HIGH COURT OF AUSTRALIA

Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.

BOUGHEY v. THE QUEEN
(1986) 161 CLR 10
6 June 1986

Criminal Law (Tas.)

Criminal Law (Tas.)—Murder—Reckless indifference to consequences—Knowledge of possibility of death—Action "likely to cause death"—Whether accused "ought to have known"—Whether hostile intent required—Criminal Code (Tas.), s. 157.

Decisions

GIBBS C.J.: I have had the advantage of reading in draft the judgment which has been prepared by Mason, Wilson and Deane JJ. Subject to the matters mentioned hereunder, I am in respectful agreement with what their Honours have said.

2. The first ground which was argued on behalf of the applicant was that the learned trial judge misdirected the jury as to the meaning of the expression "likely to cause death" in s.157(1)(b) and 157(1)(c) of the Criminal Code Act 1924 (Tas.), as amended. In the course of discussing the effect of s.157(1)(b) his Honour said:

> "The expression 'likely to cause her death' is another of these somewhat generalised expressions in the English language which most of us understand perfectly well, but would not (sic) find it difficult to define exactly. However, if something is likely to happen, there is a good chance that it will happen. It is something that may well happen. You might say about it 'It may not happen, but there is a good chance that it will.' It's likely to happen. Well, if he intended to cause her bodily harm within the meaning of that definition, was it bodily harm which he knew was likely to cause her death in the circumstances? That, of course, involves his knowledge about what carotid artery pressure involved, what the possibilities of it were, what the nature of the act and its consequences were."

A little later his Honour continued:

> "Was what he intended bodily harm within the meaning of that expression? If it was, was it bodily harm which he knew. That means which he in his own mind knew was likely to cause her

death in the circumstances. Was it likely to cause her death in the circumstances? That depends on the medical evidence, no doubt."

He gave no direction in relation to the same words in s.157(1)(c), but the jury were entitled to regard the direction as to the effect of par.(b) as applying to par.(c) also.

3. As Mason, Wilson and Deane JJ. have pointed out, this Court, in Reg. v. Crabbe (1985) 59 ALJR 417; 58 ALR 417 treated the words "likely" and "probable" as synonomous. The same view had earlier been expressed by the Supreme Court of South Australia in Reg. v. Hallett (1969) SASR 141, at p 153. In both those cases the Court was concerned to consider what mental element was necessary at common law to constitute the crime of murder. That question does not arise in the present case, and it is unnecessary to discuss whether anything that was said in Crabbe requires reconsideration in the light of the judgments of the House of Lords in Reg. v. Moloney (1985) AC 905 (which had not been reported when the judgment in Crabbe was given) and Reg. v. Hancock (1986) 2 WLR 357; 1 All ER 641. It will of course be remembered that the criminal law in Australia took a different turn from that in England when this Court in Parker v. The Queen (1963) 111 CLR 610 refused to follow Director of Public Prosecutions v. Smith (1961) AC 290 but with the enactment in the United Kingdom of s.8 of the Criminal Justice Act 1967 (U.K.) the paths have again to some extent converged. However, in so far as Reg. v. Hancock is relevant, it supports the view taken in Crabbe that in a murder case of that kind, at common law the jury is concerned with the question whether the accused knew that the act which caused the death would probably cause death or grievous bodily harm, and not with the question whether the accused knew that it might possibly do so.

4. It is trite to say that the meaning of a word will be influenced by the context in which it appears. In my opinion the word "likely" in ss.156 and 157 of the Criminal Code Act means "probable" and not "possible". That is its natural meaning. It is the meaning which a draftsman, familiar with the common law rules regarding malice aforethought, might be expected to attribute to it. In any case, if the expression were thought to be ambiguous, the doubt should be resolved in favour of the liberty of the subject. If "likely" in s.157(1)(c) were regarded as meaning "possible", that provision would have a very drastic operation, since it would treat as murder a culpable homicide caused by any unlawful act which the offender knew would possibly cause death. A death in those circumstances might understandably be regarded as manslaughter, but it would be draconian to call it murder.

5. I respectfully agree that a trial judge, in directing a jury as to the meaning of s.157(1)(b) and (c), should not seek to put a gloss on the ordinary words of the section. In particular, the judge ought not to refer to such matters as "an odds on chance" or "a more than fifty per cent chance". It would however be helpful to the jury to explain that a possibility, as distinct from a probability, is not enough. On the other hand, it would be potentially misleading to suggest that an act was likely to cause death if there was a chance that it would cause death, since the word "chance" in its ordinary meaning includes "possibility" as well as "probability". In my opinion a judge directing a jury as to the effect of the section should avoid the use of the word "chance" even if qualified by such words as "good", "substantial" or "real". However, when the passage from the summing up of the learned trial judge in the present case is considered as a whole I do not think that it would have conveyed to the jury the notion that a possibility was enough. The emphasis throughout is on the word "likely", and although in one place the learned trial judge spoke of "possibilities", he nowhere equated "likelihood" with "possibility". In the circumstances I am not satisfied that the summing up contained a misdirection on this point. In any case the argument now advanced was not put to the Court of Criminal Appeal and the circumstances of the case are not such as to warrant the grant of special leave to appeal to this Court.

6. I could not usefully add to the discussion of the other aspects of the case which is contained in the judgment of Mason, Wilson and Deane JJ. I would accordingly refuse the application for special leave to appeal.

MASON, WILSON and DEANE JJ.: The applicant seeks special leave to appeal from a decision of the Tasmanian Court of Criminal Appeal (Green C.J., Cosgrove and Cox JJ.) dismissing an appeal from his conviction of murder. It is common ground that the applicant killed Miss Begum Mahjabi Ali by applying force or pressure to the region of the carotid arteries on both sides of her neck. The applicant's case at the trial was that he had applied this force or pressure not for the purpose of causing injury to the deceased but for the purpose of causing light-headedness and increased sexual excitement on her part in and for the purposes of

sexual activities in which they were engaging at the time.

2. The applicant was a qualified medical practitioner. The deceased was a Fijian woman with whom the applicant had corresponded and who had eventually come from Fiji to live with him in Hobart. The applicant claimed that he introduced the deceased to certain unconventional sexual activities including practices from which he derived masochistic pleasure and the particular practice or "technique" of applying pressure to the carotid arteries. According to the applicant, the deceased and he had practised that "technique" on one another on a number of occasions. The applicant claimed that he had applied it to the deceased only with her consent.

3. The applicant initially told the police that, on the night on which the deceased met her death, she had gone to bed early and that he had fallen asleep in the lounge room of the house in which they were living. He said that, when he woke up, he went into the bedroom and found that the deceased was not breathing. He attempted to revive her but was unsuccessful. She was dead.

4. Subsequently, the applicant changed his account of what had happened. He made a statement to the police in the following terms:

> "(Detective Sergeant ESTCOURT said,) 'To get this perfectly clear, is it correct that you went into the bedroom with Begum after dinner and stayed there in fact until Miriam arrived?'
>
> Dr. BOUGHEY said, 'Yes, that is right.'
>
> Sergeant BLUE said, 'As I have already said,
>
> Begum died as a result of manual strangulation, is there anything you wish to say about this now?'
>
> Dr. BOUGHEY said, 'What happened was I fell
>
> asleep with Begum, when I woke up I wanted Begum to become responsive, I put each of my thumbs to her carotid arteries and pressed, there was no immediate reaction, so I pressed harder.'
>
> Sergeant BLUE said, 'How long were you
>
> pressing her carotid arteries with your thumbs?'
>
> Dr. BOUGHEY said, 'Quite some time.'
>
> Sergeant BLUE said, 'Was she breathing before
>
> you started pressing?'
>
> Dr. BOUGHEY said, 'Yes, she was.'
>
> Sergeant BLUE said, 'Did you realise the
>
> implications as to what you were doing?'
>
> Dr. BOUGHEY said, 'I just wanted her to become
>
> more assertive.'
>
> Sergeant BLUE said, 'Did you intend to kill
>
> her?'
>
> Dr. BOUGHEY said, 'I don't really know, I

remember thinking of Miriam and that's about all.'

Sergeant BLUE said, 'Being a Medical

Practitioner didn't you realise how dangerous this action was?'

