ANGUS JACOBS.....APPELLANT; 1889

AFD *Mar. 23.

HER MAJESTY THE QUEEN.....RESPONDENT. *April 30.

ON APPEAL FROM THE COURT OF CROWN CASES RESERVED FOR THE PROVINCE OF QUEBEC.

Criminal law—Indictment—Name of third person—Alias dictus—Proof of names—Variance.

Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all.

J. was indicted for the murder of A. J. otherwise called K. K. On the trial it was proved that the deceased was known by the name of K. K., but there was no evidence that she ever went by the other name.

Held, affirming the judgment of the court below, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter.

APPEAL from a decision of the Court of Crown Cases Reserved for the Province of Quebec, affirming the conviction of the appellant for manslaughter.

The appellant, an Indian, was indicted under the name of Angus Jacobs, otherwise called Skahatati, for the homicide of one Agnes Jacobs, otherwise called Kalwakeri Karonhienhawitha. At the trial the deceased was identified as an Indian woman known by the Indian name laid in the indictment, but there was no evidence that she was ever called by the name of Agnes Jacobs. The appellant was convicted of manslaughter, and his counsel having urged that he was entitled to an acquittal by reason of the variance between the evidence and the indictment, the trial judge reserved the following case for the

* PRESENT—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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consideration of the Court of Crown Cases Reserved :—

"Aux séances de la cour du Banc de la Reine, terme du mois de septembre dernier, pour affaires criminelles, Angus Jacobs, autrement appelé Skahatati a subi son procès sur accusation de meurtre pour avoir tué Agnès Jacobs, autrement appelée Kaowakeri Karonhienhawitha.

"Joseph Jones, coroner, pour le district de Montréal a été le premier témoin produit, et a prouvé à l'enquête qu'il avait tenu sur le corps de la victime qui y est désignée dans le verdict ou rapport du jury sous le nom de Agnès Jacob, autrement appelée Kaowakeri Karonhienhawitha. Le second et le principal témoin Karonhienawi a déposé qu'elle avait connu Kaowakeri Karonhienhawitha, sa sœur et la défunte femme de l'accusé, et qu'elle était présente lors de l'assaut qui a été la cause de sa mort.

"Les autres témoins n'ont pas donné le nom de la victime. Ils l'ont seulement désignée comme étant en son vivant, la femme de l'accusé.

"L'accusé et sa femme étaient des Indiens demeurant a Caughnawaga. Le témoin Agathe Karonhienawi et plusieurs autres témoins appartenaient aussi à des tribus indiennes et ne parlaient que le langage de leur tribu. Leur témoignage a été traduit aux jurés par un interprête.

"Après que la couronne eut clos son enquête, l'accusé procéda à la sienne et fit entendre plusieurs témoins.

"Avant d'adresser la parole au jury en faveur de son client, l'avocat de l'accusé attira l'attention de la cour sur ce que l'acte d'accusation portait que la défunte s'appelait Agnès Jacob, autrement appelée Kaowakeri Karonhienhawitha, et que la preuve faisait voir qu'elle s'appelait Marguerite Monique; au soutien de cette prétention il a référé a un prétendu certificat de baptême, qui n'a pas été prouvé dans la cause.

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"Le jury a trouvé la prisonnier coupable de *Manslaughter* par un verdict qu'il a rapporté le 20 septembre dernier (1888).

"Comme il n'a été fait aucune preuve que la victime des coups infligés par l'accusé s'appelait Marguerite Monique, l'objection faite par le conseil de l'accusé n'était pas fondée. D'un autre côté il n'a pas été prouvé lors du procès, si ce n'est par la production du rapport du jury sur l'enquête faite devant le coroner, que la femme de l'accusé s'appelait Agnès Jacob, ni qu'elle fut connue sous ce nom et comme la variante entre la description donnée dans l'acte d'accusation de la personne qui a été tuée et la preuve qui a été faite du nom de cette personne, m'a parue de quelqu'importance, j'ai cru devoir réserver pour la considération de la cour des cas réservés de la Couronne, la question suivante:

"Le prisonnier Angus Jacob, ayant été accusé d'avoir tué Agnès Jacob, autrement appelée Kaowakeri Karonhienhawitha, la preuve qui a été faite, tel que ci-dessus rapporté était-elle suffisante quant à la description de la victime de l'accusé, pour justifier le verdict de *Manslaughter* rapporté par le jury.

