The Maliciousness of Rape

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THE MALICIOUSNESS OF RAPE

The High Court of Australia's judgment in *Mraz v The Queen (No 1)*[1] was the first time the court offered a legal opinion on rape. But those opinions have long been forgotten as the case instead became precedential for its decisions on miscarriages of justice in *Mraz* (No 1) and estoppel in *Mraz v The Queen* (No 2).[2] These precedents, favourable to the accused, meant no justice for the deceased woman. The legal use of *Mraz* has obscured the original issue underlying the appeals at the time: what was the "maliciousness" of rape and what "injury" did it cause?

In 1955, 22-year-old Gyula Mraz, a Hungarian immigrant, stood trial on the capital charge of murder. The Crown alleged the offence was "constructive murder", accusing Mraz of raping thirty-year-old Isabella Joyce Wilson and, in the course of that felony, causing her death. The crime occurred on a bush track a short distance from Mraz's family home where Wilson had been visiting. According to Mraz's testimony, the pair had been dating and the sexual intercourse occurred with consent. The doctor who conducted Wilson's post-mortem had no better explanation than "shock" as the cause of death. He identified bruises, scratches, and other injuries to her body, including a knock to her head, but he found that these wounds were not fatal.

Summing up at the murder trial, Justice Nield of the NSW Supreme Court told the jury that if they found the accused had committed rape, they had the option to bring a verdict of either murder or manslaughter. Nield J directed that manslaughter was possible on the basis that rape was not always a "malicious" crime under the unique statutory meaning of "malice" in NSW (an act being "malicious" was required to substantiate murder).[3] Following Nield J's direction, the jury found the defendant "not guilty" of murder, but "guilty" of manslaughter and Mraz was sentenced to twelve years imprisonment.

On appeal from the defendant, the NSW Court of Criminal Appeal and the High Court of Australia found that Nield J's directions on the nature of rape and on the alternative verdict of manslaughter were erroneous. Rape was always a malicious offence and, as the High Court majority put it, the Crown case against Mraz had been "murder or nothing". However the two appellate courts differed on whether the misdirection amounted to a miscarriage of justice. The NSW Court of Criminal Appeal declined to overturn Mraz's conviction, viewing the misdirection as benefiting the accused. On appeal, the four majority judges of the High Court took the opposite view, quashing Mraz's conviction and issuing a verdict of acquittal.[4] The High Court ruled that the misdirection was not in the accused's favour because it lessened the likelihood of the jury returning a verdict of "not guilty". Both murder and rape were capital offences at the time of Mraz's murder trial and the majority High Court judges suspected that the spectre of a death sentence might have influenced the jury's verdict (had Mraz been tried one month later, neither would have been capital offences following the removal of the mandatory sentence in 1955).[5] The High Court's interpretation of the jury's manslaughter verdict was that they were likely to have acquitted the defendant but for Nield J's misdirection.[6] Following the Court's ruling that the conviction was a miscarriage of justice, Mraz was released from custody. But the case was not over yet.

[1] *Mraz v The Queen (No 1)* (1955) 93 CLR 493.

[2] *Mraz v The Queen (No 2)* (1956) 96 CLR 62.

[3] *Crimes Act 1900* (NSW) s 18(2)(a).

[4] *Mraz v The Queen (No 1)* (1955) 93 CLR 493 (Williams, Webb, Fullagar and Taylor JJ in majority; McTiernan J dissenting).

[5] *Crimes (Amendment) Act 1955* (NSW) s 5.

[6] James D Merralls, "Mraz v The Queen" (1957) 7 *Res Judicatae* 338.

In late 1955, the Crown brought further proceedings against Mraz, charging him with Wilson's rape. Mraz was denied a special plea on the grounds of *autrefois acquit* and estoppel.[7] In 1956, a jury convicted Mraz of rape and Manning J sentenced him to six years' imprisonment. His rape conviction disproved the High Court majority's doubts about a jury's findings on the charge. The case proceeded to the High Court for a second time after the defendant was unsuccessful at the Court of Criminal Appeal. In *Mraz (No 2)*, the High Court quashed the rape conviction upholding Mraz's special plea of estoppel on the indictment. The case was estopped because, in law, the High Court's decision in *Mraz (No 1)* had acquitted the defendant of murder by finding that he did not commit rape.[8]

Years of legal hearings, arguments and judgements resulted in the unsatisfactory outcome of Mraz's exoneration, despite two juries finding him liable for serious offences against the deceased. Underlying all the judicial decisions about procedure and evidence, however, was the fact that Mraz's acquittal was the direct result of Nield J's erroneous direction to the jury on rape. Nield J's misinterpretation of the law, and the subsequent judicial opinions on rape at appeal, showed many judges' reluctance to apply the modern notion of rape as sex without consent, as opposed to older notions of sexual violation by force.

At the murder trial, Nield J devoted considerable time in explaining to the jury that rape was not always a malicious crime:

> You may take the view that the act of sexual intercourse even against consent is not itself a malicious act, it is not an act in some circumstances directed towards the injury of another person, it is not an act done with intent to injure … the normal kind of rape is not a matter of design to injure the woman, but more towards the gratification of the desire of the man and gratifying his desire even against the will of the other party, but not directed to injury.[9]

Nield J went on to suggest that if the injuries were done to the deceased to "overcome her resistance" to rape, those acts were not done with "malice".

