HOMICIDE AND THE SUPPOSED CORPSE

The Hon. Sir Francis Boyd Adams, B.A., LL.M.*

When invited to write an article for the *Otago Law Review*, I was very willing to comply, having graduated in the University of Otago, and served as a lecturer in its Law School many years ago when there was no permanent staff and the "Faculty" consisted of a handful of practitioners who, in the days before the Great War, shared among six of them a princely annual grant of £100. But, whatever nostalgic reasons there might be for complying, the primary difficulty was the choice of a topic. I hope a suitable one has been found in the problem centering around the case of *Thabo Meli* v. *R.* (sometimes referred to as *Meli* v. *R.*) [1954] 1 W.L.R. 228, [1954] 1 All E.R. 373, P.C.—a problem which has troubled me a good deal recently, partly by reason of its discussion in *R.* v. *Ramsay* [1967] N.Z.L.R. 1005, C.A., and my need to consider that case in connection with a certain treatise on the criminal law, and partly also because it had become directly relevant in a case I was concerned in as a judge of the Court of Appeal of Fiji. Quite frankly, I took up my pen, not because there was light and leading ready to be imparted, but in the hope that the process of writing might clarify my own ideas, and might perhaps at the same time produce, in the end, something of interest to readers of the *Review*.

The word "Homicide" is used in the title above instead of the more dramatic term "Murder", because, as will appear, the problem is not confined to murder but may arise also in regard to manslaughter. There can be no homicide of either kind in respect of what is in fact a corpse. As to murder, the essence of the matter is that murderous intent is negatived by belief that one is dealing with a corpse. As to manslaughter, there can be manslaughter of what is mistakenly supposed to be a corpse, though in other circumstances a mental element is required which, as in the case of murder, will be negatived by such a belief.

The facts of the *Thabo Meli* case are becoming an oft-told tale, but are short and simple. In their Lordships' words:

> It is established by evidence . . . that there was a preconceived plot on the part of the four accused to bring the deceased man to a hut and there to kill him; and then to fake an accident, so that the accused should escape the penalty for their act. The deceased man was brought to the hut. He was there treated to beer and was at least partially intoxicated; and he was then struck over the head in accordance with the plan of the accused.

It will be observed that the faking of an "accident" was part of the plan. It was not said, however, that the "plan" included the faking of an accident in the precise way that was adopted. Nor was it said that a preconceived plan for the disposal of the body was essential to the decision—a point to which frequent reference will be made below. Their Lordships went on to say:

> There is no evidence that the accused then believed that he was dead, but their Lordships are prepared to assume that they did; and it is only on that assumption that any statable case can be made for this appeal.

* Formerly a Judge of the Supreme Court of New Zealand.

In this passage, the word "then" has reference to the point of time when the victim had been rendered unconscious by the blows. In the *All England Reports*, the words "from their subsequent conduct" are interpolated after the word "assume".

According to the preliminary narrative of the facts in the *Weekly Law Reports*, the two accomplices who testified had given evidence to the effect that they themselves "believed the deceased to be dead as a result of the blows in the hut." By "no evidence" I understand their Lordships to mean no direct evidence of belief on the part of the accused; but the inference that they so believed seems inescapable in view of their ensuing conduct, narrated by their Lordships as follows:

> The accused took out the body, rolled it over a low krantz or cliff, and dressed up the scene to make it look like an accident. Obviously they believed at that time that the man was dead . . .

There is no suggestion that any causal significance was to be attached to the rolling of the victim over the krantz. The injuries inflicted in the hut were, on the medical evidence, insufficient to cause death, and, as their Lordships said:

> . . . the final cause of his death was exposure where he was left at the foot of the krantz.

According to the argument for the appellants, as reported in the *Weekly Law Reports*, an intent to kill was, under the Roman-Dutch law applicable in Basutoland, essential to the crime of murder. Their Lordships found no relevant difference to exist between that law and the law of England. The argument ran like clockwork: first, the blows, though inflicted with intent to kill, did not in fact kill; and secondly, the final act, done in the belief that it was done to a corpse, was not done with intent to kill; *ergo*, there was no murder, as that crime requires that death should be caused by an act done with the necessary *mens rea*.

It was argued, their Lordships said, that the accused were not "guilty of any crime except perhaps culpable homicide" (which, in English law, would mean manslaughter). If such be the law of Basutoland, it is certainly not the law of New Zealand. Here, I imagine, there could be no "perhaps" about the crime of manslaughter; and, apart from this, there would clearly be guilt of conspiracy to murder, of attempted murder, and of some form or forms of wounding, injuring or assault.

Their Lordships' answer to the appellants' argument was as follows (quoted in full from the *Weekly Law Reports*):

> It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case either in South Africa or England, or for that matter elsewhere, which resembles the present. Their Lordships can find no difference relevant to the present case between the law of South Africa and the law of England, and they are of opinion that by both laws there could be no separation such as that for which the accused contend, so as to reduce the crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

In the *All England Reports,* the only material variation of this passage is the substitution, in the opening sentence, of "one series of acts" for "one transaction".

As to the suggested impossibility of elaboration, it may be said, with respect, that their Lordships might now think otherwise were they to read all that has since been so elaborately written in attack upon or defence of their decision. It is, moreover, unfortunate that their Lordships felt unable to elaborate, since what they did say scarcely answers the argument, and is little more than an appeal to those "ordinary ideas of justice and common sense" which, in the opinion of Dr Glanville Williams (*Criminal Law, General Part,* 2nd ed., (1961) 174, para. 65), "require that such a case shall be treated as murder." It may, indeed, be sufficient to put the matter in that short way in a common law jurisdiction such as England, where there is no statutory definition of murder specifying (as in New Zealand) the particular intent or intents required, and where the court is accordingly free to define murder as it thinks fit. It would no doubt be permissible for an English court, concerned only with the common law, to say *simpliciter,* as was in effect done in a different context in the famous case of *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, "This shall be murder." The same thing may have been permissible under the law of Basutoland, and we may well have here the true *rationale* of the judgment.

