

No. 8

RONALD JOSEPH RYAN

Applicant

THE QUEEN

Respondent

*pl* This and the next succeeding pages *(nos 1-32)* is the copy Reasons for Judgment marked "H.C. - F" produced and shown to GILLESPIE WILLIAM ALLAN DOUGLAS at the time of swearing his affidavit before me.

This 18th day of July 1966.

*John Thompson*  
A Justice of the Peace *JP*

H.C.-F

COURT OF CRIMINAL APPEAL

MELBOURNE

BEFORE THE HONOURABLE THE CHIEF JUSTICE (SIR HENRY WINNEKE)  
and  
THEIR HONORS MR. JUSTICE HUDSON and MR. JUSTICE McINERNEY

REGINA

v.

RYAN and WALKER

JUDGMENT OF FULL COURT

(Delivered 8th June, 1966.)

WINNEKE, C.J.: The applicants were presented in the Supreme Court at Melbourne on 15th March, 1966 on a charge of murder of one Hodson at Coburg about 2 p.m. on Sunday, 19th December, 1965. Ryan was convicted of murder, and Walker of manslaughter.

The applicants were long-term prisoners serving their sentences at Her Majesty's Gaol at Pentridge. Hodson was a warder at the said gaol. The applicants had planned to attempt an escape if and when a favourable opportunity offered. On the day in question they climbed a wall of the division in which they were incarcerated, and then armed with a piece of iron piping managed to climb to a tower on top of one of the external walls of the gaol. Ryan proceeded to a point on this wall known as No. 1 Post and there surprised a warder on duty - one Lange - and after he had seized from a rack a loaded rifle, the warder, after first being forced below and then back up into the tower, was eventually forced to operate a lever which opened a gate in an external wall of the gaol that led into a public street outside the gaol. The applicants made their way out of the gaol through this gate - Ryan armed with the rifle and Walker with the piece of iron piping. After assaulting a Salvation Army officer who had

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at Ryan with a rifle he was carrying, but swore that as he commenced to pull the trigger a woman moved into the line of his fire and he lifted the muzzle as he fired and the shot went into the air. Although both the rifle carried by Patterson and that carried by Ryan reloaded automatically, no discharged cartridge case or cases were found despite a thorough search of the area subsequently carried out. A few days later, on 23rd December, 1965, a bank at Ormond was held up by the applicants and Ryan was, as he subsequently admitted in evidence, armed with the rifle he had taken from the gaol. Several of the bank officers testified that in the course of the hold-up Ryan said that he had killed a man with it and that it had killed a man a few days before. A witness, Fisher, a man with a criminal record who was aware that a reward had been offered for information leading to the recapture of the applicants, testified that he met Ryan at a flat in Elwood on 24th December, 1965 and that Ryan told him he had shot the warder. A detective, Morrison, who accompanied Ryan on the flight back to Melbourne from Sydney, testified to statements by him that were clearly open to the interpretation that he had shot Hodson in order to prevent him from capturing Walker. The rifle was found in a car which the applicants had with them when taken in Sydney. There was expert evidence that the bore of the rifle after the applicants had been recaptured was consistent with a shot having been fired therefrom. On the Crown case all eight of the bullets with which the rifle was loaded when it was first seized by Ryan were accounted for save one, which it was suggested was that which entered and passed through Hodson's body. Ryan accounted for it by stating that it fell out of the rifle when he seized it in No. 1 Post. There was no evidence that any bullet had been found there and no evidence of any search for it.

Both applicants gave evidence at the trial.

Ryan's case was a denial that he had fired any shot from the rifle and that Hodson's death was caused by a bullet fired from the rifle he had in his hand when Hodson was killed. He admitted that he and Walker had escaped from the gaol pursuant to a plan agreed upon between them but denied that there was any arrangement between him and Walker to use violence in the course of their escape from gaol. He also denied the alleged admission to the witness Fisher or to the detective on the flight from Sydney to Melbourne. He admitted the substance of the statements attributed to him by the bank officers, but said they were not true and made only to terrorise the officers. Some of the eye-witnesses had testified that warder Hodson was erect at the time he was shot, and on the basis of this, and the pathologist's evidence as to the point at which the bullet entered and the angle at which it passed through Hodson's body, expert mathematical evidence was called to prove that the bullet must have been fired at a height from the ground far above the head of either Ryan or Patterson, the warder who swore he had fired a shot into the air. It should be said that the bullet that killed Hodson was not found.

Walker's defence was that he fired no shot, heard no shot fired and did not know that Hodson had been shot until the evening. He admitted he was party with Ryan to the plan to escape, but denied that he was party to any plan involving the use of violence, or that he knew that Ryan was in possession of the rifle until they were leaving the scene in the Vanguard car. He also claimed that he had given up any further attempt to escape when covered with a rifle by a warder - Bennett - from another tower on the wall - No. 2 Post - as he ran away from the gaol, and that on any view he was not a party to anything done after

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that by Ryan. At the time when Hodson was killed, he said he was running in panic to escape from Hodson.

Section 35 of the Gaols Act 1958 provides:-

"Every male person lawfully imprisoned for any crime misdemeanour or offence by the sentence of any court of competent jurisdiction, or employed at labour as a criminal on the roads or other public works of Victoria, who escapes or attempts to escape from any gaol or from the custody of any member of the police force gaoler or other officer in whose custody he may be, shall be guilty of felony; and being lawfully convicted thereof shall be liable to imprisonment with or without hard labour for a term of not more than five years."

The learned Judge at the trial took the view that upon the proper construction of this section the offence created by the words "who escapes ..... from any gaol" may be established by proof of conduct on the part of the prisoner which takes place even after he has succeeded in getting outside the confines of the gaol in which he is incarcerated; that the offence of escaping from gaol involves as one of its essential elements the regaining by the prisoner of his liberty; that this element is not satisfied the moment a prisoner sets foot outside the walls of his gaol if he is followed immediately by his gaolers in pursuit of him who have not lost sight of him and are hot on his heels.