Dr. BOUGHEY said, 'Not at the time but I do

now.'"

The reference to "Miriam" in the above statement is to another woman with whom the applicant had a continuing sexual relationship at the time.

5. At the trial, the applicant again changed his account of how the deceased came to die. In sworn testimony, he claimed that whilst he and the deceased, who was fully conscious, were engaging in sexual activity, he applied the "carotid artery technique". The deceased suddenly vomited and went limp. The applicant attempted to revive her but she did not respond.

6. The main medical witness for the Crown was Dr. Cummings, the Director of the Department of Forensic Pathology at the Royal Hobart Hospital. He conducted a post-mortem examination of the deceased which disclosed substantial bruising of the neck. His evidence was to the effect that death had resulted from throttling or manual strangulation. Dr. Cummings advanced a number of more technical explanations of the cause of death. He expressed the opinion that death could have been caused by occlusion of the airway preventing the supply of oxygen to the lungs, by compression of the carotid arteries preventing the passage of blood to the brain or by pressure on a nerve complex called the carotid sinus which is situated at the point in the neck where the carotid artery branches. If death was caused by pressure on the carotid sinus, it would have been the result of a sudden cessation of the heart beat. For reasons which he explained, Dr. Cummings thought it probable that death was caused by interference with the supply of both oxygen (through occlusion of the airway) to the lungs and blood (through pressure on the artery) to the brain and possibly also by pressure on the carotid sinus, causing the heart to stop at some stage after the other two factors had become operative.

7. In the course of his summing up, the learned trial judge (Neasey J.) made available to the jury a written memorandum dealing with matters of law. Its effect was to instruct the jury that, on the uncontested premise that the applicant had killed the deceased by applying manual pressure to her neck, they should find him guilty of murder if they were satisfied beyond reasonable doubt of any of four possible sets of circumstances. Those possible sets of circumstances reflected the provisions of pars. (a), (b) and (c) of s.157(1) of the Tasmanian Criminal Code ("the Code") which is set out in Schedule 1 of the Criminal Code Act 1924 (Tas.) ("the Covering Act"). Those paragraphs of the Code read as follows:

"157 - (1) Subject to the provisions of section 160, culpable homicide is murder if it is committed

(a) with an intention to cause the death of any person, whether of the person killed or not;

(b) with an intention to cause to any person, whether the person killed or not, bodily harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death;

(c) by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person;"

8. The first of the four sets of circumstances, which the learned trial judge left to the jury as providing a possible basis of a verdict of guilty of murder, reflected the provisions of par.(a) of s.157(1). It was that the applicant applied manual pressure to the deceased's neck with the actual intention of causing her death.

Nothing turns upon it for the purpose of this application. The second possible set of circumstances, based on s.157(1)(b) of the Code, was that the applicant applied such manual pressure with the intention of causing the deceased bodily harm which he knew to be likely to cause her death in the circumstances. The third and fourth were based on s.157(1)(c) of the Code. The third was that the application of pressure by the accused to the deceased's neck was an unlawful act which the accused knew was likely to cause the death of the deceased in the circumstances. The fourth was that such application of pressure was an unlawful act which the accused "ought to have known" was likely to cause the deceased's death in the circumstances.

9. In this Court, the applicant has sought to rely on three distinct grounds of appeal. Each alleges error, in the form of omission and/or misdirection, on the part of the learned trial judge in his final directions to the jury. We shall deal with them in the order in which they were argued on behalf of the applicant. No objection was raised to any of those alleged errors at the trial and the material before the Court does not disclose the extent to which the particular matters in the summing up which have been subjected to subsequent criticism reflected the approach adopted by the parties in the actual conduct of the trial.

"Likely to cause death"

10. The last three of the above-mentioned four possible bases of a verdict of guilty of murder, namely those founded on s.157(1)(b) and s.157(1)(c) of the Code, contain an element that the accused either "knew" (s.157(1)(b) and first limb of s.157(1)(c)) or "ought to have known" (second limb of s.157(1)(c)) that his act of applying pressure to the deceased's neck in the manner and with the force and for the length of time that he did was "likely to cause death in the circumstances". It is submitted, on behalf of the applicant, that the learned trial judge misdirected the jury about what was involved in the notion of something being "likely" to cause death. In essence, the submission is that "likely", in the context of s.157 of the Code, means "more likely than not" or "odds on" or "more than a fifty percent" chance whereas his Honour directed the jury in terms which conveyed that the phrase "likely to cause death" meant merely that there was "a good chance" that death would ensue.

11. The Code contains no definition of the word "likely". Nor is there anything in its express provisions to indicate that the word "likely" in s.157(1) should be read as "more likely than not". The applicant's argument that the word should be so read involves two related steps. The first is that the word "likely", in s.157 of the Code, is a synonym of "probably". The second step is that, so understood, "likely" means "more likely than not" in the sense of more than a fifty percent chance. In support of those steps, particular reliance is placed upon the joint judgment of the Court in Reg. v. Crabbe (1985) 59 ALJR 417; 58 ALR 417.

12. Crabbe was an appeal from the Full Court of the Federal Court in a case where the jury had, at the trial, returned a verdict of guilty on five counts of murder against an accused who had driven a prime mover and trailer into the bar of a motel near Ayers Rock. Since the Criminal Code Act 1983 (N.T.) had not been passed at the times material to the case the decision was concerned with the content of the common law rules defining the mental element of common law murder in a case where the accused lacks an actual intent to kill or to do grievous bodily harm. The trial judge had directed the jury that it would suffice if the accused had foreseen "the possibility that there might be some people in the bar" but had not taken available steps to ascertain the actual facts. The Court held that, in such a case, knowledge by the accused of a mere possibility that his acts might cause death or grievous bodily harm does not suffice: knowledge of the probability or likelihood of such a result is necessary. In the course of the joint judgment (at pp.419-420; pp.420-421 of A.L.R.), the words "probable" and "likely" (and "probability" and "likelihood") were, on a number of occasions, used as synonyms. Both words were consistently used in contrast to "possible" (and "possibility").

13. It is unnecessary for the purposes of the present application to consider whether the knowledge of "probable" or "likely" consequences which suffices as an element of common law murder should ever be explained, in directions to a jury, as requiring knowledge of some precise degree of probability or likelihood such as "more probable or likely than not" or a minimum percentage figure or maximum gambling odds. It suffices to say that it is plain enough that, in many and perhaps most cases, any such explanation would be undesirable. In the ordinary case where an accused well knows that it is probable or likely that his acts will cause death or grievous bodily harm, he will not have had the occasion to consider, let alone attempt to calculate, the degree of mathematical probability that death or grievous bodily harm will in fact result. In such a case, it would be liable to mislead or to border on the unreal to direct the jury in terms which required

them to convert the knowledge of the accused into some such degree of mathematical probability. Certainly, there is nothing in the judgment in Crabbe (or, we venture to think, in the statements in previous judgments in this Court which were accepted and applied in that case) which was intended to suggest a requirement that a person accused of murder should have stayed to consider or attempt any such mathematical calculation or that a jury should be required to translate or transform the knowledge which an accused actually had into terms of mathematical probability.

14. It is true that the meaning of the words "probable" and "likely" is liable to vary according to the context in which they are used (see Tillmanns Butcheries Pty. Ltd. v. Australasian Meat Industry Employees' Union (1979) 42 FLR 331, at pp 346-347; Aust. Telecommunications v. Krieg (1976) 14 SASR 303, at p 311; Koufos v. C. Czarnikow Ltd. (1969) 1 AC 350, at pp 410-411). In the context of the content of the element necessary to constitute common law murder, the gravity of the charge requires that the content of the requirement that an accused knew of the probability or likelihood that his acts would cause death be not discounted. Even in that context, however, it will ordinarily suffice to convey what is involved in the requirement if the direction to the jury is framed in the words of the joint judgment in Crabbe, namely, that the accused knew that death or grievous bodily harm was the probable or likely consequence of his act and if reference is made to the distinction which was there stressed, namely, the distinction between what is probable or likely on the one hand and what is only possible on the other. Be that as it may, however, one finds strong support in the Code itself for the conclusion that the word "likely" was not used in s.157(1) with the meaning for which the applicant contends.