The foregoing explanation of the case is the one which in the end commends itself to my mind. In English law, there is no difficulty in the simple proposition that murder is committed by one who causes death by a series of acts forming, on a common sense view, a single transaction motivated by the required malice aforethought; and this seems preferable to metaphysical speculations about *mens rea* and the defence of mistake, even though, in obvious response to submissions of counsel, the judgment does introduce the concept of "misapprehension" in order to reject it. In respectful agreement with their Lordships, I feel that, at common law, such considerations are "too refined a ground of judgment"; and, for my part, would eschew the possibly Sisyphean task of attempting to reconcile the decision with academical notions of *mens rea.* It is, however, in this context of mistake that Dr Williams discusses the case (*loc. cit.*), and he finds himself under the necessity of postulating "an exception to the general principle", enunciated as follows:

> . . . although the accused thinks that he is dealing with a corpse, still his act is murder if his mistaken belief that it is a corpse is the result of what he himself has done in pursuance of his murderous intent.

This treats the problem as one depending on mistake as negativing *mens rea,* rather than on the question whether the malice aforethought requiring to be proved by the Crown can be legitimately found in respect of the indivisible series of acts. It seems to me that the essence of the judgment lies rather in the robust refusal to view the acts separately than in any refinement upon the *mens rea* principle.

Professor J. W. C. Turner, as editor of *Russell on Crime,* (12th ed., (1964) 58, n.87), is rather scornful of Dr Williams' "ordinary ideas of justice and common sense", and considers that this "does not answer the legal points at all". But Dr Williams' formula really by-passes the "legal points" by going straight to a concept of murder which renders them irrelevant. And, if this be what was in their Lordship's minds—

as I am inclined to think it was—their otherwise somewhat casual judgment becomes a simple assertion that, in the law of Basutoland, equated with the English common law, a homicide committed in the way described is to be regarded as murder. There is much to be said for the application here of "ordinary ideas of justice and common sense", and, if this was not murder, it certainly ought to be. Of course, this view of the matter renders the decision applicable with certainty only in common law jurisdictions where no statutory definition intervenes; though it does not follow that the rule as to a series of acts cannot be applied where there is such a definition.

Professor Turner has subjected the judgment to elaborate and searching criticism (*Russell on Crime, op. cit.*, 55-60). He regards it as leaving the defence argument unanswered, and as providing no clear *ratio decidendi*. He considers that the accused were guilty of "culpable homicide", and of attempt to murder, but it is clear that he would acquit them of murder. He finds two *petitiones principii* in the brief judgment; maintains that it was neither logically nor legally "impossible" to divide up the transaction; and sees no reason why so exalted a tribunal should balk at a "refined ground of judgment". There is force in these comments, but only if the judgment is not to be explained in the way discussed in our preceding paragraphs.

Dr Williams (*op. cit.*, p. 173) cites a Kentucky case (*Jackson* v. *Commonwealth* (1896) 100 Ky. 239, 66 Am. St. Rep. 336), no report of which is available to me, but in which a man, having poisoned a girl in Ohio and thinking he had succeeded in killing her, took her to Kentucky and there killed her by cutting off her head. According to Dr Williams, the Kentucky court convicted the accused of murder, notwithstanding the argument that, when he did the fatal act in Kentucky, he believed he had already killed the girl in Ohio. But Professor Turner (*op. cit.*, p. 59, n.91) regards the case as irrelevant, and says that the relationship between the *actus reus* and the *mens rea* was never considered. If Dr Williams is right about the argument and the conviction, the court must surely have decided, even if no more than inferentially, that the case was one of murder justiciable in Kentucky.

Professor Turner (*op. cit.*, p. 58) supplies a note of a Bombay case (*R.* v. *Khandu* (1890) I.L.R. 15 Bomb. 194—report not available, but see also a note in (1920) 36 L.Q.R. 6). There the accused, intending to kill, rendered his victim unconscious by blows on the head, and then, believing him to be dead, set fire to the hut and killed him by burning. The court of two judges being divided, the Chief Justice, on reference to him, held that there was only an attempt to murder, he not being prepared to regard "what occurred from first to last as one continuous act done with the intention of killing the deceased". The writer of the note in (1920) 36 L.Q.R. 6 couples the case with a then recent Madras case in which, after a non-murderous assault on his wife, the prisoner had hung up her body so as to simulate suicide, and in which case also the charge of murder was rejected. The writer of that note regarded both decisions as right under the Indian Penal Code, because of the requirement therein of intent or knowledge—a point which, as will appear when we come to discuss the only New Zealand decision, may be open to doubt—but was apparently of the opinion that, in England, both cases would be decided the other way on the ground that a man who had reduced another to unconsciousness and then killed him in the mistaken belief that he was already dead could not exculpate himself

by pleading a mistake due to his own act. It would seem however that, while the *Thabo Meli* principle would apply to the Bombay case, the Madras case is distinguishable on the ground that there was no murder intent either in the original act of violence or in the hanging up of the victim. It is of interest to note that, in the Bombay case, the possibility of regarding a course of conduct as "one continuous act" was raised (though rejected) at a point of time sixty-four years prior to *Thabo Meli* v. *R.*

Professor Turner also cites (p. 58) the South African case of *R.* v. *Shorty* (1950) S.R. 280. Having felled the deceased, the prisoner had placed him in a sewer, thereby causing his death by drowning. The conviction was for attempted murder, and the very brief note does not show whether any question as to murder was actually before the court. But in saying that, "The immersion in the sewer was a new, intervening act, and it was not immediately connected with the assault," Tredgold J. no doubt meant that in his opinion there was no murder.

