Privy Council Appeal Nos. 30 and 34 of 1986

Graham Ralph Frankland and
Stephen Philip Moore *Appellants*

v.

The Queen *Respondent*

FROM

THE STAFF OF GOVERNMENT DIVISION OF THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MARCH 1987

Present at the Hearing:

LORD MACKAY OF CLASHFERN
LORD ELWYN-JONES
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Ackner**]*

These consolidated appeals are from judgments of the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man. They are the first appeals from that Court against convictions for murder to come before the Privy Council. Frankland was convicted on 17th April 1980 in the Court of General Gaol Delivery (His Honour Deemster Luft and a jury) of the murder between 27th September and 3rd October 1979 of John Gale Bridson. His appeal was dismissed on 1st July 1980, the judgment being given by Sir Iain Glidewell J.A. (President). Moore was convicted on 1st December 1982 in the Court of General Gaol Delivery (His Honour Deemster Corrin and a jury) of the murder on 20th April 1982 of Brian Marcus Battista, a baby aged 18 months. His appeal was dismissed on 18th February 1983, the judgment being given by his Honour B.A. Hytner Q.C. J.A. Both appellants had been sentenced to death but those sentences were subsequently commuted to life imprisonment.

Happily, murder is a rare offence in the Isle of Man. The last conviction prior to that of Frankland was in 1973. The last trial before that, and it resulted in an acquittal, was in 1943 and before that it seems unlikely that there had been a conviction for murder for very many years. Since the conviction in 1973 did not result in an appeal, the Frankland appeal was the first appeal against a conviction for murder to the Staff of Government Division (Criminal Jurisdiction) in the sixty one years that that Court has been in existence.

The essential issue

In the Isle of Man, murder is a statutory offence and is defined by section 18 of the Criminal Code Act 1872 as follows:-

> "Whosoever shall unlawfully and feloniously kill another with malice aforethought shall be guilty of murder and being convicted thereoF shall suffer death as a felon."

It is common ground that this definition has been given the same meaning in Manx law as the common law offence of murder in English law. Both learned trial judges in directing the jury on the meaning of "malice aforethought" informed the jury *inter alia* that they were not concerned with what the accused himself contemplated as the probable result of his unlawful act but were to apply the objective test of what an ordinary reasonable man would in all the circumstances contemplate as the natural and probable result - often described as "the *D.P.P. v. Smith* test". The question at issue is whether that test was part of the common law of England, and therefore part of Manx law, until it was abolished by section 6 of the Isle of Man Evidence Act 1983, incorporating section 8 of the Criminal Justice Act 1967.

The facts

Frankland. Sir Iain Glidewell, in his judgment conveniently summarised the facts as follows:-

> "The defendant who, at the time of the trial, was aged twenty eight years, met Mr. Bridson in London when he, the defendant, was in his mid-teens. About 1970 Mr. Bridson, who came from the Island, returned to live in Castletown and brought the defendant here to live with him and the relationship between them was such that the defendant knew him as Uncle Jack. The defendant in due course married and he left Mr. Bridson in about March 1978. But his wife left him at a date which in his evidence he put at December 1979 but must we think have meant Christmas 1978. In the summer of 1979 the defendant was working at an hotel in Douglas when he met and formed a

friendship with a Miss Farrell. She was also working in the same hotel and that friendship continued for some months. At the end of September Miss Farrell returned to her home in Ireland, leaving the Isle of Man on Sunday the 30th of September. According to the defendant he was intending to marry Miss Farrell though she gave no sign that she was intending to marry him, and the defendant said Mr. Bridson was jealous of the fact that he was intending to marry Miss Farrell and said that he was going to take steps to stop the marriage by telling Miss Farrell that the defendant had been in Borstal and was a 'queer' which is not true. I should say that in 1979 Mr. Bridson was aged sixty seven years or thereabouts. He was a man who was clearly not in good health. After his death a post-mortem examination revealed that he was suffering from chronic bronchitis and a severe degenerative condition of the lungs and that he had hardening of the coronary arteries. It may well be, of course, that these facts were not known to the defendant, but when Miss Farrell was asked about his apparent state of health (and what was apparent to her was, of course, apparent to the defendant) she said 'He seemed to me to be a very weak man, he was coughing a lot and he looked very small and delicate'.