15. The words "likely to cause death" in s.157(1) follow their use in s.156(2) where "culpable homicide" is defined to include:

> "Homicide ... caused--
>
> (a) by an act intended to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and which is not justified under the provisions of the Code;"

Section 157(1), which designates the cases in which "culpable homicide" is murder, is structured upon the definition of "culpable homicide" in s.156. Presumably, it was not intended to use the words "likely to cause death" in s.157(1) with a meaning different to that with which they were used in s.156(2)(a). In the context of the express provision of s.156(5) that "(h)omicide that is not culpable is not punishable", it would seem plain enough that the words "likely to cause death" in s.156(2)(a) are not used in a sense which would exclude from "culpable homicide" an intentional act which obviously involved a substantial risk of death or bodily harm to another unless the act was also "commonly known" to be more likely than not, in the sense of an "odds on chance", to cause such death or bodily harm. In our view, the word "likely" is used in both ss.156(2)(a) and 157(1) with what we apprehend to be its ordinary meaning, namely, to convey the notion of a substantial - a "real and not remote" - chance regardless of whether it is less or more than fifty percent (cf. Sheen v. Fields Pty. Ltd. (1984) 58 ALJR 93, at p 95; 51 ALR 345, at p 348; Waugh v. Kippen, unreported, High Court of Australia, 20 March 1986, at pp 9-10 of the pamphlet).

16. There is a further reason why one should not superimpose upon the word "likely" in either s.156(2) or s.157(1) of the Code refinements of meaning which the word does not convey as a matter of ordinary language. A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary (see Jolowicz, Historical Introduction to the Study of Roman Law (1939), pp.491-492; Gray, The Nature and Sources of the Law (1909) pp.176-177). The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty. To bury the word "likely" in s.157(1) of the Code beneath the gloss of "more likely than not" and the explanation of "a more than fifty percent" or an "odds on" chance would be to succumb to that danger. It would also, in our view, be to attribute to the word "likely" a requirement of a specific degree of mathematical probability which the word does not convey either as a matter of ordinary language or in its context in s.157(1) of the Code.

17. The written memorandum which the learned trial judge furnished to the jury in the present case strictly followed the terms of s.157(1)(b) and s.157(1) (c) of the Code in its use of the words "likely to cause ... death in the circumstances". The applicant's objection is not, however, to the use of those words or to the absence of further explanation of them in that memorandum. It is to a passage in the record of his Honour's oral directions to the jury which reads as follows:

> "The expression 'likely to cause her death' is another of these somewhat generalised expressions in the English language which most of us understand perfectly well, but would not find it difficult to define exactly. However, if something is likely to happen, there is a good chance that it will happen. It is something that may well happen. You might say about it 'It may not happen, but there is a good chance that it will.' It's likely to happen. Well, if he intended to cause her bodily harm within the meaning of that definition, was it bodily harm which he knew was likely to cause her death in the circumstances? That, of course, involves his knowledge about what carotid artery pressure involved, what the possibilities of it were, what the nature of the act and its consequences were."

18. It is obvious that the word "not", where first appearing in the above passage, is the result of either a typographical error or a slip of the tongue. No complaint is, or could properly be, made about that, however, since his Honour's intended meaning is quite clear. Otherwise, it appears to us that the above passage contained helpful and correct guidance for the jury about the expression "likely to cause death" in s.157(1) of the Code. His Honour's comments clearly and properly made the point that, whatever may be the difficulties of precise definition, the expression "likely to cause death" in s.157(1) is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility: "a good chance that it will happen"; "something that may well happen"; something that is "likely to happen". In our view, those comments went as far as was desirable in the circumstances of the case. His Honour was correct in not introducing an added requirement either that the applicant directed his mind to, or attempted to calculate, the degree of mathematical probability that his acts would cause death in the circumstances or that the applicant knew or ought to have known that it was "more likely than not" or an "odds on chance" that his actions would cause death in the circumstances.

19. It follows that there is no substance in this proposed ground of appeal.
Requirement of "hostility" or "hostile intent".

20. The second basis upon which the applicant attacks the learned trial judge's summing up to the jury turns on the meaning of "unlawful act" for the purposes of par.(c) of s.157(1) of the Code. His Honour's directions to the jury were to the effect that the application of physical force or pressure to the neck of the deceased would, in the circumstances of the case, have been an unlawful act for the purposes of that paragraph if it were done without the consent of the deceased. It was submitted, on behalf of the applicant, that his Honour should have directed the jury that the applicant's act of applying force or pressure to the neck of the deceased was unlawful only if that act was done not only without the consent of the deceased but with positive "hostility" or "hostile intent" on the part of the applicant towards the deceased. In the context of the summing up as a whole and of the absence of any objection at the trial, it would seem doubtful whether any error on the part of the learned trial judge in failing to give such a direction would be of any real, practical significance. It is, however, convenient to consider whether such a direction would have been correct.

21. Section 182(1) of the Code defines an "assault" as:

> "the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any gesture to apply such force to the person of another if the person making the attempt or threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; or the act of depriving another of his liberty."

The first limb of that definition (i.e. the actual application of force) may be likened to common law battery. The second limb (i.e. threatening or attempting to apply force) may be likened to common law assault. Plainly enough, the application of force to the neck of the deceased in the manner which caused her death in the present case constituted an assault within the meaning of the words of the first limb of the definition. It was an "act of intentionally applying force to the person of another, directly".

22. Section 184 of the Code provides that "(a)ny person who unlawfully assaults another is guilty of a crime". The Code does not define the content of the added ingredient "unlawfully". Some help may, however, be obtained from s.8 of the Covering Act which provides that "(a)ll rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, except in so far as they are altered by, or are inconsistent with, the Code". It would seem to be clear enough, in the light of s.8, that an assault is unlawful for the purposes of the Code unless it is justifiable or excusable under particular provisions of the Code or according to rules and principles of the common law whose applicability is not excluded by the express provisions of the Code (see Vallance v. The Queen (1961) 108 CLR 56, at pp 67 and 78-79). As Burbury C.J. commented in Phillips v. The Queen (1971) Tas.SR 99, at p 107:

> "...in this context 'unlawful' means not justified or excused by law, and ... by virtue of s.8 of the Criminal Code Act 1924 justification or excuse for an assault is not confined to matters enumerated in the Code, but extends to all matters of justification or excuse which may be found in the principles of the common law."

23. Section 182(3) of the Code expressly deals with one of the circumstances which would, at common law, not suffice to constitute a common law battery. It excludes from an "assault" any "act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion". The effect of this provision is to exclude from an "assault", for the purposes of the Code, commonplace, intentional but non-hostile acts such as patting another on the shoulder to attract attention or pushing between others to alight from a crowded bus. Such acts are, if committed inoffensively, regarded by the common law as ordinary incidents of social intercourse which do not, without more, constitute battery. Section 182(4) of the Code deals with another of the more common excuses or justifications for what would otherwise be an unlawful battery at common law or an "unlawful assault" for the purposes of the Code. It provides that, subject to some qualifications and exceptions, "an assault is not unlawful if committed with the consent of the person assaulted". The Code also expressly deals with most of the other circumstances in which what would otherwise be battery (or "assault" for the purposes of the Code) is justified or excused by common law principles: due execution of the law (ss.21-32), lawful correction (s.50), reasonable prevention of criminal activity (ss.34-39) and defence of person or property (ss.40-49). The most obvious of the circumstances of justification or excuse at common law in respect of which the Code contains no express provision is the non-hostile application of force to a person to rescue or protect him or her from danger or injury (see below). Apart from the question of consent which the learned trial judge left to the jury in terms of which the applicant makes no complaint, it is not suggested that any of these other circumstances of justification or excuse was involved in the present case.