Then there is the South Rhodesian case of *R.* v. *Chiswibo* 1961 (2) S.A. 714, referred to in detail by Professor Turner (*op. cit.*, pp. 57, n. 85, and 59-60), but too late in date for mention in Dr Williams' second edition. I have nothing to go upon but the notes supplied by Professor Turner. The accused had hit the deceased on the head with the blunt side of an axe, not intending to kill but with such recklessness and appreciation of risk as would have amounted to constructive intent to kill on a charge of murder. Then, believing the man to be dead, he had put him down an ant-bear hole and thus killed him. He had been convicted of murder, and the conviction having been set aside and a conviction substituted for attempted murder, the Crown appealed to the Federal Supreme Court. The learned Chief Justice distinguished *Thabo Meli* v. *R.* on the ground that there had been "no initial plan to kill", and held that the belief that the victim was dead negatived constructive intent in respect of the burying. Quenet J. is said to have distinguished *Thabo Meli* v. *R.* by seizing on the words therein, "impossible to divide up what was really one transaction in this way" —the meaning being, apparently, that he regarded the transaction as divisible, and accordingly concurred with the Chief Justice in dismissing the appeal. On the other hand, Briggs F.J., who ventured to criticise Professor Turner's criticisms of the Privy Council decision, and of whose judgment Professor Turner is in response equally critical, was in full agreement with *Thabo Meli* v. *R.*, the "central fact" of which in his opinion was that, "the attempt to 'fake an accident' was all part of the preconceived plan—not an extemporisation after the supposed death." But we are not told what his decision was, and are, I think, left in doubt: there being no suggestion of any "preconceived plan" to use the ant-bear hole, he presumably concurred in dismissing the appeal. He seems, however, to have been of opinion that the doctrine of "preconceived plan" might apply even in a case of constructive intent to kill, and is quoted as saying:

> So long as the transaction is continuing and execution of the plan is not yet complete, any intention necessary to constitute any crime committed as a part of the whole plan may be deemed to be a continuing intention. I appreciate that this doctrine may have to be applied with caution in cases of late participation or early dissociation by one of several joint accused.

Professor Turner will not accept Briggs F.J.'s view that "preconceived plan" was the central fact in *Thabo Meli* v. *R.*, and obviously

rejects it as a valid ground of decision (*op. cit.*, p. 57, n.85). I agree, and think that the reliance of their Lordships on preconceived plan does not necessarily mean that a preconceived plan is essential. It is one thing to say that a certain rule will apply where there is such a plan, and quite another to say that it cannot otherwise apply: the first proposition leaves the other question open. There is in fact no distinction in principle between a preconceived plan to dispose of the body and what Briggs F.J. describes as "an extemporisation after the supposed death"; and I find it impossible to imagine that the decision in *Thabo Meli* v. *R.* would have been any different if, instead of being planned in advance, the faking of the accident had been extemporised. (I have already pointed out that, while there was in that case a plan to fake an accident, the judgment does not say that there was a plan to do so by throwing the body over the krantz: there may in fact have been improvisation as to the way in which the accident was faked.) Professor Turner comments (*op. cit.*, p. 57, n.85) that, "There can have been very few planned murders in which the murderer had not thought out beforehand how he would proceed afterwards to cover up his tracks;" but my own impression is that murders involving any preconceived plan for disposal of the body are rare; that, in most of the cases in which there is a disposal of the body, it is done impromptu and in whatever way the murderer can devise on the spur of the moment; and that such disposals occur at least as frequently in unpremeditated murders as in planned. In *Thabo Meli* v. *R.* the fact that there had been a preconceived plan to fake an accident was known, in all probability, only because accomplices gave evidence. In most cases we simply do not know, and cannot know, whether there was or was not a plan for disposal of the body. A rule of law which, on the overt acts done in *Thabo Meli* v. *R.* would convict the accused of murder if there were proof of a "preconceived plan", and acquit them of that charge if there were none, would not only work in an arbitary way, but would have no possible foundation in principle.

It is curious that, although one of their Lordships sat as a member of the Judicial Committee in both cases, *Thabo Meli* v. *R.* was not mentioned in *Shoukatallie* v. *R.* [1962] A.C. 81; and curious, too, that the latter case seems never to have been cited in this context, though its relevancy is obvious. The judgment therein was delivered by Lord Denning, and is remarkable for the distinction drawn between the two persons accused. S. and M. being together in a corial on a West Indian river, and P. in another corial, S., with intent to kill, fired two shots at P. S. and M. then took P. to the riverbank, tied him to a log, and sank him in the stream; and, according to the statement of facts which was part of the judgment (p. 82), those acts were done "whilst he was still alive". The trial having been by jury, there are no findings of facts. There is no reference to any evidence bearing directly on the question whether M. or S. knew or believed, or might have known or believed, P. to be alive after the shooting; and they both refrained from testifying but made statements from the dock denying their presence at the scene, and thus throwing no light on those questions. Both having been convicted of murder, M's conviction was quashed by the Federal Supreme Court of the West Indies, and, in the opinion of their Lordships rightly so, because the jury had not been directed as to the possibilities that M. might have been a mere spectator up to the moment when P. fell shot, and that thereafter P. might have been dead, or M. might have