On the evening of Friday the 28th September last year the defendant visited Mr. Bridson at his home in Castletown. According to a statement which he made to the police after his arrest, he said he went to try to persuade Mr. Bridson not to speak to Miss Farrell about him and about his past. In that statement he said 'I asked him', that is Mr. Bridson, 'if he was still going to the Airport and he said yes. I said no you are not. I said I would stop him one way or another. We had a row. He said he was still going down to tell her that I was bent, about the cheques, about all my past. One thing led to another so I tied him up. It was in the bedroom. I told him if he did not lie down I would poke him. I threatened him. He lay on the bed. I tied his hands behind his back with a blue necktie, it had gold crests of some description as a pattern. I then tied his ankles together with another tie, I cannot remember that tie. I said just lie on the bed, you can get free. The reason I did this was to keep him there to give me a chance to get my girl away before he could talk to her. I went downstairs then. I thought he would be able to get free later himself. I opened the front door and closed it and waited in the hall to see what he would do. I heard him jump straight off the bed and heard him start screaming. He was not using any words, just yelling. I went upstairs

again. I slapped him round the face. I did not punch him or knife him or anything, I just slapped him. I put him back on the bed. I think I then put two handkerchiefs on his mouth, one on his mouth and one across. I had lost my temper. I knew I was losing Monica and it was really getting to me. Then I went downstairs but before that I think I put a necktie around his mouth, but I do not know the colour. By this time I did not know what day it was. Downstairs I saw some lawn mower extension cable on a hook, it was white, it was in the kitchen. I took that. In the dining room on the bottom shelf of a table with a radio on I saw some double sided tape, the tape was brown but the backing was white. I took the tape and the cable upstairs. I used another tie and tied the feet to the hands behind his back. I looped the cable through his legs and tied it to the bed, then I carried on looping it through his arms and his legs and wrapped it round and under the bed. It looped twice right under the bed. This was to stop him getting off the bed and doing the same as before. I think I could demonstrate how I did it but it is hard to describe. Then I put the tape on Jack's mouth, about seven or eight pieces. I left his nose free so that he could breathe. Jack was not struggling then. After I had slapped him on the mouth he realised I was serious, probably saw I was half drunk and decided to be quiet. I told him it was only going to be until Sunday. I told him I was sorry and he nodded as if he understood. I told him I would be back about Monday night or Tuesday and that he could tell the police what had happened after that as it would be immaterial by then, my girl would have gone. He nodded that he understood. Before I left I checked that the lights were off. I took about seventy pounds from his wallet which was in his back pocket. I gave him all the one pound notes back. I told him it would do for his food when he got loose. Jack saw me doing this, I knew he would not mind. He often gave me money and I told him that when I came back we would sort the money out and everything. When I left it would be about nine o'clock'. And there tied up on that bed Mr. Bridson stayed, no doubt at first in discomfort, very shortly in pain and eventually, it is quite clear, in agony, and in due course he died. The medical evidence was that his death probably took place on the Sunday night, in which case he was there alone for forty eight hours before he died, as lonely and as horrifying a death as one can imagine.

Meanwhile the defendant took Mr. Bridson's car and he took Miss Farrell and some friends out on the Friday night and the Saturday and he spent

the money that he had taken from Mr. Bridson on entertaining them and on Miss Farrell. On the Sunday afternoon he took Miss Farrell to the airport, he saw her leave for Ireland. He said about that period, 'On the Friday night I got drunk, the party finished about four o'clock in the morning. On Saturday I got drunk. I knew what I had done, not that I had killed him but that I had tied him up. I knew it was stupid but it was too late then. I felt I wanted to talk about it. On Sunday my girl left for Ireland in the afternoon. I saw her off. I thought of going to let Jack free. I went to the house and drove past twice but there were people about and I got panicky. I could not go in so I drove back to Douglas. Then I stayed in on Sunday night. Monday I drove round. I thought about Jack and that when I let him go he would not be too pleased about it and I was worried about what would happen to me. Today, Tuesday, I went for a drive and got some petrol. I thought I would wait until dark to go down to Jack'.

