CONSTRUCTIVE MURDER IN ENGLAND AND AUSTRALIA

I. The Law in England.

Had it not been for the decision of the House of Lords in *Director of Public Prosecutions v. Beard*[1] it seems likely that the crime of "constructive murder" would have vanished from the common law, and that the "malice" required for murder would in every case involve either an intention to cause death or grievous bodily harm to the person killed or to some other person, or at any rate an intention to do an act which the accused realised was likely to cause death or grievous bodily harm.[2]

The older common law was undoubtedly very harsh. According to Coke, if death were caused by *any* unlawful act, this would be murder even though the perpetrator of the act had no intention either to kill or to harm. Coke illustrated this proposition by several examples including the following, "if he had shot . . . at any tame fowl of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful."[3] As to this example Holt, C.J., said in 1697 that "In the case of killing the hen, my Lord Coke is too large, there must be a design of mischief to the person, or to commit a felony or great riot."[4] Sir Michael Foster whittled the rule down still further by limiting it to cases where the unlawful act was a felony.[5] Stephen seems at one time to have accepted Foster's rule, apparently on the ground that it had been repeated so often that it must be regarded as law, though he did so with reluctance.[6] But in 1887 in *Serne's Case* he expressed doubts as to its accuracy and thought that "instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the

1 [1920] A.C. 479.

2 Stephen regarded this intention as sufficient: *Digest of Criminal Law* (6th edn), 219. Under ordinary circumstances, where the probable consequences were realised but not desired the crime would seem to be manslaughter only; see, for example, Western Australian Criminal Code 1913, s. 279 (*infra*).

3 *Inst.*, III, 56. Stephen thought this statement to be without historical foundation: *History of the Criminal Law*, III, 57.

4 *R. v. Keate*, (1697) Comb. 406, at 409; cited by J. W. C. Turner in *Modern Approach to Criminal Law*, 213.

5 Foster, *Crown Cases*, 258.

6 *H.C.L.* III, 57.

purpose of committing a felony. which caused death, should be murder."[7]

Throughout the latter part of the nineteenth century cases occur in which Foster's rule was apparently applied, but for the most part the cases were not such as to throw any strong emphasis on the injustice it might work. In *Reg. v. Horsey*,[8] where its application would have led to manifest injustice, Bramwell, B., although directing the jury that, where a prisoner in the course of committing a felony caused the death of a human being, that was murder, provided the jury with a loophole by suggesting that they might not be satisfied that the death of the deceased was the natural consequence of the prisoner's act. In that case the accused had set fire to a stack of straw with the result that a man, who had apparently been sleeping in the stack, was burnt to death. The prisoner had been unaware of the man's presence and, when he did become aware of it, had in fact made every effort to save his life by attempting to extinguish the flames. There was no real possibility in fact that the deceased had come into the enclosure, where the stack was, after it had been ignited by the prisoner, and the judge's suggestion (of which the jury availed itself) was therefore a device to evade the operation of the over-harsh rule of law which apparently made the crime murder.

In other cases judges refused to recognise the validity of the rule. In particular, where several persons were jointly engaged in the commission of a felony and one of them, in the course thereof, intentionally killed another person, this murder was not attributable to the other persons concerned in the felony unless they were aware of the intention to use felonious violence.[9] By 1911[10] there had been several cases in which trial judges had directed juries, where death resulted from acts done in the course of committing a felony, that they should convict the accused of murder only where he must have contemplated that death or grievous bodily harm was likely to result from his acts. It seemed therefore that the last residues of the older and harsher rule were being eliminated from the law.

This advance to a more humane rule was arrested by the decision of the House of Lords in *Beard's Case* where it revived Foster's rule at least in part. Beard had been found guilty of the murder of a girl whom he had raped. In aid of the act of rape he had placed his hand on her mouth to prevent her from screaming, at the same time pressing his thumb upon her throat, with the result that she died from violence and suffocation. Prior to the commission of the offence Beard had been drinking, and most of the attention of the appellate courts, both the Court of Criminal Appeal and the House of Lords, was directed to the availability of a defence of drunkenness. How-