Having taken this view, the learned Judge considered that it was beyond doubt that in the circumstances disclosed by the evidence the applicants were still in the course of escaping and committing the felony created by Section 35 of the Gaols Act 1958 when Hodson was killed.

It was on the basis of this view that the learned Judge directed the jury as to what the Crown had to prove to establish murder - the crime charged. He said -  
(Transcript pp.693-696):-

"To establish murder the Crown must prove beyond reasonable doubt these things:  
Firstly, that a person, in this case Hodson, was killed. Well, gentlemen, it is a matter

for you but there would not appear to be much doubt about that. Secondly, that the accused caused his death while the accused was of sound mind. Well, there seems to be no dispute that the accused were both of sound mind although it remains a matter for you. Of course, that the accused Ryan caused his death is probably the great issue in this case. Thirdly, you have to be satisfied beyond reasonable doubt that the act which brought about his death was intentional, voluntary, conscious and deliberate. In other words not accidental, or not done in a blackout or something of that nature. Again, although it remains a matter for you, it seems if it were done at all, to be no real question of that element. Fourthly, that at the time the act was done it was done either with the intention of killing Hodson or with the intention of doing him grievous bodily harm. Now grievous bodily harm means, gentlemen, really serious bodily harm. Gentlemen, you see there are two intents here that have to be established. The act has to be done intentionally, that is one, and with the intention of killing the other person, that is two."

The learned Judge then gave an example of a deliberate act of shooting resulting in the death of a man which would not amount to murder because it was not done with the intention of causing harm. He then proceeded:-

"The last two elements, I think, need not concern you in this case but they remain strictly of course a matter for you. Firstly, provided that there is no lawful justification or excuse for the killing - that means such things as self defence, there are some circumstances where you can kill a man lawfully in self defence; there seems to be no question of self defence here although it remains a matter for you; and provided there is nothing in the circumstances which is sufficient in law to reduce the killing from murder to manslaughter. That refers to such things as provocation, gentlemen, and again there seems to be no question of that here although it remains a matter for you. That is a general definition of murder but there is one qualification, gentlemen. In certain circumstances the crime of murder may be established even though the accused had no actual intention of killing and that is so in those circumstances. If a killing occurs by an act of violence in the course of a commission of a felony involving violence or in the furtherance of the purpose of such felony the accused is guilty of murder even though there is no actual intention of killing. This is known to lawyers as felony murder. The intention is imputed to the accused by law; it is what is called constructive intention or constructive malice. Now what has the Crown got to establish in order to establish what I might for convenience call felony murder? Firstly, it has got to establish that there was a felony being committed."

Then the learned Judge referred to Section 35 of the Gaols Act and the admissions that had been made by counsel for both the applicants that they were in Pentridge serving sentences of long terms of imprisonment as a result of convictions. He then proceeded:-

"The next thing is it has got to be by an act of violence. Now, what is an act of violence in this connection? This may be said in definition, when the actor did the act if he must have contemplated or as a reasonable man should have contemplated that death or grievous bodily harm was likely to result, then this portion of the definition is satisfied. Next, in the commission of a felony involving violence: commission means while he is doing it and before it is over. Once it is complete of course there can be no question of felony murder. Furtherance: in the furtherance of the purpose of such felony. Furtherance means the promotion or advancement of the purpose or helping forward of the purpose."

The learned Judge then gave an example of an act which would and one which would not amount to the furtherance of the purpose of a felony and proceeded:-

"Now, gentlemen, in the case of an escape from gaol, it is a matter for you of course but it may be that the accused hoped very much that they would get away with it without anyone seeing them at all and there would not be any violence. But it is open to you to find that this is just the sort of crime that if detection occurred it is very likely indeed to lead to violence of one kind or another. Now, gentlemen, if you are satisfied of those things, satisfied beyond reasonable doubt you would be entitled to return a verdict of murder on this basis. It seems to me, but it is a matter for you, that as far as Ryan is concerned this is not very important. The entire fight in this case has been as to whether beyond reasonable doubt Ryan fired the shot. If he did not, of course he is not guilty of anything. If he did, no argument has been addressed to you by Mr. Opas (counsel for Ryan) as to why you should not find that all the other elements of murder were present. Evidence seems to disclose, and again I repeat it is a matter for you, that if he did fire the shot he stopped dead in his tracks and fired deliberately at Hodson and killed him. If that were so that would be murder without any resort to the doctrine of felony murder at all so you may think ..... However, the question of felony murder may be important when we come to

Walker's case. Gentlemen, that is the law so far as it applies to Ryan and of course both definitions also apply to Walker. As far as Walker is concerned no one has suggested he fired the fatal shot, or ever had a gun; and if you acquit Ryan I direct you in point of law that you must acquit Walker. However, gentlemen, the Crown presents its case against Walker in this way."

The learned Judge then proceeded to state the law which he directed the jury was applicable to the case of Walker.

Mr. Opas, for the applicant Ryan, based his application on several grounds and as Ryan's conviction was basic to the conviction of Walker, Mr. Young, for the latter, supported these grounds.