24. There is strong authority for the proposition that the application of force to another, "be it never so small", will constitute common law battery if it is "actually done to the Person of a Man, in an angry, or revengeful, or rude, or insolent Manner, as by Spitting in his Face, or any Way touching him in Anger, or violently justling him out of the Way" (Hawkins, A Treatise of the Pleas of the Crown, (1716) ch. LXII, sect.2, p.134). It has never, however, been the common law that actual hostility or hostile intent towards the person against whom force is intentionally applied is a necessary general ingredient of an unlawful battery. Where the existence of hostility or hostile intent may be of decisive importance is in a case which would otherwise be of the kind which s.182(3) excludes from "assault" for the purposes of the Code in that hostility or hostile intent may convert what would otherwise be unobjectionable as an ordinary incident of social intercourse into battery at common law or an assault for the purposes of the Code. Apart from such cases, however, the absence of such hostility or hostile intent towards the person to whom force is applied neither precludes the intentional application of force to the person of another from constituting battery at common law or assault under the Code nor, of itself, constitutes a justification or excuse for it.

25. It was not, and could not properly be, suggested that the fatal and intentional application of force to the deceased's neck in the present case constituted an ordinary incident of social intercourse. Nonetheless, it was submitted on behalf of the applicant that it would not have constituted common law battery unless it was accompanied by positive hostility or hostile intent towards the deceased and that, that being so, it did not constitute unlawful conduct for the purposes of s.157(1)(c) unless such hostility or hostile intent were present. It should be apparent from the foregoing that we are quite unable to accept that submission. Indeed, the mere formulation of the proposition that the intentional and fatal application of physical force to the carotid arteries of an unwilling victim cannot constitute common law battery unless accompanied by positive hostility or hostile intent towards the victim suffices to demonstrate its unacceptability. The applicant submits, however, that the proposition enjoys the support of statements in this Court in Reg. v. Phillips (1971) 45 ALJR 467. In particular, reliance is placed upon the judgment of Barwick C.J. in that case.

26. In the course of his judgment in Phillips, Barwick C.J. commented (at p.472):

> "Physical contact with a person may be a
>
> battery at common law. But it is not necessarily or universally so even if the contact is an intentional act and could be described as the application of force. Such contact is not a battery at common law, in my opinion, unless it is made in 'an angry, revengeful, rude, insolent or hostile manner', a description taken from Hawkin's Pleas of the Crown. Nor is it in my opinion necessarily a battery at common law to make contact with another for some purpose of the person making the contact in which the person touched or handled has, or could have an interest or benefit of his or her own, none of the other features of a battery being present."

Later (at p.473), the Chief Justice noted:

> "It seems to me that the absence of what I shall compendiously call 'hostility' in the performance of the intentional act applying force to the person of another can be properly described in common law terms as a justification for such an act."

Those passages must, however, be read in the light of the fact that the relevant issue in Phillips concerned whether the accused had moved the unconscious victim - to a place on a beach where she subsequently drowned when the tide came in - for the purpose of assisting or rescuing her in circumstances where she had been injured as a result of his prior act or for the hostile purpose of causing her further harm. To the extent that they provide literal support for the proposition that a physical attack upon a person cannot constitute common law battery unless accompanied by actual hostility towards the victim, they should not, in our respectful view, be accepted as good law. For our part, however, we read them as having no application to a case where the intentional physical contact is outside a "rescue" context and is not an incident of ordinary social contact but is, of its nature, likely to cause injury or affront to the person against whom the intentional application of force is directed. Thus, Barwick C.J. was at pains to point out (at p.473) that, in the case of an indecent assault, "the circumstances of the physical contact of one person with another which makes that contact indecent make it unnecessary upon a charge of indecent assult to establish some 'hostility' over or above the actual circumstances of the indecency and the contact of the two persons."

27. The applicant also relied upon McTiernan J's agreement in Phillips (at p.474) with the views which had been expressed by Burbury C.J. when the case was before the Tasmanian Court of Criminal Appeal and upon the judgment of Windeyer J. in this Court. Close examination discloses, however, that neither the judgment of Burbury C.J. (see 45 A.L.J.R., at p.481ff.; (1971) Tas. S.R. 99, at p.103ff.) nor that of Windeyer J. supports the proposition for which the applicant contends. Again, both judgments must be read in the light of the fact that the issue in Phillips was whether the accused had been rendering assistance to the injured victim. Thus, Burbury C.J. expressly stated (45 A.L.J.R., at p.484; (1971) Tas. S.R. at p.114) that "there were only two views reasonably open on the evidence: (1) that (the accused's action) was justified as an act done for the ultimate purpose of helping the girl; (2) that it was done for the purpose of doing her harm". Windeyer J's judgment was likewise predicated on the view that what was involved was a choice between whether "the accused was actuated by animosity or by solicitude" (at p.479). In that context, statements stressing the

decisive importance of "evil intent" or hostility on the part of the accused (see Burbury C.J., 45 A.L.J.R. at p.484; (1971) Tas. S.R. at p.114) should be read as directed to the facts of the particular case.

28. It follows that, properly understood, Phillips does not establish the general proposition that the intentional application of force to the person of an unwilling victim cannot constitute battery at common law or "assault" or "unlawful assault" under the Code unless it be accompanied or motivated by positive hostility or hostile intent on the part of the assailant towards the victim. Such hostility or hostile intent may well convert what might otherwise be unobjectionable as reasonably necessary for the common intercourse of life into assault under the Code or, as Phillips illustrates, preclude an excuse or justification of assistance or rescue. In the present case, however, the applicant's action was neither in a rescue or assistance context nor reasonably necessary for the common intercourse of life. It was an intentional, dangerous and, in the event, fatal application of force. On the assumption that it was without the consent of the victim, it satisfied the requirements of a battery at common law and an unlawful assault under the Code regardless of whether it was motivated by positive hostility or hostile intent towards the unwilling victim.

29. This ground of appeal also fails.
"Ought to have known"

30. The final ground upon which the applicant seeks to attack the learned trial judge's summing up relates to the words "ought to have known" in s.157(1)(c) of the Code. It is submitted that the requirement that the accused "ought to have known" that his actions were "likely to cause death in the circumstances" refers only to what the offender actually knew but failed to appreciate because of panic, passion, indifference, wilful blindness or the like. The learned trial judge erred, so it was said, in instructing the jury to pay regard to what the applicant would have found out if he had made inquiries rather than to what he actually knew.

31. After amendment of some typographical errors, the transcript record of the relevant passage in his Honour's summing up reads as follows:

> "The phrase to which I would like to direct your attention mainly here is 'ought to have known'. Here you consider what in your view the accused ought to have known in all his then relevant circumstances. All his then relevant circumstances would include many factors; (it) would include, for example, the fact that he is a medical practitioner, the nature of his medical practice over the years, his training, his sexual experiences, the extent to which, if any, his medical training and experience should have alerted him to the dangers of applying carotid artery pressure - assuming you accept the medical evidence - or the extent to which, if any, that experience, his experience, should have alerted him to the desirability of studying medical literature in order to acquaint himself with the dangers, if any, of such a practice and the physiological reactions involved and the like. All of those would seem to be relevant factors to the question of what he ought to have known about whether the act - applying the sort of pressure he applied - was likely to cause death in the circumstances. If it was, again an issue for you to decide. I have named only some of the relevant circumstances and it will be for you to consider all the circumstances which you consider relevant in order to decide what he ought to have known."

32. The words "ought to have known" are included in s.157(1)(c) as an alternative to "knew". Reliance upon them is necessary only in a case where it is not positively established that an accused actually knew that his act was likely to cause death. That does not, however, mean that the content of the knowledge laid at the door of an accused is to be assessed by reference to the notional knowledge and capacity of some hypothetical person. The starting point of the inquiry on the question whether an accused ought to have known that his or her actions were likely to cause death must be the knowledge, the intelligence and, where relevant, the expertise which the particular accused actually possessed. The relevant question is not whether some hypothetical reasonable person in the position of the accused would have appreciated the likely consequences of the applicant's act. It is what the particular accused, with his or her actual knowledge and capacity, ought

to have known in the circumstances in which he or she was placed. Inevitably, the word "ought" requires the making of a subjective judgment by a jury. The jury must be persuaded, on the criminal onus in the context of a murder trial, that the established circumstances were such that the particular accused, with the knowledge and the capacity which he or she actually possessed, ought to have thought about the likely consequences of his or her action. They must also be persuaded, again on that onus and in the context of such a trial, that if the particular accused had stopped to think to the extent that he ought to have, the result would, as a matter of fact, have been that he or she would have known or appreciated that the relevant act or acts were likely to cause death.