[7] *Reg. v. Serne and Goldfinch*, (1887) 16 Cox C.C. 311.
[8] (1862) 3 F. & F. 287.
[9] See especially *Reg. v. Skeet*, (1866) 4 F. & F. 931, and J. W. C. Turner, *op. cit.*, 247 et seq., where the cases are collected and discussed.
[10] *R. v. Lumley*, (1911) 22 Cox C.C. 635.

ever, another ground of appeal was that the trial judge should have told the jury that, if they were of opinion that the violent act which was the immediate cause of death was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter. In the House of Lords this ground was dismissed very shortly in the following words:—"The first objection failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt as to its soundness."[11] This statement of the law is surprising for a variety of reasons. In the first place it appears that many judges and lawyers of great distinction had doubted the soundness of the rule as stated, and secondly, although apparently the matter was not argued with any great force, the point was taken in argument, and some of the cases in which the doubts on Foster's rule were expressed were quoted.[12] Lord Birkenhead, L.C., who delivered the judgment of the House, had emphasized that "the usefulness of these proceedings will depend upon the care with which the doctrines which have been discussed in argument are examined." It would seem, however, that this care was lavished on the second ground of appeal dealing with the defence of drunkenness, and that the former ground which was at least of equal importance was treated in a much more casual fashion.

This decision has been received with dissatisfaction by many writers and some judges, but in general it has been accepted and the rule applied by the courts without any discussion of its soundness. Thus the Court of Criminal Appeal has referred to the doctrine with approval on a number of occasions.[13] The only doubt that we may have as to whether the rule is part of the English common law is raised by Mr. P. A. Landon, in a review of Cross and Jones' *Introduction to Criminal Law,* in which he makes the statement that "this doctrine (as to constructive murder-felony)—emanating (in our view) from a misinterpretation of Lord Birkenhead's language in *Beard*—is a disgrace to English jurisprudence, and we wish our authors had said so."[14] Unfortunately Mr. Landon does not indicate what is the real meaning to be attributed to Lord Birkenhead's language.

11 [1920] A.C. 479, at 493.

12 *ibid.,* at 488.

13 For example, *R. v. Larkin,* [1943] K.B. 174; *R. v. Jarmain,* [1946] K.B. 74; *R. v. Betts and Ridley,* (1930) 144 L.T. 526. For a comment on *R. v. Jarmain* and a criticism of a somewhat similar Canadian case, where a different rule is applied, see Alfred Bull, *Murder or Manslaughter?,* 24 Can. Bar Rev. 13.

14 (1949) 65 L.Q.R. 102, at 104.

One attempted justification for the rule was that put forward by Lord Alverstone, C.J., that "The experience of the judges shows that there are so many cases of deaths caused by attempts to commit felonies, that, for the protection of human life, it is not desirable to relax the rule which treats such crimes as murders."[15] However, this justification vanishes when one considers that the rule only applies to cases where there is no intention to kill or inflict grievous bodily harm. If there were such an intention it would be covered by the ordinary definition of murder without calling in aid the doctrine in *Beard*. Punishment for murder under this rule is not designed to operate "for the protection of human life" since the relevance of the punishment for murder is never brought home to the perpetrator of the act. The real reason for the retention of the rule would appear to lie in the distrust felt by some judges for the tribunal of fact, the jury. They feel that the jury may be misled into the belief that the person who has committed a felony, and has killed in the course of committing it, did not intend to kill or to cause grievous bodily harm; they therefore prefer an inelastic rule which gives the jury no latitude. As to this attitude to juries, Dixon, J., has said in another connection that "a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code."[16] It can hardly be doubted that the rule in *Beard* has on occasion prevented the jury from exercising their proper function of determining the facts both as to whether the act has been committed by the accused and the intent with which it was done. Judges have used this rule, and rules of a like kind, to enable them to substitute their own view of the facts for that of the jury. One example of this may be given. In *R. v. Larkin*[17] the accused had been charged with the murder of a woman who had been his mistress. In his evidence he stated that he had flourished a razor with the intention of frightening a man who was with the woman, but that the deceased, who was "groggy" with drink, had swayed against him when the razor was in his hand, and that her throat was cut by accident. This may well have sounded improbable, but the jury was entitled to believe it rather than the evidence for the prosecution. The trial judge directed the jury that if they accepted the story of the accused in its entirety they must still find him guilty of manslaughter; on that direction the jury brought in a verdict of guilty of manslaughter. After the verdict had been given the trial judge took the unusual course of asking the jury their reasons for giving the particular verdict; the foreman replied that in their view it had been an accident. In spite of that statement the judge sentenced the accused to five years' penal servitude. In doing so he presumably acted on his own view that the