First, it was contended that the verdict of the jury in finding that Ryan fired the shot that killed Hodson - a finding that was necessarily involved in their verdict - was against the evidence and the weight of evidence and was unreasonable. As we have already stated the case for the Crown on this issue was supported by the evidence of several eye-witnesses - about eleven in all, some prison warders, but the majority civilians, and by evidence which if accepted as true amounted to the most damning admissions. The evidence of the eye-witnesses, speaking generally, was to the effect that they observed Ryan put the rifle to his shoulder, and level it in the direction of Hodson, that they heard a shot and saw Hodson fall, mortally wounded. The distance which separated Ryan and Hodson when this took place was variously estimated at from 20 feet to about 20 yards. The argument supporting the attack on the eye-witnesses' evidence was based on inconsistencies between the various witnesses and particularly upon the fact that no one except the warder Patterson heard more than one shot, and, if Patterson was to be believed, he certainly fired a shot. Another ground of criticism was that certain of the witnesses appeared to



place Ryan on the left of Hodson which was, it was said, inconsistent with the bullet entering Hodson's body on the right side and passing out of it on the left side as it did. Perhaps the point most strongly relied on was that based upon the evidence of the mathematician Speed, called on behalf of Ryan, by which it was attempted to establish that it was impossible as a matter of scientific fact that the bullet which killed Hodson was fired from Ryan's rifle because of the course it took on entering the body. But the conclusion sought to be drawn from this evidence depended on the hypothesis that at the instant he was shot Hodson was standing upright at an angle of 90 degrees to the roadway and not bending or leaning forward. It is true that certain of the witnesses said he was standing upright but others again said he was bending forward. It was, therefore, well open to the jury to reject the hypothesis upon which the conclusion sought to be drawn from the evidence of Speed, taken in conjunction with the medical evidence, was based. The value to be placed on the evidence of the eye-witnesses and the weight to be attached to the criticism thereof were essentially jury questions and, having considered that evidence and the learned Judge's charge in which he reviewed it in detail and Mr. Opas's attacks upon it, we are of opinion that it provided adequate material upon which the jury's conclusion would be justified even if it stood alone.

But of course it did not stand alone; it was supported by evidence of admissions from three sources. The criticisms of Fisher's evidence were of course based on cogent arguments but despite these, it was nevertheless open to the jury to accept it. The evidence of the bank officials, not denied by Ryan, lends very strong support to the Crown case and unless the jury accepted Ryan's

explanation of it, must be so treated, as also must be the police evidence. Obviously the question of the credibility of the bank officials and the police witnesses as well as of Fisher was one for the jury.

We consider there is no substance in the ground that the verdict was against the evidence and the weight of evidence and unreasonable, and this ground must therefore fail.

The second and third grounds of Ryan's application were that the learned Judge, after he had, in the absence of the jury, heard argument as to the admissibility of evidence from Mrs. Jeziorski and the witnesses Wallis and Mitchinson as to whether she presented an appearance of pregnancy on 19th December, caused the trial to miscarry by the terms in which he announced his ruling on that matter in the presence of the jury. It was said that his statement to the jury that the evidence was relevant and admissible was calculated to convey to the jury that the refusal to admit the evidence was only due to the objection of counsel for the applicant and thereby raised prejudice against the applicant in the minds of the jury.

In order to deal with these grounds it is necessary to relate something of what occurred at the trial in relation to the matter of Mrs. Jeziorski's pregnancy. She apparently at this date presented an appearance consistent with that state but neither she nor any other witness in the course of the Crown case was asked about or made any reference to it. Ryan, however, in his evidence-in-chief, said that when he got into the Falcon car to drive off, he noticed that Mrs. Jeziorski was pregnant and that he was in an awful predicament, and as he did not want to drive off with Mrs. Jeziorski as a hostage he got out of the car. Ryan was not cross-examined about this and no application was then made by the Crown for leave to recall

Mrs. Jeziorski or Wallis or Mitchinson as to whether or not she presented, at the date of the shooting, any appearance of pregnancy.

At the close of counsel's final addresses to the jury the question was adverted to by the foreman of the jury and during the course of the Judge's charge the jury stated that they would like to have evidence as to the stage of Mrs. Jeziorski's pregnancy on the day of the shooting, either from her or two of the warder witnesses - Wallis and Mitchinson - who had seen her in or near her husband's Falcon car. Counsel for Ryan in the presence of the jury made an objection. Subsequently, after discussion with counsel in the absence of the jury and argument during the course of which various authorities including Dryburgh v. The Queen, 105 C.L.R. 532 were referred to, the learned Judge informed the jury that it was not the practice to admit further evidence at such a late stage of the trial save in a rare and exceptional case, which this was not, and therefore although he had a discretion and thought the evidence would be relevant, his ruling was that the evidence should not be admitted at that stage of the trial.

In our view these grounds are quite untenable. In the first place we think that the learned Judge's view that the evidence would have been relevant is correct. Evidence showing the falsity of the reason stated by Ryan was relevant as proof that his real reason for leaving the car was to go to the assistance of Walker. Moreover, although Ryan's counsel had objected to the evidence in the presence of the jury, the learned Judge made it plain that for the reasons he gave the responsibility for excluding the evidence was entirely his.

We think it convenient to deal next with grounds 5 and 6 of the application. These are based, in substance,

on the contention that on the evidence it was open to the jury to find a verdict of manslaughter against Ryan, and that the learned Judge was in error in ruling that manslaughter was not a possible verdict as an alternative to murder except in exercise of the common law right which the jury had to return such a verdict in any such case. It was contended that the jury could have returned a verdict of manslaughter against Ryan on the basis either that the rifle discharged accidentally or through criminal negligence on his part, and that the learned Judge was wrong in ruling to the contrary and refusing to direct the jury accordingly. It was said such a finding was open on the evidence of Ryan's inexperience with the working of this particular rifle, and the evidence relating to the manner in which he handled the rifle in the street prior to the shooting of Hodson. It was contended that such a finding was open also upon the inference that might be drawn from the statement by Ryan to the police (Exhibit "S") after the capture of the applicants in Sydney that they had no intention of firing at the police nor any member of the public, freedom was their main objective, and from several answers made by Ryan in the police record of interview, (Exhibit "T"), to the effect that to the best of his recollection he did not shoot a penal officer; that he would not consciously shoot a fellow human being; that to the best of his recollection he fired no shots; and that he would say that he had not possibly shot him in the excitement of the moment as that would be so out of character. In the course of cross-examination at the trial Ryan expressly swore that he had a clear recollection of all his actions up to the time he drove away; that he had not had a blackout and that he had done nothing in the heat of the moment or without thinking. When it was suggested that parts

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of his statement took the form they did so that he might raise the defence that he had had a blackout, or that if he did fire the rifle it was accidental, he denied these suggestions. He said he knew what his defence was going to be, and that was that he did not shoot the officer.