In fact on the Tuesday during the morning a neighbour of Mr. Bridson's who had observed that the curtains were still drawn and that milk was standing on the front doorstep became concerned about him, informed the police and a police officer entered the house about mid-day on the Tuesday and found Mr. Bridson dead. The police kept watch in the vicinity and during the Tuesday evening the defendant drove up to the area in Mr. Bridson's car and he was duly arrested. [This is not quite accurate. The defendant was arrested that evening at his home.]

At his trial he gave evidence which gave an account of these matters very similar to that contained in his statement which he made to the police after his arrest, except for the explanation as to why he took the money. In his statement he said 'When I went up to Jack's on the Friday it was only to reason with him, it was not to do him any malice, just to keep him away from my girl. When I tied him up and gagged him I did not intend him to die. I have been told that Jack is dead and it is a shock to me'."

Moore. Moore shared a flat with an Italian girl, Clodi Battista, in Douglas. The deceased was Miss Battista's son, who lived with her at the time of his death. On 20th April 1982 Miss Battista went to work at about noon, leaving the deceased, a healthy child but suffering from a cold, in the care of Moore. She returned at about 5.10 p.m., when the deceased appeared to be asleep. About a half an hour later Moore and Miss Battista had a violent argument, as a result of which Moore left the flat. Shortly

afterwards Miss Battista went to the shops, returning five or ten minutes later, and soon thereafter discovered that her son was dead. The deceased was examined in hospital where marks were found on his stomach, which according to Miss Battista had not been there when she dressed the child that morning. Death had been caused as a result of a blow delivered "with terrific force" to the child's stomach while his back was against some hard surface, causing his liver to split. Moore made three written statements, in the last of which he admitted punching the deceased in temper. He made two similar oral admissions. It was the Crown's case that only Moore or Miss Battista had had the opportunity to kill the deceased.

Moore's defence was limited to disputing that he was the person who injured and killed the child. He alleged that he had got on well with the deceased, but that Miss Battista had been violent towards her son on previous occasions. He stated in evidence that his second statement had been made as a result of pressure and his third as a result of physical violence and he denied the two oral admissions. He further stated in evidence that between noon and 5.10 p.m. on 20th April 1982 he had not touched the deceased so as to cause him injury.

The direction to the juries

It is common ground that there is no difference in substance between the summing up of the two learned trial judges. There is therefore no need to set out the relevant extracts from each. Their Lordships content themselves with the following quotation from the summing up of Deemster Corrin in the case of Moore:-

> "In order to return a verdict of guilty of murder the prosecution has to prove malice aforethought, and in the absence of that the verdict would be manslaughter.
>
> Now you will remember that I told you earlier that malice aforethought exists when any one of three attitudes of mind is present. You will have to decide in this case on the evidence whether any one of those attitudes of mind was present, and if you are satisfied so as to be sure that one was present, then malice aforethought has been proved and the defendant would be guilty if you were sure it was the defendant who killed the child. The first attitude of mind is that there was an intention on the part of the defendant to kill the child or to cause him really serious bodily injury. The second attitude of mind is that there was an intention on the part of the defendant to do an

act, that is, assault the child, knowing that it was highly probable that it would kill him or cause him really serious bodily injury. Now in both those attitudes of mind it is the defendant's intention which really counts. You would have to be satisfied so as to feel really sure that this defendant, Moore in this case, actually intended to kill or do really serious bodily injury to the child, or that he actually intended to attack him in such a way that it was highly probable that he would be killed. But even if you are not sure of either of those attitudes of mind on the part of the defendant, there is the third attitude of mind for you to consider. It is the one which was emphasised by Mr. Moyle. If you are satisfied so as to feel sure that this third attitude of mind was present, then malice aforethought would be proved by the Prosecution and the defendant would be guilty of murder. The third attitude of mind is different from the other two in that it does not depend throughout on the actual intention of the defendant. It is constituted if there was an intention on the part of the defendant to do something unlawful to the child knowing the circumstances which, whether he the defendant realised it or not, rendered the act likely to cause death or really serious bodily injury. So you would first have to feel sure that the defendant intended to do something unlawful to the child, that is, intended to assault him, and if you felt sure of that, then you would have to be satisfied that the defendant, committed that unlawful act knowing the circumstances whether he, the defendant, realised it or not, rendered the act likely to cause death or really serious bodily injury. So in this third test there is no need of the proof of actual foresight on the defendant's part of either death or really serious injury. The defendant might have intended only a small degree of harm, and he the defendant might fail to foresee that his act was likely to cause death or really serious bodily injury, but in that case malice aforethought would be present. What has to be proved is that the defendant intended, that is, he formed the intention to do something unlawful to the child, it matters not what the defendant himself contemplated in fact as the probable result, or whether indeed he even contemplated the result, provided in law he was responsible for his actions. If he was responsible, the question is whether the unlawful act of the defendant was of such a type that really serious bodily unjury or death was the actual and probable result, and the test for that is not what the defendant himself contemplated, but what the ordinary reasonable man or woman would in all the circumstances of