thought him to be dead (pp. 86-87). M's case was not before their Lordships, and was discussed only for the purpose of explaining why S's conviction did not necessarily fall with that of M. On the supposition that M. was not a party to the shooting, it was said (*ibid.*) that, if P. was—"despite the medical evidence"—in fact dead when M. helped in the disposal of the body, M's only guilt would have been as accessory after the fact; and that, if M. *thought* he was dead, he was not guilty of murder but only of manslaughter, or (p. 92) "at the most of manslaughter". (See *R.* v. *Church* [1966] 1 Q.B. 59, 69-70 for the view that he might not have been guilty even of manslaughter). S's appeal was on a ground that does not concern us here; but what does concern us is that, while their Lordships were so much alive to the possibility that M. might have believed P. to be dead when he assisted in disposing of the body, they made no mention of that point in regard to S. If M. thought P. was then dead, it seems certain that S. must have thought so too; and it was as much open to the jury so to hold in S's case as it was in M's. It is obvious therefore that their Lordships regarded the point as irrelevant in regard to S., and, if one asks why, the only possible answer is that it was irrelevant because it was S. who had fired the shots that brought P. to the state of being apparently dead. It is said indeed (p. 86) that:

> So far as Shoukatallie was concerned, there could be no doubt. On the evidence, if accepted, he was the man who fired both shots.

Moreover, it was only on the footing that M. might have been "merely a spectator" up to the firing of the shots that his possible belief as to death was treated as relevant; and it seems clear that, in their Lordships' view, such belief would have been irrelevant even in his case had he been in any way implicated in the shooting, and they interpreted the jury's strong recommendation to mercy as making it "apparent that they thought that Mahomed Ali did not participate in the shooting of Peeka, but only came in after the shooting and helped Shoukatallie dispose of the body" (p. 92). Having reached the conclusion that the quashing of M's conviction was justified because of the failure of the judge to direct the jury on this point as to belief of death, their Lordships added (p. 90):

> It is a point which was not available to Shoukatallie and is clearly enough to distinguish the two cases.

In other words, a person who injures another with intent to kill is guilty of murder even though the actual cause of death was a subsequent act of the murderer done in the belief that death had already occurred.

I have paid no attention to two passages quoted from the trial judge's directions to the jury (pp. 86 and 89) in which it was suggested that the drowning might have been an act done in concert in order to kill a man known to be still alive. While it may have been open to the jury so to hold, or to hold that S. in particular knew P. to be alive, there is nothing in the judgment resting on any such idea, the only distinction drawn being that it was S. who had fired the shots.

Their Lordships left S. under sentence of death, and it is not to be supposed that they acted casually or disregarded the point for any other reason than the one they gave, namely, that the defence was not open to S. The case, understood as above, is stronger than *Thabo Meli* v. *R.*, since there was no evidence of any "preconceived plan". Without

any such evidence, and while regarding the point as crucial in regard to M., their Lordships ignored it in the case of S. and left him to die. The inference seems clear that S., having shot with intent to kill, was guilty of murder even though the shots did not kill, and notwithstanding the fact that his subsequent disposal of the still living body may have been done without intent to kill and in the belief that he was then dealing with a corpse.

One may add that, if this be not the law, then in all cases where a murderer has disposed of the body, it may be arguable that it is incumbent on the Crown to negative the possibility that the act of disposal may have been the actual cause of death—a burden of proof which, as in the Fijian case yet to be dealt with, may be incapable of being discharged.

The next case requiring to be considered is *R.* v. *Church* [1966] 1 Q.B. 59, C.C.A., in which, on an indictment for murder, the accused had been convicted of manslaughter. He had quarrelled with and grievously injured a woman in his van by the bank of a river, and had then thrown her still living body into the river, where she drowned. In his statement to the police (p. 61), he said that, having "knocked her out", he had tried for about half an hour to wake her up, and had then "panicked . . . and put her in the river". In his evidence at the trial he said, for the first time, "I thought she was dead."

On the question of murder, the trial judge had, in effect, directed the jury that, if the accused genuinely and honestly believed what he threw in the river to be a corpse—not merely not caring whether the woman was alive or dead—they could not convict him of murder; and, while no question as to murder was before the Court of Criminal Appeal, that court, citing *Thabo Meli* v. *R.*, regarded this direction as "unduly benevolent", and said (p. 67):

> . . . the jury should have been told that it was still open to them to convict of murder, notwithstanding that the appellant may have thought his blows and attempt at strangulation had actually produced death when he threw the body into the river, if they regarded the appellant's behaviour from the moment he first struck her to the moment when he threw her into the river as a series of acts designed to cause death or grievous bodily harm.

This was no doubt *obiter dictum,* but has weight nevertheless; and there are three important points. First, it does not stipulate for a "preconceived plan", and there was certainly none in that case; and it follows that a series of acts may have a continuing common purpose or design even though there be no such plan, each act following *ex improviso* on what has gone before. Secondly, the final and fatal act is treated as part of the series, and the "design" attributed to it, notwithstanding that its only purpose may have been to escape from the consequences of a supposedly already effectuated design. Thirdly, the proposition is not limited to intent to kill, but expressly includes the alternative common law form of murder in which the intent is merely to do grievous bodily harm.

At a later point (p. 70 F), the court reverted briefly to this question, mentioning with apparent approval a concession by counsel to the effect that, on the murder charge, the trial judge had rightly directed the jury that, unless they found something had happened between the infliction of the injuries and the decision to throw the body into the water, they might "undoubtedly treat the whole course of conduct of the accused as one". I find a difficulty here, since the direction thus re-

corded appears to be the same as that which the court had already said should have been, but had not been, given. But, if there was inconsistency in the summing-up on this point, there is none in the judgment.