33. The learned trial judge's above direction to the jury adequately conveyed the essence of what was involved in the requirement that the applicant "ought to have known" that his act was likely to cause death in the circumstances. The repeated reference to the applicant, the emphasis which his Honour placed upon factors peculiar to the applicant, and the reference to whether the applicant should, in the circumstances, have been alerted to the dangers of his action, combined to make it clear that what was relevant was what the applicant himself, with his actual knowledge and capacity, ought to have known in the circumstances in which he was placed.

34. His Honour's remarks about the desirability of studying medical literature would, in our view, have been mistaken if they meant that there was to be imputed to the applicant the knowledge which he would have acquired if he had stopped to study such literature. As we have indicated, the words "ought to have known" in s.157(1)(c) should be understood as referring to what an accused would have known if he or she had stopped to think to the extent that he or she ought to have. They do not refer to what an accused would have found out if he or she had taken the trouble to read a book or to inquire of others. It seems to us, however, that his Honour's reference to the desirability of studying medical literature should not properly be understood, and would not have been understood, in that sense. His Honour did not tell the jury that, if they were of the view that the applicant should have been alerted to the desirability of studying medical literature, there should be imputed to him the knowledge which he would have derived from such study. Although it would have been better if his Honour had not added this somewhat ambiguous remark, he made it clear that the question was whether the applicant ought to have known that his acts were likely to cause death, and in concluding that these few words in a long summing up were not likely to have misled the jury it is not unimportant that no objection was raised to them at the trial.

35. It follows that the third of the proposed grounds of appeal also fails. That being so, special leave to appeal should be refused.

BRENNAN J.: This is an application for special leave to appeal from a judgment of the Court of Criminal Appeal of Tasmania dismissing an appeal by the applicant against his conviction for the murder of Begum Mahjabi Ali on 3 November 1983. He was convicted of that crime on the verdict of a jury in a trial before Neasey J. The applicant was a medical practitioner practising in Hobart. The deceased was a young woman, whom the applicant had recently brought to Hobart from her home in Fiji. He had gone through a form of marriage with her in Fiji though he was married at the time. They lived together in Hobart until the night of her death.

2. The grounds of appeal which the applicant seeks to argue in this Court arise out of the directions which his Honour gave the jury as to certain elements of the crime of murder. The crime of murder is defined by the Criminal Code of Tasmania ("the Code") enacted by the Criminal Code Act 1924 (Tas.). The paramount rule in construing a Criminal Code is that its meaning is to be ascertained by interpreting its language without reference to the pre-existing law, although reference may be made to that law where the Code contains provisions of doubtful import or uses language which has acquired a technical meaning (Robinson v. Canadian Pacific Railway Co. (1892) AC 481, at p 487). It is erroneous to approach the Code with the presumption that it was intended to do no more than restate the existing law (Brennan v. The King (1936) 55 CLR 253, at p 263) but when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law (Mamote-Kulang v. The Queen (1964) 111 CLR 62, at p 76) including decisions subsequent to the Code's enactment: Murray v. The Queen (1962) Tas.SR 170, at pp 172-173,192; Reg. v. Rau (1972) Tas.SR 59, at pp 71-72. The meaning of the words and phrases to be found in a Code is controlled by the context in which they are found but when the context does not exclude the common law principles which particular words and phrases impliedly import, reference to those common law principles is

both permissible and required. Apart from principles of the common law impliedly imported by particular words and phrases in the Code, s.8 of the Criminal Code Act expressly preserves the common law rules and principles as to justification and excuse and common law defences to a charge upon indictment "except in so far as they are altered by, or are inconsistent with, the Code".

3. Chapter XVII of the Code creates the crimes of homicide. Homicide is defined by s.153, the material provisions for present purposes being:

> " (1) Homicide is the killing of a human being by another.
>
> (2) Killing is causing the death of a person by an act or omission but for which he would not have died when he did, and which is directly and immediately connected with his death."

4. The prosecution bears the onus of proving that an accused who is charged with actually committing a crime of homicide did the act or made the omission which caused death. Where death might have been caused by any of a number of acts done by an accused, the prosecution must prove that each of the acts which might have caused death amounts to culpable homicide, because an accused cannot be convicted if death might have been caused by an act done by him which does not amount to culpable homicide. Homicide that is not culpable is not punishable (s.156(5)). Culpable homicide is defined by s.156(2) which provides:

> " Homicide is culpable when it is caused -
>
> (a) by an act intended to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and which is not justified under the provisions of the Code;
>
> (b) by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life, although there may be no intention to cause death or bodily harm; or
>
> (c) by any unlawful act."

Section 156(2) of the Code gives statutory expression to the corresponding principles of the common law, substantially reproducing Sir James Fitzjames Stephen's formulation of those principles in art.222 of his Digest of the Criminal Law (1877) which states that -

> " Homicide is unlawful,
>
> (a.) When death is caused by an act done with the
>
> intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the provisions contained in Chapter III., or Chapter XXI.;
>
> (b.) When death is caused by an omission,
>
> amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm;
>
> (c.) When death is caused accidentally by an
>
> unlawful act. "

5. We are not concerned to explore the meaning of par.(b) in this case. The case against the applicant was not

that he was guilty of an omission causing death but that he committed a number of acts one or more of which caused the death of the deceased woman.

6. The applicant told the police, in one of the versions he had offered of the deceased's death, that he had been asleep beside her and, when he woke, he had put his thumbs on and applied pressure to her carotid arteries because he wanted her to become "responsive". He said she had not reacted immediately, so he pressed harder for "quite some time". In evidence at the trial he said that, while they were engaged in sexual activity, he had applied pressure to her carotid arteries four or five times. He said that the application of pressure to the carotid arteries was a technique of sexual arousal which he and the deceased woman had practised on each other by mutual consent and which he had practised on other women with whom he had had sexual relations, again by mutual consent. The evidence of one of those women may have been understood as supporting his evidence in that respect. There was no evidence that on any previous occasion injury had been done to any of the women or to him, other than the inducing of a light-headed feeling. In fact, pressure on the carotid arteries can cut off the supply of blood to the brain and pressure on the carotid sinuses can produce cardiac arrest. The carotid sinuses are at the fork of the carotid arteries on either side of the neck. It was open to the jury to find that death may have been caused by the applicant's putting pressure on the carotid arteries or on the carotid sinuses or on both the carotid arteries and the carotid sinuses. It was therefore necessary to give the jury an appropriate direction as to the applicant's liability to conviction for the crime of murder or for the crime of manslaughter if the jury should find that pressure on her carotid arteries or carotid sinuses was the cause or a possible cause of the woman's death. For the purposes of the following discussion it is convenient to assume that the prosecution had proved that such an act was the cause of the woman's death and to put aside the other possible causes, although the medical evidence showed that manual strangulation which stopped her breathing had occurred and it was open to the jury to find that asphyxia contributed to her death.

7. Leaving aside omissions which cause death, an act which causes death amounts to culpable homicide only if it falls into one of the three categories prescribed by s.156(2): an act done with one of the intents prescribed by par.(a), an act "commonly known to be likely to cause death or bodily harm", or an "unlawful" act. Culpable homicide is the crime of manslaughter unless it amounts to murder (s.159). If the doing of the fatal act is not culpable homicide it is neither manslaughter nor murder. The structure of the Tasmanian Code in this respect differs from the structure of the Codes of Queensland and Western Australia which follow substantially the draft code of Sir Samuel Griffith. The Griffith code provides that homicide is unlawful unless authorized, justified or excused by law (Queensland, s.291; Western Australia, s.268) and murder is unlawful homicide committed with a prescribed intent or by prescribed means (Queensland, s.302; Western Australia, s.279). Manslaughter is the crime which comprehends all cases of unlawful homicide which do not amount to murder (Queensland, s.303; Western Australia, s.280). Under the Tasmanian Code, there is no general proscription of homicide. Homicide is culpable only if it belongs to one of the three categories prescribed by s.156.