the case have contemplated as the natural and probable result."

The Director of Public Prosecutions v. Smith [1961] A.C. 290.

The facts of that much discussed case, in which the victim was a police officer who clung to the side of the defendant's car, to prevent the defendant driving off with stolen property, and subsequently fell off in front of another car thus receiving fatal injuries, are too well known to require detailed recapitulation. In the course of his summing up the learned trial judge, Donovan J., as he then was, said:-

"The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts."

Byrne J., in giving the judgment of the Court of Criminal Appeal, commented that the learned trial judge at no stage gave the jury any explanation of the meaning or effect of the word "presumption" or that any such presumption might be rebutted. He said at page 300:-

"Whatever may have been the position last century when prisoners could not go into the witness box and the distinction between presumptions of law and presumptions of fact was not so well defined, it is now clear, as was naturally conceded by Mr. Griffith-Jones [for the prosecution] that the presumption embodied in the above maxim is not an irrebuttable presumption of law.

The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."

Accordingly the conviction was quashed.

When the case went to the House of Lords the Attorney-General submitted:-

"... The presumption that a man intends the natural and probable consequences of his acts is rebuttable only on proof of insanity, diminished responsibility or incapacity to form an intent.

> It is not rebuttable simply by evidence that, though the accused was sane and did the acts deliberately, he did not intend grievous bodily harm because he gave way to panic or lost his head or lost his temper. Apart from the exceptions stated, he must be taken to be a reasonable man" (306-307) "If he did acts which, in all the circumstances of the case, a reasonable man would say were calculated to cause grievous bodily harm to someone, that is enough to establish intent on his part, and he cannot be heard to say that he did not intend to do grievous bodily harm to the deceased" (page 308). "If a reasonable man would have concluded that the act was calculated or likely or certain to do grievous bodily harm, the jury are bound to conclude that the accused acted with the intent to do grievous bodily harm. While the presumption that a man intends the natural and probable consequences of his acts is rebuttable, it is not rebuttable in the case of acts deliberately done; it is no defence that he did not foresee the consequences." (309/310)

Those clear and forthright submissions were in substance accepted and resulted in the appeal by the Crown being allowed. In the course of the single speech, concurred in by Lord Goddard, Lord Tucker, Lord Denning and Lord Parker of Waddington, Viscount Kilmuir L.C. said at page 327:-

> "The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result."

Although it has been suggested that the words "in such a case as the present" in the above quotation from the speech of the Lord Chancellor made it clear

that he was not propounding an objective test and that the test is always subjective (see in particular *Hardy v. Motor Insurers' Bureau* [1964] 2 Q.B. 745 per Lord Denning M.R. at page 758/759 and Pearson L.J. at 764) Mr. McKinnon Q.C. for the Crown has throughout these appeals proceeded on the generally accepted view that the House of Lords reversed the Court of Appeal, because the Court of Criminal Appeal had held that the test was a subjective one and not an objective one. Indeed the strength of the criticism of the decision (as so interpreted), resulted in Parliament imposing the subjective test, both as to foresight of the consequences and as to intention, by enacting section 8 of the Criminal Justice Act 1967.