Before making the last-mentioned reference to the question of murder, the court had given detailed consideration to the grounds on which the conviction for manslaughter might be sustained. As to criminal negligence, the court found it difficult to imagine a grosser case, its view being apparently that there was "utter recklessness" in the failure to find out whether the woman was alive or dead (p. 68). It is obvious of course that, on a charge of manslaughter, mere belief as to death will not suffice, since the belief itself may be negligent.

As to manslaughter by "unlawful act", the court held—an important conclusion but one that does not concern us directly—that, in English law, an "unlawful act" is not enough: it must be "such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm"; and the corollary was that it had been "a misdirection to tell the jury *simpliciter* that it mattered nothing for manslaughter whether or not the appellant believed Mrs Nott to be dead when he threw her in the river" (p. 70). The meaning is, of course, that the requisite *mens rea* as to foresight of possible harm would be missing if he believed her to be dead. Now, such a misdirection would normally have led to the quashing of the conviction; but the court escaped from that result by holding that the concession which counsel had properly made (as above) in regard to murder was equally applicable to manslaughter, and that all that was lacking in the learned judge's direction was that, when dealing with manslaughter, he had not again told the jury, as he had done on the murder charge, that they might (p. 71),

> regard the conduct of the appellant in relation to Mrs Nott as constituting throughout a series of acts which culminated in her death, and that, if that was how they regarded the accused's behaviour, it mattered not whether he believed her to be alive or dead when he threw her in the river.

As on such a direction the inevitable verdict would have been one of guilty, the court applied the proviso and dismissed the appeal. We have here no *obiter dictum* but an essential step in the decision. Having previously said that, in murder, belief as to death would be irrelevant in the case of "a series of acts designed to cause death or grievous bodily harm", the court here holds that, in manslaughter, such a belief is irrelevant in the case of "a series of acts which culminated in her death".

The result of the decision appears to be that, at common law, and whether the charge be one of murder with intent to kill, or of murder with intent to do grievous bodily harm, or of manslaughter, a final act causing death but done in the belief that death has already occurred, may be regarded as done with the same *animus* or *mens rea* as actuated the earlier acts with which it was linked so as to form "a series of acts". Moreover, it is important to note that the *mens rea* on which the court relied in regard to manslaughter involved, not *intention*, but *knowledge* of the risk of harm. In English law, the decision ranks as of higher authority than that of the Privy Council in *Thabo Meli's* case (22 *Halsbury's Laws of England*, 3rd ed., para. 1691), and is perhaps the conclusive answer to Professor Turner's earlier criticism of the latter decision.

One final point in connection with *Church's* case: the learned judge, in dealing with the charge of murder in the passage first mentioned above, had spoken of "genuine and honest belief", and had drawn a distinction between *belief* as to death and the state of mind of one "not caring whether she was alive or dead"; and the court paraphrased this as meaning that the prosecution would have to prove "that the appellant *knew* that Mrs Nott was still alive when he threw her into the river or (at least) that he did not then *believe* she was dead" (p. 67 E: italics supplied). The view taken as to "a series of acts" rendered it unnecessary to pursue any psychological inquiry as to knowledge or belief; but the court would seem to have thought that had the psychological question been relevant, the onus on the Crown would have been, not to prove knowledge that the victim was alive, but to negative belief that she was dead. There was, however, nothing by way of decision on this point.

Except for what I have derived above from Dr Glanville Williams and Professor Turner, I have found no real assistance in any of the textbooks available to me. In *Smith and Hogan's Criminal Law* (1965), 173, the only relevant comment is to the effect that the result in *Thabo Meli* v. *R.* might have been different had there been no antecedent plan to dispose of the body.

The writer of a note on *Thabo Meli* v. *R.* appearing almost contemporaneously in (1954) 70 L.Q.R. 146 suggested that, while the exposure was the cause of the death of the victim in that case, the blows inflicted on him were another cause; and this suggestion has been more recently put forward in expanded form by C. C. Turpin in "Manslaughter", [1965] C.L.J. 170, 173, where it is said:

> Quite another approach to the difficult issues raised by cases like *Meli* and *Church* was suggested by the writer of a note in (1954) 70 L.Q.R. 146. Where measures are taken by an assailant to dispose of the supposed corpse of his victim, and death ensues, it will usually be the case that the initial acts of the accused contributed in a significant degree to the ultimate death of the victim. If not first beaten into unconsciousness the victim in *Meli* would not have died of exposure to the cold, and the victim in *Church* would probably not (or not so soon) have drowned. If the initial act was causally significant, and was accompanied by the *mens rea* required for the crime charged, there is no need to consider the subsequent act at all. Being a voluntary act of the accused himself, it can hardly be deemed a *novus actus interveniens.*

The argument seems unanswerable. In *Thabo Meli's* case, the real cause of death was not the mere act of leaving the victim where he lay. But for the injuries previously inflicted he could have walked away; and what really killed him was the fact that those injuries rendered him incapable of escape from the exposure to the cold. (Cf. *R.* v. *Waters* (1848) 1 Den. C.C. 356, where the death of a helpless baby was held to have been caused by such exposure.) What would the position have been if the accused had, with murderous intent, merely struck the man down at the foot of the krantz, and left him lying where he fell? Can anyone doubt that this would have been murder if death from exposure followed as a natural result? It is strange that this aspect of the case has attracted so little attention.