8. The definition of murder in the Tasmanian Code builds on the categories prescribed by s.156. To amount to murder, the act or omission causing death must amount to culpable homicide and must be done with an intention prescribed by par.(a), (b) or (d) of s.157(1) or with the knowledge or in the circumstances prescribed by par.(c) or by the means prescribed by par.(e) or (f) of that sub-section. Section 157(1) provides:

> " Subject to the provisions of section 160, culpable homicide is murder if it is committed -
>
> (a) with an intention to cause the death of any person, whether of the person killed or not;
>
> (b) with an intention to cause to any person, whether the person killed or not, bodily harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death;
>
> (c) by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person;

(d) with an intention to inflict grievous bodily harm for the purpose of facilitating the commission of any of the crimes hereinafter mentioned or the flight of the offender upon the commission, or attempted commission, thereof;

(e) by means of administering any stupefying thing for either of the purposes mentioned in paragraph (d); or

(f) by wilfully stopping the breath of any person by any means for either of such purposes as aforesaid,

although, in the cases mentioned in paragraphs (d), (e), and (f), the offender did not intend to cause death, and did not know that death was likely to ensue."

9. There is a partial correspondence between the intents prescribed by par.(a) of s.156(2) and the intentions prescribed by pars (a), (b) and (d) of s.157(1). A fatal act which is done with an intention to cause death is culpable homicide (s.156(2)(a)) amounting to murder (s.157(1)(a)). A fatal act which is done with an intention to cause bodily harm is culpable homicide (s.156(2)(a)) and amounts to murder if the offender knows that the bodily harm which he intends is likely to cause death in the circumstances (s.157(1)(b)). A fatal act which is done with an intention to cause bodily harm is culpable homicide (s.156(2)(a)) and amounts to murder if the offender intends to inflict grievous bodily harm for either of the purposes specified in s.157(1)(d). An intention prescribed by par.(a), (b) or (d) of s.157(1) includes and exhausts an intent prescribed by s.156(2)(a).

10. Omitting reference to omissions, par.(c) of s.157(1) applies only to culpable homicide by an unlawful act - the category prescribed by par.(c) of s.156(2). If the fatal act falls into that category, it amounts to murder if the offender actually knows that the act is likely to cause death in the circumstances or if the offender ought to know that the act is likely to cause death in the circumstances (s.157(1)(c)). The elements of murder drawn from par.(c) of s.156(2) and from par.(c) of s.157(1) are the elements on which the submissions of counsel for the applicant have focused. Those elements would have fallen for consideration by the jury if they were not satisfied that the applicant had a specific intent to kill the deceased woman when he did the fatal act. Paragraphs (e) and (f) of s.157(1), which appear to apply to all categories of culpable homicide, have no relevance to the questions to be answered.

11. With this brief conspectus of the facts of the case and the structure of the Code, I turn to examine the relevant legal issues and to examine the directions given by the learned trial judge to the jury the correctness of which counsel for the applicant has challenged.
Culpable homicide by unlawful act : s.156(2)(c).

12. As culpable homicide not amounting to murder is manslaughter (s.159(1)), the elements prescribed by s.156(2) are elements of culpable homicide amounting to manslaughter. Section 157(1) defines the elements of murder which distinguish that crime from manslaughter. It is wrong to regard par.(c) of s.156(2) as embodying the common law doctrine of felony-murder or its modern derivative of a killing in the course of an unlawful and dangerous act (see per Windeyer J. in Reg. v. Phillips (1971) 45 ALJR 467, at p 479), but there is no reason to doubt that s.156(2)(c) states the common law in conventional terms and is to be construed accordingly. It has been so held in Tasmania: Reg. v. McCallum (1969) Tas.SR 73; Reg. v. Rau.

13. It is not every criminal or tortious act which is an unlawful act for the purposes of the common law of manslaughter. In the first place, where an act is unlawful simply by reason of the negligence with which the act is done, the doer of the act is not guilty of manslaughter if death results from the act unless the negligence amounts to criminal negligence. As Lord Atkin said in Andrews v. Director of Public Prosecutions (1937) AC 576, at p 585:

" There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter."

14. Secondly, cases of negligent acts apart, not every act which is criminal or tortious is an "unlawful" act for the purposes of the common law of manslaughter. Since Field J. in Reg. v. Franklin (1883) 15 Cox CC 163, at p 165, expressed his "great abhorrence of constructive crime" the trend of the common law has been against the view that manslaughter is committed merely by doing any unlawful act which causes death: the act must be both unlawful and dangerous. Humphreys J. stated the now established law when he said in Larkin (1942) 29 Cr.App.R.18, 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."

In D.P.P. v. Newbury (1977) AC 500, at pp 506-507, Lord Salmon, delivering the leading speech, cited this passage with approval and went on to explain what was meant by a "dangerous act". He said:

" It (that is, the statement of the law by

Humphreys J.) makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous. This is one of the reasons why cases of manslaughter vary so infinitely in their gravity. They may amount to little more than pure inadvertence and sometimes to little less than murder.

I am sure that in Reg. v. Church (1966) 1 QB 59 Edmund-Davies J., in giving the judgment of the court, did not intend to differ from or qualify anything which had been said in Rex v. Larkin, 29 Cr.App.R.18. Indeed he was restating the principle laid down in that case by illustrating the sense in which the word 'dangerous' should be understood. Edmund Davies J. said, at p.70:

'For such a verdict' (guilty of manslaughter) '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.'

The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger."

15. 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, 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"; 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 (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. As Staughton J., speaking for the Court of Appeal in Reg. v. Mitchell (1983) 1 QB 741 said, at pp 749-750:

> " There need not be any intention to injure or kill, or any foresight that injury or death would be caused, provided that all sober and responsible people would have recognised the act to be dangerous."

16. As par.(c) of s.156(2) should be construed according to common law principles, it requires that the fatal act be dangerous as well as unlawful and the test of the act's dangerous character should be understood as Edmund Davies J. stated it: an objective test of the risk of harm to some person. The significance of this construction of par.(c) in this case is to be found in the light it sheds on the meaning of the phrase "commonly known to be likely to cause death or bodily harm" in par.(a) - a question considered below. For the moment it is sufficient to note that the dangerous character of the act of applying pressure to the carotid arteries or the carotid sinuses was an element in culpable homicide under par.(c).

17. All sober and reasonable people would realize that there is danger in the bilateral application of pressure to a person's neck, especially when the application of that pressure is known to produce a light-headed feeling. Although the applicant denied that he knew of the danger in the bilateral application of pressure to the carotid arteries or carotid sinuses when that pressure is applied for "quite some time" or repeatedly, the jury could have been satisfied beyond reasonable doubt that the act was dangerous by the standards of sober and reasonable people. The evidence that it was in truth dangerous was overwhelming. The issues under par. (c) on which the jury were invited to entertain a reasonable doubt relate not to the dangerous character of the act but to its unlawfulness. The prosecution case was that the act was an unlawful assault. The defence case was that the deceased woman had consented to the practice of applying pressure to the carotid arteries and that the act, though an assault, was lawful.

18. The submission made in this Court, but not made at the trial or in the Court of Criminal Appeal, is that the application of pressure to the carotid arteries or carotid sinuses was not unlawful because that act was done without hostility towards the deceased woman. It is submitted that the evidence raised the issue of absence of hostility and that it was necessary to give the jury appropriate directions on that issue. It is implicit in the submission that, if the jury had entertained a reasonable doubt as to the unlawfulness of the applicant's act, either because there was no hostility in the act or because the deceased woman had consented to it, the jury would have been bound to acquit the applicant of both murder and manslaughter.

19. The jury were directed that the applicant's act was unlawful "unless the deceased consented". That direction may have been too favourable to the applicant, for s.53(b) of the Code denies any effect to a consent to the infliction of an injury likely to cause death, subject to an exception that is presently immaterial. It is not necessary to decide whether s.53(b) precluded the deceased woman from giving an effective consent, however, for if the accused was convicted of murder pursuant to par.(c) of s.156(2) and par.(c) of s.157(1), the jury's verdict negatived consent. Consent was the only matter which the jury were directed to consider in finding whether the applicant's act was unlawful. They were directed that, if there was no consent, the act was unlawful.