In *Hyam v. The Director of Public Prosecutions* [1975] A.C. 55, at pages 70 to 71 Lord Hailsham of St. Marylebone L.C. having referred in some detail to the many criticisms from different sources of the decision in *D.P.P. v. Smith*, rejected the suggestion that their Lordships' House should make use of the Practice Statement (Judicial Precedent) 1966 and depart from that decision. He considered that it was far better to recognise that Parliament in 1967 had appropriately dealt with the main criticism, be it right or wrong, of that decision. Viscount Dilhorne saw no reason to review the decision because *Hyam* raised no question as to the applicability of the objective test since, in the light of the direction given to the jury and its verdict, the jury were to be taken to have found that the appellant herself knew that it was highly probable that serious bodily harm would be caused.

However Lord Diplock in his speech took up the point which was made by Byrne J. giving the judgment of the Court of Criminal Appeal in *D.P.P. v. Smith* and cited above. He said at page 94D-F:-

> "It was, I venture to think, a comparable failure to appreciate the significance of the accidents of history in the development of English criminal law that led this House in the same case to adopt the objective test of intention as to the consequences of a voluntary act, i.e., that part of the decision that is now overruled by the Criminal Justice Act 1967. Intention can only be subjective. It was the actual intention of the offender himself that the objective test was designed to ascertain. So long as the offender was not permitted to give evidence of what his actual intention was, the objective test provided the only way, imperfect though it might be, of ascertaining this. The Criminal Evidence Act 1898 changed all this. A defendant to a charge of felony became entitled to give evidence in his own defence. The objective test no longer provided the only means available in a criminal

> trial of ascertaining the actual intention of the offender; but it had been so for so long that this House overlooked the historical fact that the objective test did not define the relevant intention as to the consequences of a voluntary act. It was no more than one means of ascertaining the relevant intention, to which the Criminal Evidence Act 1898 added another - the defendant's own evidence of what his actual intention was."

Clearly, in Lord Diplock's judgment, *D.P.P. v. Smith* had wrongly stated the common law.

Two recent decisions of the House of Lords are of particular relevance, although the observations which their Lordships will quote were clearly *obiter*. In *R. v. Moloney* [1985] A.C. 905 Lord Bridge of Harwich gave the sole speech with which all their Lordships agreed. At page 921 he referred to *D.P.P. v. Smith*, quoted the direction given by Donovan J. and stated that the effect of the decision of the House of Lords was:-

> "... to declare the presumption that a man intends the natural and probable consequences of his acts to be irrebuttable, or, put in other language, to require juries, in deciding whether a person accused of murder had the necessary intention to kill or cause grievous bodily harm, to apply the objective test of the reasonable man, not the subjective test of what was in the mind of the accused man. In this respect the decision was never popular with the profession. It is said to have been widely disregarded by trial judges, directing juries in murder cases, until it was eventually overruled by section 8 of the Criminal Justice Act 1967."

At page 928 he again referred to *D.P.P. v. Smith* and said:-

> "A rule of evidence which judges for more than a century found of the utmost utility in directing juries was expressed in the maxim: 'A man is presumed to intend the natural and probable consequences of his acts'. In *Director of Public Prosecutions v. Smith* [1961] A.C. 290 your Lordships' House, by treating this rule of evidence as creating an irrebuttable presumption and thus elevating it, in effect, to the status of a rule of substantive law, predictably provoked the intervention of Parliament by section 8 of the Criminal Justice Act 1967 to put the issue of intention back where it belonged viz., in the hands of the jury 'drawing such inferences from the evidence as appear proper in the circumstances'."

Their Lordships view these observations as being consistent with and supporting the criticism made by Lord Diplock of *D.P.P. v. Smith* quoted above. Lord Scarman in giving the single speech in *R. v. Hancock and Shankland* [1986] 1 A.C. 455 at page 473 referred to Lord Bridge's comment on *Smith*'s case accepting and paraphrasing it in these terms:-

> "... that Parliament intervened by section 8 of the Criminal Justice Act 1967 to return the law to the path from which it had been diverted, leaving the presumption as no more than an inference open to the jury to draw if in all the circumstances it appears to them proper to draw it."

Was the "objective test" part of Manx law until May 1983, when section 6 of the Evidence Act 1983 incorporated into the law of the Isle of Man section 8 of the Criminal Justice Act 1967?