In our opinion the abovementioned statements in their context afford no evidence that the rifle discharged accidentally in circumstances that would justify a finding of manslaughter.

We are accordingly of opinion that there was no view of the facts arising from the evidence upon which a finding of manslaughter against Ryan was fairly open, and the learned Judge was right in so ruling. Furthermore, having regard to the Judge's direction, excepting an accidental killing from his definition of murder, the jury, by its verdict, must be taken to have found that the shot was not fired accidentally, but was an "intentional voluntary conscious and deliberate act." For these reasons we consider that grounds 5 and 6 must fail.

We return now to ground 4 which alleges that the learned Judge was in error in ruling that at the time of the shooting the escape from lawful custody had not been completed. The contention was that if this ruling was erroneous, then the learned Judge had misdirected the jury in stating that it was open to them to find Ryan guilty of murder on the basis that he fired the shot in the course of committing the felony of escaping from gaol created by Section 35 of the Gaols Act 1958. The argument for the applicant was that that crime was complete as soon as Ryan was clear of the external wall of the gaol, and accordingly the shot that killed Hodson was not fired in the course of committing the crime.

At the trial when this point was taken the learned Judge agreed with the view put to him by the Solicitor-General

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that to interpret the word "escapes" in Section 35 in the limited manner contended for by counsel for the applicants, would make nonsense of the provisions of the section, and that the word ought to be interpreted in its normal sense. "Escaping", he said, "is a continuing act starting from within the confines of the gaol and finishing when the getaway is effected and the escape is successful. Possibly it continues until the escapee is re-arrested, if ever. However, it matters not in my view which of those interpretations should be placed on the word in this case, because it is quite clear on the evidence in my judgment that the escape was not in fact completed in the sense that the accused had not in fact made their getaway when the murder is alleged by the Crown to have been committed." No authorities appear to have been cited to the learned Judge in the course of argument.

But before us the view taken by the learned Judge was supported by the decision of the Full Court of New South Wales in the case of R. v. Tommy Ryan (1890) 11 L.R. (N.S.W.) 171, a case in which the judgments deal very fully with a number of topics not unrelated to the questions that arise in the present case. The point ultimately decided in that case was that a verdict of maliciously wounding a police officer in the course of endeavouring to arrest the appellant without a warrant was not open to attack by him on the ground (as he urged) that he was not liable to arrest without warrant as a person "in the act of committing or immediately after having committed an offence" of a nature described in Section 429 of the Criminal Law Amendment Act 1883 (46 Vic. No. 17). The appellant had in fact been convicted of a felony some two months previously, but had escaped after conviction and eluded pursuit until the police officer, while seeking to arrest him, was shot and wounded by him. All three Judges held

that the Constable was acting within his powers in attempting to arrest the appellant, but they were not all in agreement as to their reasons. Windeyer, J. held that despite the absence of a warrant the arrest was justified on the ground that the appellant was "a felon illegally at large", notwithstanding that he had already been convicted of that felony and sentenced and imprisoned therefor. But he also held that the arrest was justified under Section 429 of the Criminal Law Amendment Act because, as he said, an escape being an offence punishable under the Act (See Section 458), in his opinion "the prisoner when he was apprehended by the Constable a month after he walked out of Grafton gaol was still escaping and still engaged in the commission of the offence of escaping." He continued (at pp.125 and 6), "The view apparently taken by the Chief Justice at the trial was that the offence was complete as soon as the prisoner got outside the gaol and that as the arrest was not immediately after the prisoner committed the offence the Constable had no authority to arrest him without a warrant. The view of the law on this point taken by His Honor appears to me erroneous. The offence of escaping is a continuing offence so long as the person escaping is keeping out of imprisonment. The offence no doubt has been committed and is complete as an offence for which a man may be punished, directly he gets outside the gaol gates, though he should go no further and be at once retaken; but he is no less committing his offence because after getting outside he runs away and eludes his pursuers ..... In theory though a man has escaped, his imprisonment is still continuing and every hour that he remains out of and is defeating his imprisonment he is escaping." Innes, J. (at p.199) agreed that Section 429 applied to the case and authorised the arrest. Section 458, he pointed out, authorised a sentence for the offence of "any escape from

lawful custody on a criminal charge" and said that, in his opinion, notwithstanding that the appellant had been two months out of prison he was still escaping within the meaning of that section. Foster, J. took the view that though the appellant's escape did not consist of the felony of prison breach, which he described as "a single concentrated act", nevertheless he had been guilty of the offence of escaping under Section 458 of the Act. For the purpose of this section he thought escaping consisted of a condition - that of refusing to undergo imprisonment and evading its infliction. "It seems therefore", he said (at p.216) "to be a continuing offence and the person is continually committing this offence as long as he evades the penalty of his sentence. .... Escape is just the converse of imprisonment - that is evading this restraint."

On behalf of the applicants it was pointed out that that decision depended on the words "escape from custody on a criminal charge" whereas the material words of Section 35 are "escapes from gaol", words intended, so it was said, to reproduce in statutory form the common law felony of prison breach. In support of the submission that the construction adopted by the learned Judge was erroneous, reliance was placed upon the decision of the Supreme Court of New Zealand in R. v. Keane (1921) N.Z.L.R. 581 at 583, in which the material provisions of the Act were - "who ..... assists any person in escaping or attempting to escape from lawful custody whether in prison or not", and in which it was held that this offence was not committed if the prisoner had got away from gaol some time prior to the assistance being rendered to him on the view, which the Court took, that his escape was complete when he left the gaol. Reference was also made to two other New Zealand cases - R. v. Otto Gibbs and Harvey (1951) N.Z.L.R. 602 and

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R. v. Kafka (1962) N.Z.L.R. 351, but these do not appear to us to add anything useful to the determination of the present point.