20. That direction was not strictly correct if it be applied to a version of the facts according to a possible interpretation of the statement the applicant had made to the police. It would have been open to the jury to find that the applicant and the deceased woman had been asleep, that he awoke and, while she was asleep, he applied pressure to arouse her sexually and that that act caused her death. If that was a reasonable hypothesis, the absence of consent by the sleeping woman was not inconsistent with the lawfulness of the act. On that hypothesis, there was no assault on her in the common law sense - that is, in the sense of a threatened application of force to a person raising an expectation in the mind of the person threatened that force would be applied. But there was an assault on her in the Code sense of "assault" which is defined to include what the common law knows as an element in battery, that is, "the act of intentionally applying force to the person of another, directly or indirectly" (s.182(1)). It is in the latter sense that I use the term "assault".

21. The Code creates the offence of unlawful assault (s.184), but it does not expressly define what makes an

assault unlawful. For the reasons stated by Barwick C.J. in Reg. v. Phillips, at p 473, "(t)o ascertain whether or not it is unlawful it becomes necessary under the command of s.8 of the Code (scil. of the Criminal Code Act) to examine whether the act would or would not have been unlawful at common law in the circumstances in which it was done". The common law is as the Chief Justice stated it, at p.472:

> " (Physical) contact is not a battery at common law ... unless it is made in 'an angry, revengeful, rude, insolent or hostile manner', a description taken from Hawkins' Pleas of the Crown. Nor is it in my opinion necessarily a battery at common law to make contact with another for some purpose of the person making the contact in which the person touched or handled has, or could have an interest or benefit of his or her own, none of the other features of a battery being present."

That is no novel statement of the common law: see Archbold's Criminal Pleading Evidence &Practice, 42nd ed. (1985), par.20-116; Russell on Crime, 12th ed. (1964), vol.1, p.655. Phillips was a case where the appellant had placed an unconscious girl at the edge of the water in a tidal river. She died by drowning when the tide rose and the appellant was convicted of her murder. Windeyer J. said (at p.479):

> " I agree that the act of dragging the girl from where she first fell could be an unlawful assault. Whether it was so or not would, in my view, depend on whether when doing it the accused was actuated by animosity or by solicitude."

22. The rule stated by Hawkins is not merely the established law; it is manifestly necessary in cases where the person to whom force is applied is unable consciously to give or withhold consent to what the supposed assailant is threatening to do or doing. Generally speaking, consent on the part of a person to whom force is applied is necessary before the application of any force is lawful. To apply force to another without his consent is, generally speaking, a hostile act and therefore unlawful. There are, of course, exceptions to that general rule. There may be a particular ground of justification or excuse, for example, the assault may be done in self defence, or in the execution of lawful process, or it may be "necessary for the common intercourse of life" (s.182(3)). But where the person assaulted is not able consciously to give or withhold consent, it is important to remember that the application of force is unlawful only if the assailant acts in "an angry, revengeful, rude, insolent or hostile manner". If it were otherwise, those who give physical succour to a disabled person whose disability precludes him from giving or withholding consent to his being touched would be guilty of unlawful assault. That is not to say that sleep is, so to speak, a defence to a charge of unlawful assault. If force is applied to a sleeping person in a manner which is calculated merely to gratify the wishes of the assailant, the manner is at least "insolent". Much depends on the nature of the act done and its significance to the parties in the light of their relationship.

23. It follows that a direction that the applicant's act was necessarily unlawful if consent had not been given was not sufficient in the circumstances of the case if, on the evidence, it was a reasonable hypothesis that (1) the woman was unable to give consent at the time when pressure was applied to her carotid arteries or carotid sinuses, and (2) that that pressure was applied merely in order to waken her from sleep and to make her sexually responsive. But, at the end of a lengthy trial and summing up, there was no application for a further direction in accordance with the law as it had been stated by Barwick C.J. in Phillips. The passages from that case must have been familiar to all parties and the manifest inference to be drawn from the absence of a direction along the lines now contended for and from the absence of an application for further direction is that the defence did not raise the issue and did not wish the issue to be raised. That was understandable, for the issue would have arisen only if the jury rejected the applicant's evidence that he and the deceased were engaged in conscious sexual activity when he employed his technique of sexual stimulation. The issue, one might surmise, was one on which the defence was unlikely to succeed and which, if raised, would have redounded against the prospects of acquittal. A failure to seek a further direction in those circumstances is eloquent to demonstrate that there was no miscarriage of justice or at least no ground which should be entertained on an application for special leave to appeal (R. v. Sorlie (1925) 25 SR (NSW) 532; Pemble v. The Queen (1971) 124 CLR 107, at pp 117-118; La Fontaine v. The Queen (1976) 136 CLR 62, at pp 73-74). Knowledge that the unlawful act was "likely to cause death": s.157(1)(c).

24. The learned trial judge gave the jury a written direction to which he referred in the course of his summing up. Both the summing up and the written direction contained reference to the terms of pars (a), (b) and (c) of s.157(1) of the Code. No objection is taken to his Honour's direction based on par.(a). His direction based on par.(b) followed upon a direction that bodily harm included any hurt or injury calculated to interfere with health or comfort, not necessarily permanent but more than transient or trifling. He said:

> " If you conclude that the accused did intend to cause the deceased bodily harm by his application of carotid artery pressure, but did not wish to cause her death, it will be necessary for you to consider whether he knew that such bodily harm was likely to cause her death in the circumstances. The expression 'likely to cause her death' is another of these somewhat generalised expressions in the English language which most of us understand perfectly well, but would not (sic) find it difficult to define exactly. However, if something is likely to happen, there is a good chance that it will happen. It is something that may well happen. You might say about it 'It may not happen, but there is a good chance that it will.' It's likely to happen. Well, if he intended to cause her bodily harm within the meaning of that definition, was it bodily harm, which he knew was likely to cause her death in the circumstances? That, of course, involves his knowledge about what carotid artery pressure involved, what the possibilities of it were, what the nature of the act and its consequences were."

25. I doubt whether a direction based on par.(b) ought to have been given. Paragraph (b) deals with the case where death is not actually intended but injury is intended and the likelihood that that injury will cause death is known. In such a case, an actual intention to cause an injury other than death is an element. Although the jury was properly instructed that the temporary stopping of blood to the brain or the temporary stopping of the heart were capable of constituting bodily harm, the evidence hardly supports the inference of an intention to cause such an injury which he knew was likely to cause her death though he did not intend to cause her death. The evidence evoked consideration chiefly, if not exclusively, of pars (a) and (c). However that may be, the substance of the attack made on the quoted passage from his Honour's summing up is as relevant to the element of knowledge of the likelihood that death would result from the applicant's act - the element in par.(c) - as it is to the element of knowledge of the likelihood that death would result indirectly from that act, that is, from a bodily injury which his act was intended to inflict - the element in par.(b). The substance of the attack is that the statutory criterion of likelihood that death would result was wrongly equated with a good chance that death would result. As the written direction reproduced the relevant words of s.157(1)(b) and (c), the jury would take the equation to be as applicable to the words of par.(c) as to the corresponding words in par.(b).

26. The attack on the summing up in this respect raises two questions: first, did the learned trial judge equate likelihood with "a good chance"? and, second, was he wrong to do so? The proposition that if something is likely to happen there is a good chance that it will happen is not open to question. It is the converse which is dubious: that if there is a good chance that it will happen, it is likely to happen. Yet the summing up put the latter proposition to the jury: "It may not happen, but there is a good chance that it will. It's likely to happen". Was this direction wrong? If "likely" is synonymous with "probable", to say that there is a good chance that an event may happen is not to say that the event is likely to happen. Knowledge that there is a good chance that an event may happen is a different state of mind from knowledge (or foresight) that the event will probably happen. One state of mind is an appreciation of a risk, perhaps a substantial risk; the other state of mind is an expectation. I do not put this on any basis of mathematical odds. It is simply that one form of words conveys the meaning of a state of mind different from the state of mind meant by the other form of words.

27. I should not have thought that the common law was open to doubt. It was expounded by this Court in R. v. Crabbe (1985) 59 ALJR 417; 58 ALR 417. Earlier authorities were reviewed and the judgment of the Court proceeded (at pp.419-420; pp.420-421):

> " The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm. Indeed, on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur. ... If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word 'probable' means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence, and where he knows that it is a likely result."