Mr. Carman Q.C. for the appellants submitted to their Lordships that if section 8 of the 1967 Act had not been passed, the House of Lords would, pursuant to the Practice Direction of 1966, have departed from the decision in *D.P.P. v. Smith*, insofar as it had laid down an objective test of intention, well before the appellants had committed these homicides. While their Lordships are prepared to accept that this might have been the case, they do not have to be so satisfied. Decisions of English Courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx Courts, but they are of high persuasive authority, as was correctly pointed out by Sir Iain Glidewell in giving the judgment of the Staff of Government Division, Criminal Jurisdiction. Such decisions should generally be followed unless either there is some provision to the contrary in a Manx statute or there is some clear decision of a Manx Court to the contrary, or, exceptionally, there is some local condition which would give good reason for not following the particular English decision. The persuasive effect of a judgment of the House of Lords, which has largely the same composition as the Judicial Committee of the Privy Council, the final Court of Appeal from a Manx Court, is bound to be very high. Sir Iain Glidewell cited as authority for this proposition the well known case of *De Lasala v. De Lasala* [1980] A.C. 546, an appeal from the Court of Appeal of Hong Kong. Lord Diplock said (at pages 557F/558 B):-

> "It has become generally accepted at the present day that the common law is not unchanging but develops to meet the changing circumstances and patterns of society in which it is applied. In *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590 it was accepted by this Board that the

> common law as to the right to punitive damages for tort had of recent years developed in different ways in England and in New South Wales and that neither Australian Courts themselves nor this Board sitting on an appeal from an Australian Court were bound by the decision of the House of Lords in *Rookes v. Barnard* [1964] A.C. 590 which limited the categories of cases in which punitive damages could be awarded in England. So too in Hong Kong, where the reception of the common law and the rules of equity is expressed to be 'so far as they are applicable to the circumstances of Hong Kong or its inhabitants' and 'subject to such modifications as such circumstances may require', a decision of the House of Lords on a matter which in Hong Kong is governed by the common law by virtue of the application of English Law Ordinance is not *ipso facto* binding upon a Hong Kong Court although its persuasive authority must be very great, since the Judicial Committee of the Privy Council, whose decisions on appeals from Hong Kong *are* binding on all Hong Kong Courts shares with the Appellate Committee of the House of Lords a common membership. This Board is unlikely to diverge from a decision which its members have reached in their alternative capacity unless the decision is in a field of law in which the circumstances of the colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."

Sir Iain Glidewell correctly took the view that there was nothing in local conditions, much less in local statutes, that should lead the Court to the view that the objective test as laid down in *D.P.P. v. Smith* was not the common law of England and therefore the law of the Isle of Man until Tynwald enacted the contrary in 1983. In reaching this conclusion, the learned President expressed his awareness of the criticisms, particularly by academic writers, of *D.P.P. v. Smith*. It does not appear, however, that the learned President's attention was drawn to Lord Diplock's clear view expressed in *R. v. Hyam (cit supra)* that the decision was erroneous and how that error came to be made, following in this regard the observations of Byrne J. when giving the judgment of the Court of Criminal Appeal in *D.P.P. v. Smith*, which their Lordships have quoted. Moreover Sir Iain Glidewell did not have the benefit of the very recent observations made by Lord Bridge in his speech in *R. v. Moloney* which their Lordships have set out above, and those of Lord Scarman in his speech in *R. v. Hancock* also quoted.

Their Lordships, having had the benefit of extended argument, and, particularly in the light of the

recent cases, have concluded that the decision in *D.P.P. v. Smith*, insofar as it laid down an objective test of the intent in the crime of murder, did not accurately represent the English common law. It therefore follows that the trial judges in both trials were in error in directing the jury that they were entitled to ascertain the intent of the accused by reference to an objective test.

The application of section 12(1) of the Criminal Code (Amendment) Act 1921 as amended by section 8 of the Criminal Appeal Act 1969

Section 12(1) lays down the duties and powers of the Court of Appeal on the hearing of an appeal against a verdict of a jury. It contains, in its amended form, the following proviso:-

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

In relation to these two appeals different considerations arise as to whether or not this proviso should be applied. Their Lordships will accordingly deal with each separately.