"Si la cour est d'opinion que la preuve sur ce point est suffisante le verdict devra être maintenu.

"Si au contraire la Cour est d'opinion qu'il y a une variante fatale entre le nom sous lequel la personne qui a été tuée est désigné dans l'acte d'indictement et la preuve qui en a été faite, le verdict devra être annulé.

"Jacob a été condamné à être detenu pour la vie dans le pénitencier provincial où il est maintenant à subir sa sentence.

"A. A. DORION,
"Juge en chef, B. R

"Montréal, 8 novembre, 1888.

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The Court of Crown Cases Reserved held the evidence sufficient and affirmed the conviction. The prisoner then appealed to the Supreme Court of Canada.

Cornellier Q.C. for appellant and *Trenholme* for the respondent.

STRONG J.—The prisoner, Angus Jacobs otherwise called Skahatati—an Iroquois Indian of the Caugnawaga tribe—was indicted for the murder of his wife, who was described in the indictment as Agnes Jacobs otherwise called Kaowakeri Karonhienhawitha. The prisoner having been found guilty of manslaughter the learned Chief Justice of the Court of Queen's Bench before whom the trial took place reserved this case for the opinion of the Court in banc pursuant to the Statute (1).

The Court of Queen's Bench (Mr. Justice Doherty dissenting) held that the prisoner was properly convicted.

It was not proved that the deceased was known by the name of Marguerite Monique; the objection on that score was therefore properly overruled – and indeed the point reserved by the case does not include any question on that head. The allegation of the name of the deceased in the indictment under an alias was clearly good pleading inasmuch as the names of third persons as well as those of prisoners may be thus laid. In Mr. Justice Stephen's work on Criminal Procedure (2) the rule of pleading is thus stated "The indictment "must state the Christian name or names and the "surname of the Defendant and the person against "whom the offence was committed. If they have gone "by or acknowledged more names than one they may "be described as J. S. otherwise called J. T."

(1) See p. 434. (2) P. 160.

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The deceased being thus properly described in the indictment as "Agnes Jacobs alias Kaowakeri Karonhienhawitha the proof to support the indictment must of course be *secundum allegatum*.

Then it is proved by the sister of the deceased that the latter was known by the Indian name in which under an alias she was described in the indictment, but there is no proof that she was ever known as or called Agnes Jacobs. The sole question is, therefore, whether this proof supports the indictment. On the one hand it is said that when a party is described under an alias it must, in order to support the indictment, be proved that he is known by both names, being called sometimes by the one and sometimes by the other. On the other hand it is contended for the crown that when the name of a person mentioned in an indictment is laid in this way, it is sufficient to shew that he was known by one of the names stated though there may be no proof whatever of his having been called by the other.

I am of opinion that the latter is the correct conclusion. The literal terms of the allegation in the indictment "otherwise called" are covered by such proof which in the case of a prisoner described under an alias has always been held sufficient. I can see no reason why any distinction should be made in this respect between the instance of a prisoner and that of a third person described in this alternative manner. In the one as well as the other it is a literal proof of an averment that his name was A otherwise B, to prove that he was called by the name B and by no other name. I find no English case upon the point for the reason probably that the practice was too plain ever to have given rise to doubt. In Dr. Wharton's work on Criminal Evidence (1), there is the following passage

(1) Ed. 1884 p. 92.

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When the name either of the defendant or a third party is laid with an *alias dictus* proof of either name will be enough.