The Solicitor-General supported the learned trial Judge's ruling by the contention that upon the proper construction of Section 35 of the Gaols Act 1958, the offence of escaping from gaol thereby created embraced a process which began inside the gaol and continued until the prisoner got outside and successfully eluded his pursuers. The word "escape", he said, connotes the regaining of liberty, and it would be a violation of the language of Section 35 to regard its effect in the creation of the offence as exhausted at the instant when the prisoner emerged from the walls of the gaol. He relied, of course, on the decision of R. v. Tommy Ryan (supra) and particularly upon the judgment of Windeyer, J. that though the offence of escaping may be complete directly he gets outside the gaol gates, he is no less committing the offence because after getting outside he runs away and eludes his pursuers. He also relied upon the dicta in R. v. Keane (supra) at p.583, that "If a prisoner has regained his liberty by getting away from the precincts of the prison and also from the sight and control of all the prison officials, he then has made his escape and is not then in lawful custody." Though this view was not applicable to the facts of the case then before the Court it is, argued the Solicitor-General, precisely in point in the present case where the applicants, though outside the walls of the gaol, were still in the immediate vicinity thereof being still in the sight of their gaolers and closely pursued by them.

The words of the section upon which the Judge's direction was based are "escapes from any gaol", and emphasis was laid in the argument of the applicants upon

the last three words. It is, however, to be observed that the section also includes escape from the custody of any member of the police force gaoler or other officer in whose custody the prisoner may be, and extends to any person employed at labour as a criminal on the roads or other public works of Victoria. Reading the section as a whole it appears to have been the dominant intention of the Legislature to impose a penalty upon persons lawfully imprisoned, whether in a gaol or elsewhere, in the event of their not remaining in the state of imprisonment to which they have been subjected unless lawfully authorised to leave the same. The view may be accepted that a prisoner who without such authority succeeds in leaving the gaol by complete emergence therefrom has incurred the penalty imposed on him by the section, but it does not necessarily follow from this that he is not still committing the offence at the stage when he is in the act of making good his escape after his emergence. Had it been proved, for instance, in what may be regarded as a classic case of felony murder - Director of Public Prosecutions v. Beard (1920) A.C. 479 - that the accused had killed the girl to stifle her cries after initial penetration but whilst still in the act of intercourse, could it be doubted that he was still in the course of committing the felony? We think not and for like reasons in the present case we have reached the conclusion that the felony created by Section 35 was still being committed by the applicants at the time when they were endeavouring to elude pursuit outside and in the immediate vicinity of the gaol.

For these reasons we are of opinion that the view taken by the learned Judge as to the construction of Section 35, and the direction given by him founded on that view that the jury might convict Ryan on the basis that he killed Hodson in the course of committing the felony

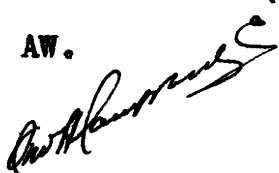
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created by Section 35, were correct.

Although it was not raised as a ground of appeal, it was argued before us that on this interpretation of the section the question whether the applicants had completed the process of escaping from gaol prior to the shooting or were still in the process of escaping at that moment was a question of fact for the jury to determine, and that the trial Judge did not leave that issue to it but instead directed it on the basis that the escape had not been completed. This may be accepted, and to that extent the learned Judge withdrew from the jury an issue which properly should have been left to it. But on that interpretation of the section we are of opinion, having regard to the evidence, that a jury properly instructed could not reasonably have failed to draw the inference that the applicants were still in the process of escaping from gaol at the time of the shooting. Consequently, even if this point of appeal were to be decided in favour of the applicant, no substantial miscarriage of justice has actually occurred.

As appears from his charge, the learned Judge directed the jury that a verdict of murder might be found on either of two bases.

If the jury founded its verdict on the first basis of express malice - an intention by Ryan to kill or do grievous bodily harm - clearly no exception could be or in fact was taken to it. But if, as was possible, it reached its verdict on the second basis, that is of felony murder, it becomes necessary to consider the seventh and final ground of Ryan's application, namely, that the learned Judge misdirected the jury that in the case of felony murder the intention of the accused either to kill or do grievous bodily harm was irrelevant in the circumstances of the case.



Such a direction was in fact given and the learned Judge did tell the jury that it was sufficient in such a case if the killing was brought about by an act of violence which the actor must have contemplated or as a reasonable man should have contemplated was likely to result in death or grievous bodily harm. It was contended for the applicant that this brought into the definition of felony murder an objective element which was inconsistent with the ruling of the High Court in Parker v. The Queen, 111 C.L.R. 610 at 632.

As to this there are, in our opinion, two answers.

In the first place, we think that the Solicitor-General was right in his submission that the principle stated in Parker v. The Queen (supra) was expressed in relation to cases of express malice, and is not applicable to cases of constructive murder. In the latter, once the intentional act of violence is found, the malice is imputed by law, and if the principle referred to were to be applied, the effect would be to abolish the rule of felony murder.

Secondly, we think that the question whether the act by which the death is brought about is an act of violence is, if abortion cases are put on one side, one ordinarily to be determined by the character of the particular act itself rather than by the intent of the actor. To that extent the learned trial Judge's direction at this point introduced an unnecessary element, for it is apparent that he was adopting the language of directions given in the case of deaths following abortion or an attempted abortion - (See R. v. Lumley (1915) 22 Cox C.C. 635; R. v. Brown & Brian (1949) V.L.R. 177 at 181-2, per Lowe, J.). In such cases the direction is given as a guide in the determination of whether the killing is murder or manslaughter. But such cases stand in a special category,

no doubt for the reason pointed out by the Court of Criminal Appeal, in R. v. Stone (1937) 53 T.L.R. 1046, (1937) 3 All E.R. 920, namely, that -

"In those cases, although an illegal act was being done there was no intention to do any harm or anything against the wish of the person hurt. Indeed the desire was to help or assist that person ..... " (53 T.L.R. at 1047).