[15] Quoted by Kenny in *Outline of Criminal Law* (14th edn.), 158. This judicial pronouncement was made in 1909, eleven years before *Beard's Case*.
[16] *Thomas v. The King*, (1937) 59 C.L.R. 279, at 309.
[17] [1943] K.B. 174; for a more detailed account see 168 L.T. 298.

killing was not accidental, since, if it had been an accident, the offence might technically have been manslaughter but it would not be regarded as meriting the sentence imposed.

II. The Law in Australia.

In Australia the position is complicated by the fact that three States—Queensland, Western Australia, and Tasmania—have Criminal Codes, New South Wales has a statutory definition of murder, and in Victoria and South Australia the common law applies.

In the Queensland and Western Australian Codes the definition of murder does not embody in express terms either Foster's rule or the rule in *Beard*,[18] however, it will be seen that the actual decision in *Beard* is covered by clause 5. There may, however, be cases within the doctrine enunciated in *Beard* which would not be covered by the provisions in the Codes. This will depend on the meaning to be given to the phrases "act of violence" and "felony involving violence" in Lord Birkenhead's judgment.[19] On the other hand, the provisions of the Codes may go further than the common law rule since clause 4 refers to an act which in some circumstances would probably not be classified as "an act of violence" and which would therefore be outside the rule in *Beard*.

Section 157 of the Tasmanian Code differs only slightly from those provisions. The most significant variation is that the category of crimes referred to in clause 3 of the Queensland and Western Australian sections is restricted in the Tasmanian section to certain

[18] Section 302 of the Queensland Code and section 279 of the Western Australian Code are in the following terms:—

> Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:—
>
> (1) If the offender intends to do to the person killed or to some other person some grievous bodily harm;
>
> (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
>
> (3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
>
> (4) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;
>
> (5) If death is caused by wilfully stopping the breath of any person for either of such purposes,
>
> is guilty of murder.
>
> In the first case it is immaterial that the offender did not intend to hurt the particular person who is killed.
>
> In the second case it is immaterial that the offender did not intend to hurt any person.
>
> In the three last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

[19] See below.

named crimes.[20] In New South Wales, murder is defined by section 18 of the Crimes Act 1900.[21] It will be noted that in some respects the section is very wide since it apparently extends to acts not obviously dangerous, done during or immediately after the commission of a dangerous act or crime punishable by death etc. It is by no means clear to what extent section 18 (2) (a) rectifies this position. Obviously "malice" in this subsection does not refer to the "malice aforethought" required for murder at common law, since the incorporation of this element would frustrate the purpose of the section which was "to substitute acts or omissions of a stated character for acts and omissions induced by what is termed at common law malice aforethought."[22] The definition of "maliciously" given in section 5[23] of the Act when read into section 18 excludes some, but not all, of the anomalous cases to which the latter section would otherwise apply. It would seem, therefore, that this attempted definition of the crime has created as many problems as it has settled.

In Victoria and South Australia there is no statutory definition of murder; therefore it could normally be assumed that the position would be the same as in England—particularly in view of the rule in *Piro v. Foster*[24] that decisions of the House of Lords should be treated as authoritative by all Australian courts and should be followed even when they are in conflict with decisions of the High Court. However, it is not easy to maintain that the common law in Australia is identical with that in England in the face of the decision of the High Court in *Ross v. The King,*[25] decided after *Beard,* in which a majority of the Court accepted as the law a statement that

[20] Piracy and offences deemed to be piracy; murder; escape or rescue from prison or lawful custody; resisting lawful apprehension; rape; forcible abduction; robbery with violence; robbery; burglary; arson.

[21] (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life.
(b) Every other punishable homicide shall be taken to be manslaughter.
(2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence.

[22] Hamilton and Addison, *Criminal Law and Procedure,* 30.

[23] "Maliciously": Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

[24] (1944) 68 C.L.R. 313.

[25] (1922) 30 C.L.R. 246.