Frankland. As has already been made apparent from the statement of the facts of Frankland's case, as set out in the judgment of Sir Iain Glidewell quoted in extenso above, a post-mortem examination of Mr. Bridson revealed that he was suffering from chronic bronchitis and a severe degenerative condition of the lungs and that he had hardening of the coronary arteries. A very important question in the case was whether Frankland was aware that the deceased was in very poor health. If he was so aware, this would clearly provide strong support for a jury concluding that Frankland must have appreciated that to leave him trussed up and gagged as he did, even if he did so intending to release him on the Sunday evening after his girlfriend had departed, would inevitably cause him serious bodily injury. As to this aspect of the case Miss Farrell had told the jury, under cross-examination, that the deceased did not appear to be a man in normal health. He seemed to be a very weak man. He was coughing a lot and looked very small and delicate.

However, a Mrs. Holmes said he appeared to be in normal health and a Dr. Bourdillon said in evidence that these diseases do not always show symptoms apparent to the layman. Moreover, the deceased's cousin, Mr. J. Bridson told the Court that during the previous ten years he had never known the deceased to

be ill apart from the odd cold. Frankland's evidence was to the effect that he thought that the deceased was a healthy man and that it did not occur to him that the binding and gagging would cause him any really serious bodily injury. What he thought it would do was to make him feel sore. All he wished to do was to keep the deceased away from his girlfriend until she left the island. In directing the jury on the law, the trial judge gave what he described as three "examples" of malice aforethought. It is the third example that expressed the objective test. He said:-

> "The third example is an intention on the part of the defendant to do something unlawful to a person knowing the circumstances which, whether he realised it or not, rendered the act likely to cause death or really serious bodily injury. Now in this third example there need be no proof of actual foresight on the defendant's part of either death or really serious bodily injury. The defendant might intend only a small degree of harm and he, the defendant, might fail to foresee that the act was likely to cause death or serious bodily harm, but in that case he would still be guilty. It must be proved that the defendant intended, that is, he formed the intention to do something unlawful to the victim. Now this third case, in that case, it matters not what the defendant himself contemplated in fact as the probable result or whether indeed he contemplated it at all, provided he was in law responsible and accountable for his actions, that is, he was capable of forming an intent, he was not insane. If he was so accountable, the question is whether the unlawful and voluntary act was of such a kind that really serious bodily harm was a natural and probable result, and the test for that is what the ordinary reasonable man would in all the circumstances of the case, have contemplated as the actual and probable result."

Quite clearly on this direction it was open to the jury totally to ignore the defendant's evidence not only as to his intentions, but as to his knowledge and appreciation of the deceased's physical condition and to have convicted him of murder on the basis that any ordinary reasonable man would have foreseen that what he did was likely to cause serious bodily harm. That certainly would have been a miscarriage of justice. Their Lordships are not satisfied that, if the jury had not been so misdirected, they would inevitably have convicted Frankland of murder rather than manslaughter. If properly directed they could have concluded that he, Frankland, might not have been aware of the deceased's physical state of health and that in his desperation to prevent the deceased making serious and untrue allegations about him to

his girlfriend he gave little or no thought to the serious consequences which his unlawful actions might or would involve. In these circumstances their Lordships do not consider that this is a proper case for the application of the proviso. Accordingly they will humbly advise Her Majesty that this appeal should be allowed; that the conviction for murder should be quashed, that a verdict of guilty of manslaughter should be substituted and that the appeal should be remitted to the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man for consideration of the appropriate sentence to be imposed.

Moore. Moore's defence raised only one issue namely whether or not it was he who had struck the blow to the child's abdomen, which because of its "terrific force" split his liver. The jury, by its verdict, rejected Moore's evidence and concluded that he killed the child. There was no evidence before the jury of what Moore intended when he so brutally struck the child. In such circumstances the jury were obliged to ask themselves what would a man of Moore's age and intelligence have realised would have been the result of his actions. Their Lordships have no hesitation in concluding that it was an irresistible inference that he would have realised that at least serious bodily harm to the child was inevitable.

Their Lordships are accordingly satisfied that, notwithstanding the misdirection in Moore's case, there was no miscarriage of justice and accordingly they will humbly advise Her Majesty that his appeal should be dismissed.