumstances with gravity. In Giorgianni v. The Queen (118) (1985) 156 CLR 473, at p 503, Wilson, Deane and Dawson JJ. cited as an accurate statement of the law a passage from the judgment of the Court of Criminal Appeal in Reg. v. Creamer (119) (1966) 1 QB 72, at p 82 that included the following:
"A man is guilty of involuntary manslaughter when he intends an
unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault, or, in the present case, abortion. This can no doubt be said to be illogical, since the culpability is the same, but nevertheless, it is an illogicality which runs throughout the whole of our law, both the common law and the statute law." Of course, not every case of manslaughter is of the same gravity. As Lord Salmon pointed out in Newbury (120) (1977) AC, at p 507 cases of manslaughter vary infinitely in this respect. That is the utility of the offence. It enables the law to express forcefully its regard for human life, at the same time allowing the particular circumstances to be reflected in the penalty imposed.

15. And if, as we think is the law, the test for a dangerous act is no more than whether there is a sufficient likelihood or risk of sufficient injury to enable the act to be characterized as dangerous, then any offence of battery manslaughter, if it emerged at some time in the diverse history of the crime of manslaughter, has been subsumed in the crime of manslaughter by an unlawful and dangerous act. A battery is always unlawful and the only question now is whether the act involved is at the same time dangerous.

16. In this case the appellant, on his own evidence, struck the deceased in the face with sufficient force to cause him to fall to the ground. He described the blow as not "really that very hard" but not soft. The trial judge directed the jury:
"A serious assault - you may think the punch by Wilson or the
hitting of the head on the concrete by Cumming to be serious assaults - would be an unlawful act for this purpose. Whether the particular act you are considering is a dangerous act is a matter for your judgment." Whilst that direction was less helpful than it might have been, it was not, in the circumstances, inadequate. Clearly the act in question exposed the deceased to injury and it was open to the jury to find that it was dangerous.

17. The appellant relied on two further grounds of appeal with which it is necessary to deal briefly. In his summing up the trial judge told the jury that the verdicts which were open to them in relation to both the appellant and his co-accused (Cumming) were murder, manslaughter or acquittal. He continued: "(t)here are now two matters of law relevant only to Wilson arising out of those possible verdicts". The first of these matters was provocation about which the trial judge gave a lengthy direction and as to which no question arises on this appeal. The second of these matters was self-defence, as to which his Honour gave a somewhat briefer direction, saying:
"If you think there is a reasonable possibility that the accused,
Wilson, believed on reasonable grounds that it was necessary in his own defence to hit Ormsby the deceased as he did, in other words, that he acted in self-defence and in so doing did not use more force to defend himself than was necessary, even though you think the blow caused Ormsby's death, then your verdict will be that Wilson was not guilty of murder, for self-defence is a complete answer to a charge of murder. In that case too Cumming would not be guilty of anything." At the request of the jury, his Honour later repeated his direction to the jury on self-defence and repeated the passage we have set out above, although on this occasion his Honour omitted the words:

> "for self defence is a complete answer to a charge of murder. In that case too Cumming would not be guilty of anything."

In a memorandum of possible verdicts which was given to the jury by his Honour, he stated that they could:

> "7. ... find Wilson guilty of murder because he killed Ormsby with the intention of inflicting grievous bodily harm on him, and that he Wilson was not acting ... in self-defence ... 9. ... find Wilson guilty of manslaughter because he was engaged in an unlawful and dangerous act - the punch - but without the intention to cause grievous bodily harm, and not acting in self defence, and as a result of which Ormsby was killed ... 10. ... find Wilson not guilty of either murder or manslaughter because although he caused the death of Ormsby by his punch, and did so with either intention to inflict grievous bodily harm or by an otherwise unlawful and dangerous act, he was acting in self defence ..."

18. The appellant submitted that in his summing up the trial judge did not put self-defence to the jury as a defence to manslaughter. He also contended that the trial judge failed to relate the plea of self-defence to the evidence.

19. The evidence to support a plea of self-defence was slight, to say the least. The appellant said in evidence: "A. I started to walk off, then I saw that the deceased had his

> fists down to his side and he went to raise one of his fists.
>
> Q. What did you think was going to happen. A. I thought he was going to hit me. Q. So what did you do. A. That's when I hit him."

The trial judge read these questions and answers to the jury in his summing up and subsequently repeated the appellant's assertion that the deceased was the aggressor and that the appellant had punched him in self-defence. There was some evidence from other witnesses that the deceased had shouldered or elbowed the appellant before the appellant hit him.

20. Although the trial judge's first direction to the jury on the question of self-defence as a defence to manslaughter might have been more clearly put, it was in our view adequate to convey to the jury that both the appellant and his co-accused were to be acquitted on all counts if they found that the appellant acted in self-defence. Any ambiguity in the further direction would, we think, have been removed by the memorandum with which the trial judge provided the jury. We would observe that no objection was taken at the trial to this aspect of the trial judge's directions.

21. Nor do we think that there was any failure on the part of the trial judge to relate the plea of self-defence to the evidence. The relevant facts were, as we have indicated, few and not complex. In the circumstances of this case it was, in our view, sufficient for the trial judge to deal with them as he did.

22. For these reasons, we would dismiss the appeal.

Orders

Appeal allowed.

Set aside the order of the Court of Criminal Appeal of South Australia. In lieu thereof quash the conviction for manslaughter and order that there be a new trial on that charge.