In Stone's case the direction complained of was the affirmative answer given by the trial Judge to the jury's question:

"If as a result of an intention to commit rape a girl is killed, although there was no intention to kill her, is the man guilty of murder?"

Answer: "Yes, undoubtedly."

In dismissing the appeal, the Court of Criminal Appeal rejected the appellant's argument that -

"The same steady growth of a current of mercy which had appeared in recent years in constructive murder arising out of the crime of abortion should apply to constructive murder arising out of the crime of rape." (53 T.L.R. at 1047).

The position is therefore that in R. v. Stone (supra) the Court rejected the view that in felony murder not only must the act which caused death be one done in the course of committing a felony, but also that the act must be one which, in the contemplation of a reasonable man, must be capable at least of causing grievous bodily harm.

The direction of Sholl, J. in the case of R. v. Parmenter (1956) V.L.R. 312 at 314, in which R. v. Stone (supra) was not cited, is quite inconsistent with that decision, and with the direction explicitly approved in Ross v. The King (1922) 30 C.L.R. 246, per Knox, C.J., Gavan Duffy and Starke, JJ., at p.252, and per Higgins, J. at p.271. It is also inconsistent with the direction approved in Beard v. Director of Public Prosecutions (1920)

A.C. 479 at 493, and with the decision in R. v. Betts and Ridley (1930) 22 Cr. App. Rep. 148, 144 L.T. 526 at 528.

In these circumstances the introduction of the unnecessary element could not have operated to the prejudice of the applicant.

But even if, contrary to our view, the interpretation placed upon Section 35 of the Gaols Act 1958 by the learned Judge was wrong so that his direction as to felony murder constituted a misdirection, we are nonetheless of opinion for the following reasons that no substantial miscarriage of justice has actually occurred.

In our opinion, it is clear law that the killing of a person by the intentional use of force, knowingly to prevent such person from making an arrest which he is authorised by common law to make, is murder even if the person using the force did not intend to kill or do grievous bodily harm, and even if he did not foresee that he was likely to do so. See East Pleas of Crown Vol. 1 p.295; Stephen Digest of Criminal Law 226 (d); Halsbury 3rd Ed. p.707 par.1358; R. v. Woolmer 1 Moody 334 (168 E.R. 1293); R. v. Robert Williams 1 Moody 387 (168 E.R.1314); Archbold 35th Ed. pp.973-4 and 1077; R. v. Howarth 1 Moody 207 (168 E.R.1243); Russell 10th Ed. 503-4 and 544-51; R. v. Porter 12 Cox 444; R. v. Appleby 28 C.A.R. 1; R. v. Vickers (1957) 2 Q.B. 664 at 670; and R. v. Scriva (No. 2) (1951) V.L.R. 290 per Smith, J. at 304-5 and the authorities there referred to; and R. v. Tommy Ryan (1890) 11 L.R. (N.S.W) 171.

Whether the jury's verdict against Ryan was based on express malice or felony murder it must by that verdict having regard to the direction of the learned Judge be taken to have found that Ryan intentionally fired the shot which killed Hodson. On the evidence, a jury properly directed could not, in our opinion, reasonably have failed to draw

the inference that, at the time when Ryan intentionally fired that shot -

(a) Walker had committed the felony of escaping from gaol;

(b) Hodson had reasonable grounds for believing that Walker had committed that felony;

(c) Hodson was attempting to apprehend Walker following the commission of that felony;

(d) Ryan knew that Walker had committed that felony;

(e) Ryan knew that Hodson was attempting to apprehend Walker following the commission of that felony;

(f) Ryan fired that shot to prevent the apprehension of Walker by Hodson.

The result is that in law the case was one of constructive murder by Ryan, because that finding and those inferences mean that Ryan, knowing that Walker had committed the felony created by Section 35 of the Gaols Act 1958 and knowing that Hodson was attempting to arrest Walker therefor, intentionally used force, which resulted in Hodson's death, to prevent him from making that arrest. That, coupled with the fact that Hodson was, in the above circumstances, lawfully authorised by common law to make the arrest of Walker, (see Christie v. Leachinsky (1947) A.C. 573; and R. v. Hunt, 1 Moody 93 (169 E.R. 1948)) constituted Ryan's action in killing Hodson, murder.

In any event, on the evidence and having regard to the closeness of the range at which Ryan fired the shot, we are of opinion that a jury properly directed could not reasonably have failed to draw the inference that Ryan did in fact contemplate that death or at least grievous bodily harm was likely to result to Hodson (see Smyth v. The Queen, 98 C.L.R. 163, and Parker v. The Queen, 111 C.L.R. 610 at pp. 648-9 per Windeyer, J.).

As there was no suggestion that the firing was done in self-defence or provocation, the only verdicts reasonably open in such circumstances were murder, or manslaughter, on the basis of the learned Judge's charge of the jury's common law right to return such a verdict which it must be taken to have rejected.

For these reasons, we are of opinion that the application on behalf of Ryan cannot succeed.

We have already observed that the conviction of Ryan was basic to the conviction of Walker, and insofar as Mr. Young for the latter adopted and supported the grounds taken on behalf of Ryan, we are of opinion that his submissions fail for the reasons already expressed. Mr. Young, however, raised additional grounds in support of Walker's application.