I also find in the treatise on Criminal Procedure (1) by the same learned writer the following passage containing a reference to the same point speaking however of the defendant's name.

> The surname may be such as the defendant has usually gone by or acknowledged : and if there be a doubt which one of the two names is the real surname the second may be added in the indictment after an *alias dictus* thus "Richard Wilson otherwise called Richard Layer." Proof of either will be enough.

I am of opinion that the decision of the Court of Crown Cases Reserved holding the prisoner properly convicted was entirely right and that this appeal from it should be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—The appellant, an Indian, was indicted under the name of Angus Jacobs, otherwise called Skahatati, for the homicide of one Agnes Jacobs otherwise called Kaowakeri Karonhienhawîtha, and pleaded not guilty. At the trial evidence was given identifying the deceased as an Indian woman by the Indian name given to her in the indictment, but no evidence was offered to show that she was known by the name of Agnes Jacobs. There does not appear to have been any evidence that she had acquired by marriage or otherwise the name of Jacobs or that she was known by that name, or in fact by any other than her Indian name as above stated. It was objected at the trial upon the part of the now appellant that he could not be convicted of the offence charged in the indictment for want of evidence to shew that the deceased was known by the name of Agnes Jacobs. The objection was overruled and the prisoner was found guilty, by the jury,

(1) Ed. 8, pp. 75 and 76. citing (South Car.) Reports p. 310. *State* v. *Graham* 15 Richardson's

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of manslaughter. In view of the above objection the learned judge who tried the case, reserved for the consideration of the Court of Crown Cases Reserved in the Province of Quebec, where the trial took place, the question whether proof only that the deceased was known by the Indian name given her in the indictment, was sufficient to justify the conviction.

The Court of Crown Cases Reserved for the Province of Quebec decided that it was and from that judgment this appeal is taken.

I am of the opinion that proof of the deceased's Indian name as given was sufficient. In fact, as far as appears, this was her only true name, or that by which she was known. The description as stated in the indictment was just the same as if the Indian name had been stated first, followed by "otherwise called Agnes Jacobs," in which case, on the Indian name being proved the identification would surely be sufficient. No case has been cited in support of the contention that where two or more names are laid under an *alias dictus* all must be proved. Such a contention is at variance with the use of the form *alias dictus*, the object of which is to enable proof of one or other of the names to be sufficient. The contention that the appellant, if again indicted for the homicide of this same person described by a different name, would be unable to plead his conviction in the present case, has no foundation in point of fact, for in the event of such a contingency, remote if possible, occurring, there would be no difficulty whatever in pleading that the person in such an indictment, charged to have been killed, was an Indian woman, known by the name of Kaowakeri Karonhienhawîtha of the homicide of whom the accused was convicted on the indictment in the present case This case appears to be quite distinguishable from the case of

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Reg. v. *Frost* (1) in which proof of some only of the christian names as laid in the indictment of a person necessary to be identified was held to be insufficient, it having been proved that the person had other christian names than those proved. Here the whole of the deceased's Indian name has been proved, and so far as appears she had no other name, so that there can not be said to be any uncertainty as to the person for whose homicide the appellant has been convicted.

The appeal must be dismissed.

PATTERSON J.—The prisoner was indicted for the murder of "Agnes Jacobs, otherwise called Kaowakeri Karonhienhawitha," and was convicted of manslaughter and sentenced, the Chief Justice, Sir A. A. Dorion, reserving for the opinion of the Court of Queen's Bench the question whether sufficient evidence was given of the description of the person alleged to have been murdered to justify the verdict of manslaughter.

The Court of Queen's Bench held the evidence sufficient, Mr. Justice Doherty dissenting, and the prisoner has appealed to this court.