Nield J's interpretation of malice was based upon his reading of s 5 of the *Crimes Act 1900* (NSW), which defined "malicious" for as an act "done of malice … or done without malice but with indifference to human life or suffering, or with intent to injure some person". This unique definition of malice referred to the mental state of the accused during the commission of an offence.[10] Nield J saw the "injury" caused by rape as physical assault of a complainant, rather than the long established common law focus on the violation of a woman's consent.

Although no other judge who adjudicated on *Mraz* agreed with Nield J's interpretation of malice, they were just as inconsistent in their understanding of the offence. McLelland J of the Court of Criminal Appeal, ruling against Nield J's interpretation of malice, noted that rape involved male sexual gratification "against the consent of the other party and to do such acts of violence as are necessary for that purpose". He concluded therefore that a "woman raped with violence is injured within the meaning of s 5".[11]

Yet "rape with violence" was no different to "rape without violence" in the eyes of the law. Common law in England and Australia had overturned the necessity of proving "force" in the offence.[12] In 1915, Madden CJ compared the force required in proving rape with that of trespass. Just as all that was required was that "the trespasser invaded the house", in rape "all that is denoted by the use of the word 'force' in the definition of rape is that the man, not having the consent of the woman,

[7] *R v Mraz* (1955) 55 SR (NSW) 479. Autrefois acquit: "a plea that the prisoner has already been tried for and aquitted of the same offence." *The CCH Macquarie Dictionary of Law* (CCH, rev ed, 1996) 15.

[8] BA Mckillop, "Some Aspects of Malice and Estoppel in the Criminal Law: Mraz v The Queen" (1957) 2 *Sydney Law Review* 337, 345.

[9] *R v Mraz* (1955) 55 SR (NSW) 479.

[10] Arlie Loughnan, "'In Accordance with Modern Notions': Criminal Responsibility at the Turn of the Twentieth Century" in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 157–175.

[11] *R v Mraz* (1955) 55 SR (NSW) 479, 494.

[12] *R v Camplin* (1845) 1 Cox 22.

enters her person by the degree of force which is necessary to accomplish that act".[13] But Nield J and McLelland J's reasoning in the 1950s shows the longevity in judicial opinion of older ideas of physical violence as a requirement in the proof of rape. For these judges, the maliciousness of rape was the physical violence inflicted upon the complainant rather than sex without consent.

When *Mraz* reached the High Court of Australia in 1955, all justices agreed that Nield J had erred in his view and that rape was indeed a malicious offence. However, in their judgements in favour of acquittal, the four majority judges expressed their doubts about the rape allegation itself. In a joint judgement, three of the judges explained that certain aspects of the case increased their "degree of doubt". These aspects were in fact in line with what Nield J had told the trial jury, and were all in the defendant's favour: that the defendant was twenty-two and the deceased was thirty (or as Nield J had put it, the deceased was "apparently a virgin at the age of thirty"); that they were "in the habit of going about together"; that the offence occurred near the defendant's family home; that the defendant did not make an attempt to silence the deceased; and that the deceased's body did not show a tangible cause of death. In a separate judgement, Fullagar J labelled the rape case "a very weak one" because, he said, it rested upon the confession of the accused and that there were little signs of a struggle.

In essence, the four majority High Court judges doubted that the deceased had been raped, choosing to view the fact that the deceased was older than the accused, that they had a prior relationship and that there was a purported absence of serious physical violence as facts pertinent to uphold the defendant's defence of consent. Although they acknowledged that rape was an offence with malice, they were no clearer than Nield J about the actual wrong done to the dead woman. Their assumption that the jury would have acquitted Mraz if not for the misdirection may have been driven by their doubts about the rape allegation in the first place, which were based on their interpretation of what facts disproved consent. Indeed, the dissenting judgement of McTiernan J, who upheld the murder conviction, expressed no doubt that Wilson had been raped, ruling that the Crown had shown "convincing evidence" of the crime.

Of all the judges who heard the case, Street CJ of the NSW Supreme Court was the only one to point out that rape was a violation of a woman's autonomy. He concluded that Nield J's concept of maliciousness was incorrect because "[r]ape does not happen accidentally or inadvertently". Nield J had put too much emphasis on physical "injury" from rape, Street CJ declared, whereas rape should be seen as a violation of "her right to her own personal integrity" and an outrage on "her body".[14]

At the time of *Mraz*, sexual intercourse without consent was the prevailing legal definition of the offence. Yet even the most experienced judges rarely applied this concept, looking to factors such as the prior relationship between the accused and the complainant and especially the absence of physical violence to demonstrate the possibility of consent. The consequence of these judicial views on rape underlay the decision to quash Mraz's convictions.

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[13] *R v Bourke* [1915] VLR 289, 293.

[14] *R v Mraz* (1955) 55 SR (NSW) 479, 485.