In charging the jury in relation to Walker the learned Judge directed that the Crown must prove that Ryan killed Hodson and that the killing amounted to murder, that there was a prearrangement between Walker and Ryan to commit a felony of violence, namely, the felony of escape from gaol created by Section 35 of the Gaols Act 1958, that the killing was in the course of committing such felony and before it was completed, and that the prearrangement included an arrangement that they would use such violence as was necessary against any person seeking to prevent them from effectuating their purpose, at least to the extent of inflicting grievous bodily harm. He directed that the latter meant that Walker was a party to a prearrangement under which he must have contemplated, or as a reasonable man should have contemplated, that the violence to be used if necessary by Ryan and himself was likely to result in death or grievous bodily harm. He further directed that it must be proved that this arrangement, if it ever existed, was not terminated before Hodson was shot, and that Ryan



did not go beyond the scope of the agreement, whatever it was, that was made. The learned Judge further directed that if the jury was not satisfied that the prearrangement to which Walker was a party was one under which he must have contemplated, or as a reasonable man should have contemplated, that the violence to be used was likely to result in death or grievous bodily harm, but was satisfied that Walker was a party to a prearrangement under which some lesser violence not calculated to cause death or bodily harm but to cause some lesser injury, then it would be open to find him guilty of manslaughter. He further directed that if Ryan was acquitted, Walker also must be acquitted. He also directed that if the common purpose was merely to escape without violence at all, then equally Walker must be acquitted. In the course of his charge in relation to both applicants the learned Judge directed the jury that it had a common law right where a man is charged with murder to return a verdict of manslaughter notwithstanding that it was satisfied that all the elements necessary to constitute the crime of murder had been proved.

In our opinion, having regard to that direction and to the evidence and the jury's verdict against Walker, the jury must be taken to have found that Ryan intentionally shot and killed Hodson, and that Walker was a party with Ryan to a plan to escape from the gaol and to use some degree of violence in effecting that purpose - even though the intent to use violence was limited to violence falling short of killing or doing grievous bodily harm. And having regard to the meaning of "escape" which the learned Judge took and left to the jury - that is to get outside the walls of the gaol and make good their freedom, the jury must also be taken to have found that the plan to use violence extended to and embraced the acts of the applicants in attaining their freedom and getting away when they got

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outside the gaol - certainly up to the point of time which is material here, - when Hodson was shot. The applicants must accordingly be taken to have been found by the jury to be linked in common purpose at the time when Ryan fired at and killed Hodson.

The first additional ground argued by Mr. Young was that on the findings involved in the verdict, the verdict of manslaughter against Walker was inconsistent with the verdict of murder against Ryan. On the Judge's direction, he said, the jury must have found that Ryan fired with intent to kill or do grievous bodily harm, and must have found that the arrangement to which Walker was a party involved some lesser intent on his part. In those circumstances, Mr. Young contended, the death of Hodson ensued from the use by Ryan of a degree of force which was outside the arrangement to which Walker was a party, and that therefore there was no factual basis for a verdict of manslaughter against Walker.

We are unable to accept this submission. In the first place, the basal premise upon which it is founded is that the jury must have found that the arrangement to which Walker was a party involved the use of a degree of violence less than an intent to kill or do grievous bodily harm. But as already mentioned the learned Judge directed the jury that it had a constitutional or common law right to return a verdict of manslaughter even though satisfied that every element necessary to constitute the crime of murder had been established. That a jury has this power is shown by such authorities as Brown v. The King 17 C.L.R. 570 at 578-9, and Beavan v. The Queen 92 C.L.R. 660 at 662-3. As the jury was expressly directed that it had this power, the basal premise of this submission cannot be taken to be definitely established by the jury's verdict.



In the second place, even if such basal premise is accepted, we are of opinion that it does not justify the conclusion Mr. Young sought to derive from it. His contention was that the abovementioned basal premise meant, in short, that Hodson's death had resulted from an independent criminal act on the part of Ryan, which could involve him alone in criminal responsibility therefor.

But as already pointed out the jury must necessarily be taken to have found that Walker was party to the unlawful use of force by Ryan to prevent his lawful arrest by Hodson, and that the carrying into effect of the arrangement from which that common purpose of Ryan and himself sprang resulted in Hodson's death. If the fact was that Ryan used a greater degree of force than Walker contemplated in giving effect to their common purpose to prevent Walker's arrest, that does not, in our opinion, mean that Hodson's death resulted from an independent criminal act by Ryan, for it was the arrangement between Ryan and Walker to use force that initiated Ryan's act, and Ryan's act was done to prevent Walker's apprehension and thereby to effectuate their common purpose of escaping. If that act involved more force than Walker in fact contemplated, it remained nonetheless an act which flowed from and was the result of his assent to the use of force for the unlawful purpose of effecting the escape. See Russell v. R. (1933) V.L.R. 59 at 66-67. In such circumstances we are of opinion that the authorities establish that criminal liability in varying degrees may result for the parties to the unlawful arrangement. See R. v. Smith (1963) 1 W.L.R. 1200 at 1205-7; R. v. Betty (1963) 48 C.A.R. 6; and R. v. Murray (1962) Tas. L.R. 170 at 173.

Alternatively, Mr. Young argued that if Walker was criminally responsible for Hodson's death on the basis

of Ryan's action in carrying out their common purpose, it was so far as Walker was concerned a case of murder or nothing, and as the learned Judge had left manslaughter to the jury, a crime which it was not open to it to find, his misdirection involved a substantial miscarriage of justice. He relied upon the decision of the High Court in Mraz v. The Queen, 93 C.L.R. 492, and particularly the reasoning of Fullagar, J. at p.512.

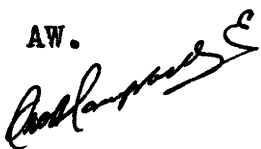
We have already observed that the jury by its verdict against Walker must be taken to have found that Walker was party to the intentional and unlawful use of force by Ryan to prevent his arrest by Hodson which force resulted in the death of the latter, and as in our opinion a jury properly directed could not on the evidence reasonably fail to draw the inference that Walker was committing or had committed the felony created by Section 35 of the Gaols Act 1958 (depending upon whichever interpretation of that section be adopted), and that Hodson to the knowledge of Walker was attempting to arrest him therefor and had reasonable grounds to suspect that he was committing or had committed that felony, the position in law was that Walker was guilty of constructive murder. Although he may therefore have had the benefit of an unduly favourable direction and been convicted of a lower degree of homicide than was warranted in law, such a result does not in our opinion involve that a substantial miscarriage of justice has actually occurred.

