before a magistrate's court . . . and that court should commit him in custody, or remand him on bail with or without sureties, to be brought or appear before the court at which he is required".[11]

Section 40(4) of the *Justices Act* seems also to suggest that when the hearing has not commenced the arrested witness is to be brought, on apprehension, before a Justice. Such Justice may then either commit the witness to gaol until the hearing or discharge him upon his entry into a recognizance with or without sureties.

It is submitted, with respect, that a similar provision should be enacted with subsection 415(1A). Indeed, Crockett J. thought it ". . . curious that there is no similar provision or a provision as is to be found in s. 55 of the *Justices Act* in s. 415".[12]

Conclusion

The power conferred on the County Court and the Supreme Court by s. 415 may be beneficial to society. Every individual owes a duty to the State to help the law enforcement agencies in apprehending and successfully prosecuting criminals. The present section as it stands, however, is unduly harsh on a witness and should be amended. As Wigmore correctly stated:

> ". . . if this duty exists for the individual to society, so also he may fairly demand that society, so far as the exaction of it is concerned, shall make the duty as little onerous as possible."[13]

NORA KOTSIA*

R. v. SERGI[1]

This case is notable for the unequivocal rejection by the Full Court of the Supreme Court of Victoria of the argument that the mental element in murder is limited to an intention to kill or an intention to inflict grievous bodily harm. The Court held that recklessness as to the causing of death or the infliction of grievous bodily harm is a state of mind falling within the concept of malice aforethought involved in the crime of murder.[2]

The appellant was convicted of murder in the Supreme Court of Victoria and appealed to the Full Court relying on three grounds in support of the appeal.

This case note is confined to an examination of the Court's approach to

[11] Ibid. par. 64.
[12] Supra.
[13] Wigmore; *Evidence*, (3rd ed., Boston, Little Brown and Co. 1940) par. 2192.
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[1] [1974] V.R. 1.
[2] In *R.* v. *Hallett* [1969] S.A.S.R. 141, 154 the Supreme Court of South Australia thought that this proposition was "abundantly established".

the third ground of appeal which was that the learned trial judge misdirected the jury in the way in which he put to the jury that the verdict of murder was open in law on the basis of recklessness.

A brief narration of the facts will be sufficient to explain how the issue arose.

The deceased man, Condo, died outside the appellant's home from bullet wounds as a result of shots fired by the appellant. The deceased was visiting the appellant, an argument developed between them and Condo left the house to go to his car which was parked outside the house. The appellant obtained a rifle and from the hallway of his house fired several shots four of which hit the deceased. In an unsworn statement from the dock, the appellant admitted he fired several shots but said that he did not intend to hit the deceased whom he believed to be at his motor car out of the line of fire.

In directing the jury on the law relating to the crime of murder the trial judge, Lush J. said that in addition to an intention to kill and an intention to do grievous bodily harm, the requisite state of mind to justify a conviction could take a third form. The judge told the jury:". . . it is murder if, when the accused man fired, he did not intend or wish to hit Condo, but deliberately opened fire, knowing that to do so would more likely than not bring about Condo's death or serious injury. . ."[3]

Counsel for the appellant contended that the mental element involved in the crime of murder was limited to an intention to kill or to inflict grievous bodily harm and was not satisfied by the third state of mind set out by the judge in his direction to the jury.

The Full Court (Winneke C.J. Smith and Menhennitt JJ.) emphatically rejected this argument saying that it was contrary to authority and that "it would unduly limit the concept of the state of mind involved in the crime of murder and, consequently, unduly limit the ambit of the crime".[4]

The Court pointed out that in *R.* v. *Jakac*[5] it was held that there had been no misdirection by the trial judge who, relying on a passage in *Stephen's Digest of the Criminal Law*,[6] had directed the jury in terms similar to those used by Lush J. in this case. The Court also rejected a submission that *R.* v. *Jakac* was of doubtful authority because it was partly based on *Director of Public Prosecution* v. *Smith*[7] a case criticised by the High Court in *Parker* v. *R.*[8] The Court indicated that the direction before the Court in *Jakac's* case involved a subjective test as distinct from the objective test, referred to in the speeches in *Smith's* case, which was the real subject of the High Court's criticism in *Parker*.