I come now to the decision of our own Court of Appeal in *R.* v. *Ramsay* [1967] N.Z.L.R. 1005. The accused had been convicted of murder. In the early hours of New Year's Day, he had picked up in his car in Waimate a girl whom he knew only slightly. What had followed

afterwards was quite uncertain (p. 1009, line 4), but the girl's dead body was found some three weeks later in an offal pit on his farm some fourteen miles from Waimate. The medical evidence disclosed multiple grievous injuries, and in the mouth was a gag of screwed-up newspaper which had forced the tongue backwards, causing complete obstruction of the air passage. Death had been due to asphyxia, caused either by the gag or by one or some of the injuries; and, according to the medical evidence, the gag had been inserted either during deep unconsciousness, or possibly after death (p. 1009, line 34). According to the evidence given by the accused at the trial, the girl had become unconscious after the infliction of a series of injuries, and, finding that he would have to get petrol, he had wrapped her in a horse cover, inserted the gag, and then stowed her in the boot of the car and closed it (p. 1011, lines 40-55). He claimed in his evidence that she was breathing when he gagged her, and that he did not realise that the gagging might cause any risk to her at all. When he eventually opened the boot, the girl, he said, was dead.

It would seem that, on this evidence, no question arose of the precise kind considered in any of the cases dealt with above, since there was no suggestion that anything had been done to the girl at a time when the accused supposed she was already dead; and, quite apart from his statement that she was then breathing, the very act of gagging presupposes that the victim is still believed to be alive. The case, indeed, fell into a different category.

At the trial, the Crown alleged, (1) murder by act or acts done meaning to cause death (Crimes Act 1961, s.167 (a)); (2) murder by act or acts done meaning to cause injury known to be likely to cause death, and with recklessness as to death (s.167 (b)); and (3) murder by act or acts done for an unlawful object and known to be likely to cause death (s.167 (d)). The defence was a denial of the various allegations so made as to intent and knowledge, and was based on the view that each act of the accused which might have caused the death must be considered with reference to the intent and/or knowledge with which that act was done. The argument appears to have centred on, (a) a blow which had fractured the skull, and (b) the gagging, the Crown contending that it was immaterial which of these was the cause of death, as one or more of the relevant states of mind was present with reference to each (p. 1014, line 15), and the defence contending that the gag might have been the cause of death and that the accused was not proved to have known its use "to be likely to cause death" (p. 1012, line 51).

The learned judge, in his summing-up, had relied strongly on *Thabo Meli* v. *R.*, and had read the headnote of that case to the jury; and the Court of Appeal, with some doubt, reached the conclusion that the summing-up would probably be understood by the jury as a direction that they must view the actions of the appellant as an inseparable series of acts (p. 1014, line 20), "not singling out any one particular item when considering his state of mind in relation to the cause of death" (p. 1013, line 32). In the opinion of the court, such a direction was wrong, as it was for the jury to determine whether or not the course of conduct was to be regarded as an indivisible whole (p. 1013, line 6).

So far, we have merely a decision, seemingly impeccable, that a relevant question of fact was not left to the jury. But the court went on to consider the further argument that, in any event, the test applied in

Thabo Meli v. *R.* was inappropriate and misleading in this case (p. 1014, line 24).

The court accepted that decision as authoritative in the case of an indivisible course of conduct actuated throughout by a plan to kill (p. 1014, lines 26-48): "We do not doubt that in any such case it is permissible to view conduct comprehensively". This impliedly limits the rule to cases of intention to kill under s.167 (a), and also apparently to cases of "preconceived plan". The court took the point that the question in the Privy Council case was one of intention, not knowledge (*ibid.*, line 34), a distinction which was regarded as rendering that decision inapplicable as to knowledge of the likelihood of death under paragraphs (b) and (d) of s.167; and the court went on to say that, as nothing remotely approaching a "plan" had been suggested by the Crown, there was a "fundamental distinction" between the two cases, and *Thabo Meli's* case "had no application and was seriously likely to mislead the jury in its approach to the facts". Apart from the words, "See also *R.* v. *Church,*" appearing in this passage there is no reference to that case either here or elsewhere in the judgment; and, as we have seen, there was in *Church's* case no "preconceived plan", and, moreover, the rule was applied to manslaughter, where intent to kill is not required, and in regard to which the question as posed by the court was really one not as to intention but as to knowledge—actual or imputed—of the risk of resulting harm. *Shoukatallie's* case was not cited.

The court proceeded (p. 1015) to elaborate the view that, while *Thabo Meli's* case may be applicable in New Zealand ("though perhaps only in a limited number of such cases": p. 1015, line 3) in cases of intent to kill under s. 167 (a), it is "plainly inappropriate" with reference to questions of knowledge under paragraphs (b) or (d); the conclusion being that, whether there be a series of interconnected acts or not, the relevant knowledge must relate to the particular act causing death. Accordingly, the jury should have been directed to identify the act causing death, and then to determine whether that act was performed with one of the required states of mind. With regard to the gag, it would not suffice that it was part of a "course of conduct", if the accused did not know it was likely to kill (p. 1015, lines 37-52).

Apart from the obvious point that the question whether there had been a relevantly connected series of acts is one of fact for the jury, the *ratio* of the judgment would seem to be what is summarised in the last preceding paragraph, the actual point of decision—as distinguished from reasons for decision—being contained in the last sentence thereof. It comes to this, that, if the gagging were held to be the cause of death, then, in so far as the prosecution might be relying on s.167 (b) or (d), there could be no conviction for murder by that act unless it were proved to have been done with one or other of the mental states required by those paragraphs. The mental state in which any earlier act was done would have no direct relevance.