In this and in other passages in the judgment in Crabbe, "likely" is equated with "probable" and both terms are contrasted with "possible". The meaning of "likely" may depend on its context, though the terms "likely" and "probable" are treated as synonyms by the Shorter Oxford and Macquarie Dictionaries. The equation of "likely" and "probable" in reference to the mental element in unintended murder is of long standing. Stephen in his Digest (art.223(b)) spoke of knowledge that the fatal act will "probably" cause death or grievous bodily harm. On the other hand, the Draft Code of 1879 (s.174) and the Report which accompanied it (Report of the Criminal Code Bill Commission (1879), p.23) spoke of knowledge that an act is "likely" to cause death. There are compelling considerations of principle why "likely", when used in reference to knowledge of the prospect of death as an element in murder, should be understood as meaning probable, not possible. If it be murder to do an unlawful and fatal act with knowledge that it is possible that death will result, the mental element which stamps the truly heinous character on the crime of murder is relaxed. If that element of the crime of murder is relaxed so that knowledge of the possibility of death suffices to establish it, the distinction between murder and manslaughter by unlawful act would be hard to preserve. Absent an actual intention to kill or to do grievous bodily harm, the distinction would turn on mere epithets to describe the kind of possibility which is to be apprehended (subjectively for murder, objectively for manslaughter) in order to define one crime or the other - for example, a substantial possibility for murder, a real possibility (or real risk) for manslaughter. Such a distinction is, in my opinion, too fine to grasp.

28. Although we have accepted in this country that an intention to kill is not necessarily the same mental state as knowledge that death will probably result, we have regarded the two mental states as comparable in heinousness. We have understood that to be the orthodox view of the common law. In England, where the House of Lords has been astute to ensure that the doctrine of Director of Public Prosecutions v. Smith (1961) AC 290 should not be revived in a new garb, their Lordships have relegated knowledge of the probability of death to the field of evidence, treating it merely as a foundation for an inference of an intention to cause death. In Reg. v. Hancock (1986) 2 WLR 357, at p 363, Lord Scarman noted that in Reg. v. Moloney (1985) AC 905, the House of Lords had

> " made it absolutely clear that foresight of consequences is no more than evidence of the existence of the intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply the existence of intention, though it may be a fact from which when considered with all the other evidence a jury may think it right to infer the necessary intent."

In this country we have followed a different path by declining to follow Reg. v. Smith and by acknowledging the separate mental states of intent and knowledge of likely consequences. But the notion which underlies both the judgment of this Court in Crabbe and the speeches in Moloney and Hancock is that the mental state which is necessary to establish the crime of murder when the accused does not actually wish that death should result from what he does is knowledge (or foresight) that that result is so probable or likely that the doing of the fatal act is as heinous as if the accused had wished that result. In either case the accused compasses the death of the person killed or of some other person.

29. There is no reason why "likely" in s.157(1)(b) and (c) should not be construed to mean "probable". If "likely" were construed to mean "possible" or "a real chance" or as connoting any degree of contingency which falls short of probability, the terms of the Code relating to the mental state in murder would bear a meaning different from the meaning which those terms bear in the common law. Moreover, to attribute to "likely" in s.157(1)(b) and (c) the meaning of "possible" would create anomalies in the operation of two

related provisions in which the phrase "likely to cause death" is used: ss.156(2)(a) and 53(b).

30. Section 156(2)(a) defines the second category of culpable homicide - "caused by an act ... which is commonly known to be likely to cause death or bodily harm". This category is independent of, though it may overlap, the other categories of culpable homicide. The second category comprehends acts which may be either lawful or unlawful and is thus distinguishable from par.(c). Whether or not par.(c), or par.(c) alone, imports the common law of manslaughter by criminal negligence into the Code (cf. Phillips, at p 479; Reg. v. Davis (1955) Tas.SR 52; Reg. v. Fleeting (No.1) (1977) 1 NZLR 343), it is clear that the second category of culpable homicide in par.(a) comprehends acts which would be lawful but for the fact that such acts are, objectively considered, "likely to cause death or bodily harm". It would be absurdly draconian to hold that the phrase "likely to cause death or bodily harm" connotes a possibility of death or bodily harm. That would equate the danger to be apprehended from a lawful act with the danger to be apprehended from an unlawful act - "the risk of some harm" - under par.(c). A lawful act which carries a possibility of harm, albeit a substantial possibility of harm to another, may not amount even to civil negligence. It would be harsh indeed to require conviction for manslaughter if such an act should unintentionally cause death. But where the probable result of a lawful act is that death or bodily harm will be caused to some person, it is understandable that the legislature should provide that the doer of the act be guilty of manslaughter if death should result from the doing of that act - subject, of course, to any authorization, justification or excuse provided by Chapter IV of the Code (especially s.13(1) relating to voluntariness and events which occur by chance), by s.8 of the Criminal Code Act or by particular statutes.

31. Section 53(b) which precludes a person from giving an effective consent to the infliction upon himself "of an injury likely to cause death" would have a very wide operation if it precluded the giving of consent to the infliction of an injury which might possibly cause death. In some sports and theatrical performances where consent is given to the infliction of injury there is a possibility that death might result from an injury inflicted, and it would be a curious operation of s.53(b) if it made ineffective a consent to injury in those cases. On the other hand, it is a sensible operation of s.53(b) to make ineffective a consent given to the infliction of an injury which would probably cause death. In all of these provisions of the Code, "likely" means "probable". In none of them does "likely" mean "possible".

32. If the jury had a reasonable doubt as to the applicant's intention to cause death or bodily harm, they would have had to consider whether, when he applied pressure to the carotid arteries or the carotid sinuses of the deceased woman he knew that his action would probably kill her. The question for the jury under par.(c) is "did the accused know when he did the act that it was likely to or would probably cause death?" It is not sufficient if he knew that death was possible if he did not know that it was "likely or probable". That is a different question from the question "did the accused know that there was a good chance that his act would cause death?" There is a real, not merely verbal, difference between the two questions. The direction given the jury under this limb of par.(c) of s.157(1) was not correct.

33. The second limb of par.(c) of s.157(1) introduces an objective and therefore novel mental state as an element in murder. The phrase "ought to have known to be likely to cause death" appeared in s.174(d) of the Draft Code of 1879 in reference to an act done "for an unlawful object", where it was critized as an unsatisfactory provision in the Draft Code which generally maintains the requirement of a subjective intention as the condition of liability to conviction for murder (see Russell on Crime, p.495). Its introduction into the Code may have been intended to cover cases where an accused had killed while intoxicated and his intoxication precluded the drawing of an adverse inference as to his intention or state of mind at the time. However that may be, it covers cases where the accused does not have the knowledge prescribed by the first limb of the paragraph but where he ought to have had that knowledge when he was doing the unlawful act which caused death. The character of the act, the fact that it was likely to cause death (as the accused would have known had he thought about it) and the surrounding circumstances are material to a finding - I do not say that they are the only facts material to a finding - as to whether the accused "ought to have known". The criterion to be applied to these facts is whether any sober and reasonable man, having the accused's knowledge, experience and acumen, would have adverted to the possibility that his action might cause death and, adverting to that possibility, would have known that his action was likely to cause death. If the hypothetical sober and reasonable man would have known, it is right to find that the accused ought to have known that his action was likely to cause death. But the words "ought to have known" do not create a duty to enquire about facts before acting; they relate to inadvertence, not ignorance. An objection is taken to the summing up on the ground that the jury were invited to find the applicant guilty if he failed to read his

medical texts to discover the nature of the danger of applying pressure to the carotid arteries or carotid sinuses before applying such pressure. The summing up did not, I think, go so far. I would not allow the appeal on this ground.

34. However, I would grant special leave to appeal and I would allow the appeal on the ground of misdirection as to the mental element in s.157(1)(c) of the Code. If there were a proved absence of motive, it might be arguable that the appropriate order would be to quash the conviction and to substitute a conviction for manslaughter, as was done in Reg. v. Sharmpal Singh (1962) AC 188. But the evidence in this case is capable of supporting a verdict of murder under s.157(1)(a) and the only order appropriate in the circumstances is that a retrial be ordered. That was the order sought by the applicant and it is the order I would make.

Orders

Application for special leave to appeal refused.