The Full Court also found that the direction given by Lush J. was

[3] [1974] V.R. 1, 7.
[4] Ibid.
[5] [1961] V.R. 367.
[6] 9th ed. pp. 211-12; in *R.* v. *Hallett* (supra) the Court thought that the proposition in *Stephen's Digest* was "generally accepted as representing the law". For a recent House of Lords decision which considers Stephen's proposition see *Reg.* v. *Hyam* [1974] 2 W.L.R. 607.
[7] [1961] A.C. 290; [1960] 3 All E.R. 161.
[8] (1963), 111 C.L.R. 610; [1963] A.L.R. 524.

further supported by the judgments in *Pemble* v. *R.*[9] where the argument that recklessness would not warrant a conviction for murder where death resulted from it was found to be 'misconceived'. It was there said that the concept of malice aforethought included a mind reckless as to whether death or serious bodily harm resulted from a contemplated act or course of conduct. The High Court held that to be relevant recklessness must involve foresight of, or advertence to, the consequences of the contemplated act together with a willingness to run the risk of the likelihood of those consequences maturing into actuality.

The Full Court in *Sergi* stressed three points. First, the real test involved in this aspect of malice is the actual state of mind with which the act was done—a subjective test. Secondly, "a direction relating to this aspect of malice should be given only where the facts of the case are such as to make it a practical issue". And thirdly,

> "It needs to be made quite plain to the jury that in order to bring the case within the principle, the Crown has to establish that when the accused did the act which caused the death he realized or believed that it was more likely than not that death or grievous bodily harm would be the result, or, in other words, that he realized or believed that the odds were against the deceased escaping without at least suffering grievous bodily harm."[10]

There has been controversy as to whether the foresight of death or grievous bodily harm required to constitute recklessness must be foresight of probability or likelihood on the one hand, or only of its possibility on the other. In *R.* v. *Hallett*[11] the Supreme Court of South Australia said that "as the rule has been formulated in the Australian courts the former alternative seems to be the correct one".

The Full Court in *Sergi* used the expressions 'more likely than not' and 'the odds were against', making it clear that realization or belief by the accused that he was creating no more than a substantial risk of death or grievous bodily harm was not enough to constitute the requisite kind of recklessness.

In its reliance on *Pemble's* case, however, the Full Court quoted Barwick C.J. as saying: "a willingness to run the risk of the likelihood, *or even perhaps the possibility* of the consequences maturing into actuality".[12] (Emphasis added.) Indeed, in his judgment in *Pemble's* case Barwick C.J., with whom Windeyer J. concurred, went on to say:

> "I should add that it is in my opinion sufficient that the death or grievous bodily injury to the person towards or in connection with whom the accused contemplated an act or omission should be foreseen by him as possible. I see no logical reason why in such a case as the present it should be probable, though of course, it must not be merely a remote possibility. It must be something which it is seen could happen so that if nevertheless the contemplated act is done it can be said that it was

9 (1971), 45 A.L.J.R. 333; [1971] A.L.R. 762; 124 C.L.R. 107.
10 [1974] V.R. 1, 9-10.
11 [1969] S.A.S.R. 141, 153.
12 [1974] V.R. 1, 9.

done with indifference to the fact that death or grievous harm might ensue."[13]

In *Sergi* no comment was made on this formulation. One can only imply that the Court was not prepared to accept foresight of 'possibility' of death or grievous bodily harm as sufficient to constitute the relevant kind of recklessness. The controversy is likely to continue.

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[13] [1971] 45 A.L.J.R. 333, 338-9.

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