So far, my main endeavour has been to analyse the decision. Comment is much more difficult, and I think the difficulty springs largely from the fact that *Thabo Meli* v. *R.* was under discussion in a case on which it had no direct bearing, since there was no suggestion that anything had been done in the belief that death had already occurred. The only common feature was that in both cases a "course of conduct" —a series of connected acts as distinguished from a single act—was in

question. Now, it may well be that *Thabo Meli's* case is merely an application of a wider rule applicable to a case such as *Ramsay's*, and that, quite apart from any question of belief as to death, it is legitimate to find the required *mens rea* in a course of conduct regarded as an indivisible whole. I begin by asking the question, what would the position have been in *Ramsay's* case if the earlier injuries were held to have been inflicted with intent to kill, but the gagging were regarded as the sole cause of death, and were held not itself to have been done with any of the three relevant mental states? This, I am inclined to think, would be the nearest parallel (if there be any) with *Thabo Meli* v. *R.*, and the answer arrived at by applying that case would seem to be, not that the gagging should be regarded as done with intent to kill, so as to make that act murder, but that, if there were an indivisible series of acts, then the whole series should be regarded as having been done with that intent and as having caused the death. On this view, no *mens rea* is attributed specifically to the fatal act: it is regarded simply as part and parcel of an indivisible series of acts done with intent to kill. It would not be necessary to inquire whether that act had been done with any of the specified mental requirements, an affirmative answer to which question would render resort to the *Thabo Meli* doctrine unnecessary, while a negative answer would not prevent it from applying.

I am inclined also to think that the same reasoning would apply if the earlier acts were regarded as having been done, not with intent to kill, but with one or other of the mental requirements of s.167 (b) or (d). If, for instance, there had been an indivisible series of acts known to be likely to cause death and recklessly inflicted (s. 167 (b)), and the gagging had followed as part of the indivisible transaction but without any *mens rea* sufficient to render that act murder if standing alone, I can see no good reason why the *Thabo Meli* rule should not apply; and, as we have seen, this view accords with what was said in *R.* v. *Church* with regard to murder by acts done with intent to cause grievous bodily harm, and also with what was there held in regard to manslaughter by acts known to involve risk of harm. Similar reasoning would, of course, apply to acts falling within s.167 (d); and a mixture of acts falling within (a), (b) and (d) would create no difference in principle. While apparently accepting the view that *Thabo Meli's* case may apply in cases within paragraph (a), the court distinguished paragraphs (b) and (d) (p. 1015) on the ground that, under them, the mental elements must be present at the time when the causal act is committed: a proposition that is obviously true if mental elements are required, but is equally true in regard to intent to kill under paragraph (a). As to paragraph (d), the court reinforced its argument by reliance on the words "and thereby kills" in paragraph (d). But those words are really surplusage, since the whole of s.167 is dealing expressly with "homicide", which means a killing (s.158). It is difficult to see why the words should have appeared at all in s.167 (d), but, in any event, they merely express what is clearly implied in each of the other paragraphs. For those reasons, I would respectfully reject the supposed distinction between "intention" and "knowledge". The *Thabo Meli* rule is applicable to cases in which, *ex hypothesi*, the mental element required for murder is lacking in the final and fatal act of the series, and it would seem to be immaterial whether the lack be of intent or of knowledge.

The court laid some stress on the supposed necessity for the jury "to identify the act causing death" (p. 1015, line 44). Without stopping here to consider how far this may or may not have been appropriate in the particular case, it is not, I respectfully suggest, to be taken as a general rule. Homicide is often committed by a series of acts in regard to which it may be difficult or impossible to determine which particular act or acts may have caused or contributed to the death; and normally, in such cases, the question is simply whether the whole course of conduct caused the death. There is nothing in s.167 that is inconsistent with the view that murder may be committed by a course of conduct or series of acts, and, even where the words "an act" appear, the singular embraces the plural. It would introduce great confusion if it were accepted as a universal rule that, in cases of homicide, every separate act must be considered with regard to a mental element attributable to that particular act. Apart from the practical difficulty of so doing, the approach is wrong, and it is enough if the required intent and/or knowledge can be inferred as to the conduct as a whole. There is an analogous rule in cases where several persons have joined in shooting, blows or stabbing, and it cannot be known which shot, blow or stab actually extinguished life (*Ghosh* v. *King-Emperor* (1924) 41 T.L.R. 27, P.C.).

Returning now to the type of case in which the cause of death is an act done to a supposed corpse, it is desirable to say something about the onus of proof. There is, first of all, the question whether the death was caused by that act, and secondly, the question as to the accused's knowledge or belief as to death.

Let us suppose that a corpse is found in such a state that it is impossible to ascertain the cause of death, the circumstances suggesting that there has been an act of disposal by casting the body into a stream or pond, or by putting it into a sewer, or in some other way which might have caused death. Now, in such circumstances, it is always possible that death may have occurred by reason of the act of disposal, and that the act may have been done in the belief that death had already occurred. In the absence of evidence fixing the cause of death, it may be impossible for the Crown to negative these possibilities. (I am assuming, of course, that apart from them the Crown is able to prove murder by the accused.) It is clear, I think, that an onus as to his belief must necessarily rest on the accused, the onus being the evidentiary one of pointing to or adducing some evidence on which the conclusion may reasonably be based. In *Shoukatallie* v. *R., supra,* the evidence on this point (as to the accused M.) was slender; and what was treated as sufficient to raise the question for the jury was that the victim, P., had been shot and was no doubt apparently dead. It would, of course, be for the jury to say what inference should be drawn, and the ultimate onus of persuading them beyond reasonable doubt in favour of the negative view would lie on the Crown. I think the position must be the same on the other point that death had been caused by the act of disposal. In other words, always assuming that the Crown can prove murder apart from this question, it is not for the Crown to negative the possibility in the first instance, but for the defence to adduce or point to some evidence, not only as to belief, but also as to causation. (As above, the persuasive onus would then be on the Crown.) I can cite no case that is relevant on this point, those mentioned above—putting *Ramsay's* case aside as irrelevant here—

being cases in which causation by the act of disposal was affirmatively proved. But, were it otherwise, any prosecution would necessarily fail if there were evidence of a possibly fatal act of disposal, and no evidence as to the cause of death. One need shed no tears over the position of a defendant who, being otherwise proved to have committed murder, finds himself unable to point to any evidence that an act done in the belief that his victim was dead had in fact caused the death: indeed, the belief he alleges is in itself evidence, as against him, that the victim was in fact dead.