"the unintentional killing of one person by another while such other is in the course of committing a felony, or acting in furtherance of the purpose of committing felony, that is to say, in the promotion or advancement of the purpose of committing a felony not yet accomplished, is murder."[26] It is clear that this statement goes beyond the rule in *Beard,* and indeed it was necessary to go beyond that rule to enable the Court to arrive at its conclusion that the direction of the trial judge had been satisfactory. The facts of *Ross* were not dissimilar from those in *Beard.* It was alleged that the accused had strangled the deceased, a young girl aged twelve, while having intercourse with her or after having had intercourse with her. But in this case the felony alleged to have been committed by the accused was not rape, as in *Beard,* but the statutory offence of "having carnal knowledge of a girl under the age of sixteen years." This offence would not fall within Lord Birkenhead's description of "a felony involving violence" since force or violence is not a necessary ingredient in the offence as it may be in rape. The case therefore appears to be authority for the proposition that in Australia the rule as to constructive murder is the rule laid down by Foster and not that accepted by the House of Lords in *Beard.*

In the years which have elapsed since 1922 some trial judges have apparently ignored the decision in *Ross,* and at least in cases where death has been brought about in the course of an illegal attempt to procure a miscarriage, have directed the jury that this will not be murder unless in the circumstances of the case the accused must have realised that his acts were dangerous to life. Gavan Duffy, J., of the Victorian Supreme Court did not feel free to adopt this course but regarded himself as bound to direct the jury in accordance with the rule in *Ross.* He did so in the case of *R. v. Brown and Brian*[27] but, realising the harshness of the rule and apparently hoping that another view might be taken if the case went on appeal to the High Court, requested the jury that they should make a specific finding as to whether a reasonable man would have contemplated that death would result from the attempt to procure a miscarriage. This question the jury answered in the negative, but as they had also found that the accused had unlawfully used an instrument to procure a miscarriage and that the use of the instrument had brought about the death of the deceased, His Honour held that this amounted to a verdict of guilty of murder. An appeal having been brought to the Full Court, the conviction was set aside on another ground; but Lowe, J., with whose judgment the other members of the Court agreed, adverted to the problem raised by *Ross* and held that that case had not intended to lay down a rule different from that in *Beard.* He was prepared to distinguish *Ross* on the ground that it was a case of "death by violence in the course of committing a felony," whereas the instant case was not. The Court

[26] *ibid.,* at 252.

[27] [1949] A.L.R. 462. The learned judge had used the same device in *R. v. Carlos,* [1946] V.L.R. 15, where the accused was acquitted.

made no attempt to define what it meant by an "act of violence," nor what is meant by "a felony involving violence." Both of these terms present difficulties. If "felony involving violence" means only a felony which by its definition requires violence, then *Ross* is inconsistent with *Beard*. If it merely involves that in the particular felony there must in fact be violence, then the use of the phrase adds nothing to the requirement of an "act of violence" which was the other constituent in Lord Birkenhead's definition. If violence means physical interference of some kind, then it is difficult to see why the use of instruments to procure a miscarriage does not come within its meaning. On the other hand, if it means physical interference with some person against his or her will then, though the felony of rape would be a felony of violence, the felony in *Ross* would not since the defence there claimed that the girl was a consenting party.[28]

Although these difficulties are latent in the decision in *Brown and Brian* the decision is none the less welcome since it means that the importance of the unfortunate decision in *Ross* is minimized and that the ultimate decision is in line with the law declared in the Codes and in section 18 of the Crimes Act of New South Wales. If *Ross* had fallen to be determined under the provisions of one or other of the Codes, the offence committed would have been murder if the jury had found that, in endeavouring to stop the girl from crying out, the accused had done an act in the prosecution of the felony of a nature likely to endanger life. Again, it would have been murder if the accused had "wilfully stopped the breath of the girl for the purpose of carrying out the felony" (with this qualification, that in Tasmania, unless the felony alleged was rape, the killing would be manslaughter only). In New South Wales his act would be murder only if he had acted with reckless indifference to human life or with intent to kill or inflict grievous bodily harm, or if his act was itself obviously dangerous to life.

A. L. TURNER.

[28] (1922) 30 C.L.R. 246, at 272.