Mr. Young, however, contended that if on the proper view of the law as applied to the facts which the jury must be taken to have found, the correct verdict against Walker was one of murder, the verdict of manslaughter could not stand, and as he has been acquitted of murder he is entitled to a complete acquittal. He agreed that this produced a somewhat "odd" result, but contended that this

result must follow from the decision of the High Court in the case of Mraz v. The Queen, 93 C.L.R. 492. In our opinion this is not so. That decision is in our view clearly distinguishable from the present case because of two factors. The first is that the jury in the present case was clearly directed by the learned trial Judge that it had a common law or constitutional right to return a verdict of manslaughter, whereas in Mraz's case (supra) the jury received no such direction. We may add that we do not find it very surprising that the jury, having made a comparison of the parts played by the two applicants in their joint crime, was disposed by its verdict to show some mercy towards Walker. The second factor arises from an examination of the facts of Mraz's case and the reasons given by the learned Justices for their decision. Basic to the decision was the view expressed by Williams, Webb and Taylor, JJ. (at 506) that it did not appear to them "to be safe to assume, that properly instructed the jury would have returned such a verdict", that is, a verdict of murder and (at p.508) where they said:- "In the circumstances we feel strongly that the introduction of the topic of manslaughter may well have operated to lessen the applicant's chances of acquittal and, accordingly, we are by no means satisfied that, had the jury been properly instructed, they would have found the appellant guilty either of murder or manslaughter (R. v. Haddy), or that a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict (Stirland v. Director of Public Prosecutions)."  
Fullagar, J. (at p.514), after referring to the failure of the learned Judge at the trial properly to direct the jury - said:- "If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the

law, a miscarriage of justice." It is clear, we think, from a perusal of the judgments that the learned Justices took the view that the evidence to establish rape on the part of the appellant, which formed the basis of any crime of which he could be convicted, was of the weakest character and the appellant, had the jury not been confused by the misdirection they received as to manslaughter, certainly had a fair chance of being acquitted altogether. In the view we take of the present case this most important consideration is lacking. As we understand Mraz's case in relation to the present, it decides no more than that where a verdict of manslaughter is returned following a misdirection that such verdict is open, a new trial will not be denied as a matter of course merely because a verdict of murder, which there is evidence to support, might have been returned had the jury not been so misdirected. Our view of the present case is that even on the hypothesis that the direction that manslaughter was open on the evidence was incorrect, the giving of such direction did not deprive the applicant Walker of "a chance which was fairly open to him of being acquitted" under a proper direction. It is our view that the jury, properly directed, would inevitably have come to the conclusion that the applicant was guilty of murder or manslaughter, and it follows that no substantial miscarriage of justice has actually occurred.

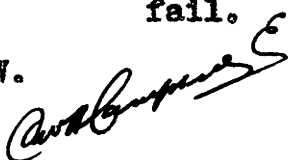
The final objection taken by Mr. Young was that the learned Judge was wrong in refusing an application made on behalf of Walker, at the commencement of the trial, for a separate trial. The substance of this objection was that it was likely to become apparent during the course of the trial that Walker was present with Ryan at the hold-up of the Bank, which occurred on 29th December, 1965.



It was said that this evidence was not admissible against Walker, but would tend seriously to prejudice his defence on the issue of the existence and extent of the concert alleged to exist between Ryan and himself prior to and at the time of the shooting of Hodson. The learned trial Judge considered this objection, and in the exercise of his discretion refused the application.

In considering the validity of the exercise of the learned Judge's discretion it must be borne in mind that it was a joint offence that was alleged by the Crown against the applicants, that it was relevant and would be proved in evidence that they were both convicted persons serving long terms of imprisonment at the time of the alleged offence, that evidence would be properly given that they were still together and in possession of the rifle at the time of their subsequent apprehension in Sydney, and that in the course of the trial the jury would be clearly warned by the learned Judge, as in fact was the case, as to the only way in which the evidence relating to the Bank incident could be used, and that it was not relevant and could not be used against Walker. It is also material to observe that when it appeared from the evidence of Ryan that Walker was present during the Bank incident, no application was made on behalf of Walker to have him discharged from the trial without verdict.

Having regard to the principles enunciated in R. v. Grondkowski 31 C.A.R. 116; R. v. Downey (1910) V.L.R. 361; R. v. Teitler (1959) V.L.R. 321; and R. v. Callaghan and Thomas (1966) V.R. 17, and to the considerations above-mentioned, we are of opinion that the trial Judge was entitled to exercise his discretion as he did, and that it certainly cannot be said that such discretion was wrongly exercised. This ground of the application must therefore fail.



We are accordingly of opinion for the reasons  
we have given that both applications must be refused.

The order of the Court is that in each case the  
application for leave to appeal against conviction is  
dismissed.

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IN THE HIGH COURT OF AUSTRALIA

PRINCIPAL REGISTRY

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No. 38 of 1966

IN THE MATTER of an APPLICATION  
by RONALD JOSEPH RYAN for SPECIAL  
LEAVE TO APPEAL from a decision of  
the Full Court of the Supreme Court  
of the State of Victoria in its  
criminal jurisdiction refusing an  
application for leave to appeal  
from a conviction of murder

W h e r e i n -

RONALD JOSEPH RYAN was Applicant

- and -

THE QUEEN was Respondent

EXHIBIT "H.C. - F" - REASONS FOR  
JUDGMENT

10/10/66

10/10/66

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