I conclude with a brief discussion of the Fijian case mentioned in my opening paragraph, in which judgment has since been delivered. It is *Tara Chand* v. *R.* (Appeal No. 23 of 1967: Sir Trevor Gould, V-P., and Marsack and Adams JJ.A.). Trial in Fiji is frequently—and was in this case—by judge sitting with assessors; but, while a proper summing-up must be given to the assessors by the judge in open court, their opinions are not binding and decision rests with the judge alone, though in the particular case assessors and judge had concurred. The provisions governing appeals correspond in all relevant respects with those now in force in New Zealand. The summing-up is open to attack as here, and the only important difference is that the appeal is not from a jury's verdict but from a reasoned judgment with findings of specific facts, the findings being of course open to review. The Privy Council entertains appeals from the Fijian courts, and its decisions are there accepted as binding authorities.

The facts were simple. One Ram Kumar had disappeared, and, about a fortnight later, his much decomposed body had been found in a pool, its condition being such as to render it impossible to ascertain the cause of death. There was confessionary evidence of a murderous assault by the three accused, followed by the throwing of Ram Kumar into the pool, but no evidence of any preconceived plan for the disposal of his body in that or in any other way. While there was no finding on the point, either by the judge or by the Court of Appeal, my own view would be that there was good ground, both in the nature of things and from what was said in the confessions, for thinking that the accused believed Ram Kumar to be dead when thrown into the pool.

The appeal was mainly concerned with an unsuccessful attack on the admissibility of the confessions, but it was also argued that, the cause of death not being proved, Ram Kumar might have been alive when immersed, and might have been believed by the accused to be dead; in response to which argument the Crown relied on *Thabo Meli* v. *R.* and *R.* v. *Church*. The Court of Appeal deemed it unnecessary to consider whether the accused had so believed, or whether Ram Kumar was in fact then alive, or any questions as to the onus of proof. There is no relevant difference between the laws of Fiji and of England in regard to the required "malice aforethought" on a charge of murder, it being sufficient under both that there should be either intent to kill or intent to do grievous bodily harm; and, applying *Thabo Meli* v. *R.* and *R.* v. *Church*, and with some reliance on *Shoukatallie* v. *R.*, it was said:

> We hold therefore that the three accused were guilty of murder if, with malice aforethought either in the form of intent to kill or in the form of intent to do grievous bodily harm, they inflicted grievous injuries on Ram Kumar, and then, mistakenly believing him to be dead, and in continuance of a course of conduct that may propertly be regarded as indivisible, threw

him into the water—whether in execution of a pre-arranged plan or merely on the spur of the moment—and thereby caused his death by drowning.

R. v. Ramsay, supra, was of course considered. There was acceptance of the view therein applied that the indivisibility of a course of conduct is a question for the tribunal of fact. It had not been so dealt with, but, following *R.* v. *Church,* the court applied the well-known proviso on the ground that, as no tribunal properly directed could have held the transaction to be otherwise than indivisible, there had been no miscarriage of justice. *R.* v. *Ramsay* was not followed in so far as it treated the absence of a "preconceived plan" as raising a "fundamental distinction"; nor in so far as it purported to limit the rule to cases of intent to kill. The trial judge had based his findings solely on intent to do grievous bodily harm, this being enough for his purposes in a judgment which paid no attention to the possibility of death by drowning; and his finding of murder with intent to do grievous bodily harm was regarded by the Court of Appeal as sufficient to bring the *Thabo Meli* rule into operation. It was, of course, unnecessary for the court to express any opinion on the question whether different views should prevail under such legislation as was applicable in *R.* v. *Ramsay,* and none was expressed.

The only other matter of interest is that the court discussed, though without decision, the point that, even if Ram Kumar had been alive when immersed, the antecedent acts of violence might have continued to operate as concurrent causes of death by drowning; and it was thought that the decision might well be supportable on the alternative ground that Ram Kumar might have escaped from the water but for the state of unconsciousness to which he had been reduced. This is, of course, the alternative approach put forward in the two articles mentioned above but not hitherto judicially considered. I should perhaps add that no part of this brochure was in the hands of other judges, and that they are in no way responsible for anything said herein.

The passage quoted above from *Tara Chand* v. *R.* summarises my own final views as to the rule that should apply in common law jurisdictions and in others where malice aforethought is defined as at common law. I would include in it, *mutatis mutandis,* a reference to manslaughter, thus reaching the point that, in all cases of homicide by an indivisible series of acts committed with the relevant *mens rea,* it is immaterial that the actual cause of death may have been a final act done in the belief that it was done to a corpse. This conclusion rests perhaps rather more on *R.* v. *Church,* with some support from *Shoukatallie v. R.,* than on *Thabo Meli* v. *R.;* but it rests more fundamentally on what, in common with Dr Glanville Williams, I venture to regard as "ordinary ideas of justice and common sense".

As to New Zealand, it is impossible to speak so categorically, since the terms of our statute and the decision in *R.* v. *Ramsay* have to be taken into account. But, even under our legislation, I personally would reject, for the reasons given above, the views that a preconceived plan is essential, or that the rule cannot apply where an element of knowledge is included in the required *mens rea.*