



HIGH COURT OF AUSTRALIA

Public Information Officer

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THE QUEEN v WAYNE KELVIN LAVENDER

Malice is not an element of the offence of manslaughter either at common law or under the New South Wales *Crimes Act*, the High Court of Australia held today.

On 2 October 2001, Mr Lavender ran over a 13-year-old boy with a front-end loader when he pursued four boys trespassing at the sand mine at Redhead near Newcastle where he worked. The loader travelled at four kilometres per hour. The driver's vision was obscured by a bucket on the front. Mr Lavender was driving the loader through thick vegetation after the boys when he ran over the victim. He was convicted in 2003 of manslaughter by criminal negligence and was sentenced to four years' imprisonment with a non-parole period of 18 months. The conviction came at the end of his third trial, the first ending in a jury disagreement and the second ending when an unrelated point of law was referred for decision.

Mr Lavender successfully appealed against his conviction. The NSW Court of Criminal Appeal, by majority, held that the trial judge's directions to the jury on manslaughter by criminal negligence were inadequate because he failed to address whether the act causing death was done maliciously. The prosecution appealed to the High Court, contending that malice is not an element of involuntary manslaughter, either at common law or under the *Crimes Act*.

The Court unanimously allowed the appeal and overturned the Court of Criminal Appeal's decision. At common law, murder was the form of unlawful homicide accompanied by malice aforethought, while manslaughter was unlawful homicide not involving malice aforethought. That distinction was reflected in section 376 of the *Crimes Act* which provided that in an indictment for murder the accused would be charged with feloniously and maliciously murdering the deceased and in an indictment for manslaughter with feloniously slaying the deceased. Section 18 defines the crime of murder, and goes on to provide that every other punishable homicide shall be taken to be manslaughter. It also states: "No act or omission which was not malicious ... shall be within this section". The Court held that section 18, understood in context, did not alter the common law of unlawful homicide by involuntary manslaughter. The words "within this section" refer to the work done by the section in defining the crime of murder.

Mr Lavender was released from prison after the Court of Criminal Appeal decision, seven months before the end of the 18-month non-parole period. In view of the three trials and the time elapsed, the High Court stayed its orders for 28 days to allow Mr Lavender to seek leave from the Court of Criminal Appeal to appeal against his sentence.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*