The facts stated by the learned Chief Justice are that Angus Jacobs was tried for the murder of "Agnes Jacobs otherwise called Kaowakeri Karonhienhawitha:" That the coroner proved the inquest on the body of the victim, who is described in the verdict or return of the jury under the name of Agnes Jacob, otherwise called Kaowakeri Karonhienhawîtha: That the second and the principal witness, Karonhienawi deposed that she knew Kaowakeri Karonhienhawîtha, her sister, and the deceased wife of the prisoner, and that she was present at the assault which caused her death: That the other witnesses did not give the

(1) Dea. 464 and 1 Jur. N. S. 406.

name of the deceased, only describing her as being, when alive, the wife of the accused: That the accused and his wife were Indians, living at Caughnawaga: That the witness, Agathe Karonhienawi and several other witnesses belonged also to Indian tribes, and spoke only the language of their tribe, their evidence being given to the jury by means of an interpreter: That after the close of the evidence for the Crown, the accused called several witnesses on his own behalf: That before addressing the jury for his client, the prisoner's counsel called the attention of the court to the fact that the indictment purported that the deceased was called Agnes Jaçob, otherwise called Kaowakeri Karonhienhawîtha, and that the evidence was that she was called Marguerite Monique, in support of which proposition he referred to a pretended certificate of baptism which was not proved in the cause: That the jury found the prisoner guilty of manslaughter by a verdict returned on the 20th of September, 1888: That as there was no proof that the victim of the blows inflicted by the accused was called Marguerite Monique, there was no foundation for the objection of his counsel: That on the other hand it was not proved during the proceedings, unless it was by the return of the jury at the coroner's inquest, that the prisoner's wife was called Agnes Jacob, nor that she was known by that name; and that as the variance between the description given in the indictment of the person killed and the proof of the name of that person seemed to him, the Chief Justice, of some importance, he thought it right to reserve for the consideration of the Court of Crown Cases Reserved the question which I have mentioned.

If the court should be of opinion that the proof on the point was sufficient the verdict was to stand.

On the contrary, if the court should think there was

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a fatal variance between the name by which the person killed was described in the indictment and the proof which had been given, the verdict was to be annulled.

The term "variance" is hardly appropriate. There is no variance. The proof in no way differs from the description in the indictment. As far as it goes, it agrees with that description. The question is, does it go far enough?

The evidence is direct that the woman killed by the prisoner was Kaowakeri Karonhienhawitha. It is also directly proved that she was the wife of the convict, whence it follows that her name was Jacobs. Thus the whole description is covered with the exception of the christian name Agnes. It does not appear that Agnes was not her name. If that had been shown there would have been more reason to talk of a variance. Counsel who took the objection would seem, as I gather from the learned Chief Justice's note, to have been alive to the difference between proving a different name from that given in the indictment and failing to prove what the name was, for he based his objection on the name of Marguerite Monique. The objection in that form was not improperly urged as a variance, but it failed for want of proof that Marguerite Monique was the name of the deceased.

I have given as full an examination as has been in my power to the question whether the verdict would have been justified if the evidence had gone no further than to prove that the woman killed by the prisoner was called Kaowakeri Karonhienhawitha, and I have not been able to find authority for holding that it would not be justified. The question is one of identity, and it has been properly so treated by Mr. Cornellier in his able and ingenious argument on behalf of the prisoner.

The rule, which is well settled as illustrated by decisions many of which were cited to us, and which is usually enforced with strictness, requires the name, whether of the accused or of a third party, to be proved as laid in the indictment, and the mitigation of the harshness incident to the operation of the rule, by the extension of the power of amendment, rather affirms than discredits the rule. But the necessity of proving more than one name when alternative names are laid with an *alias dictus*, is a different thing. I was a good deal impressed by the argument that the substantive description here was Agnes Jacobs, the Indian name being secondary only, and that, whether the latter was proved or not, the identity was not established without proof of the former; but I cannot find authority to support that view with sufficient certainty to warrant an interference with the judgment in appeal.

The deceased is not described in the indictment as the wife of the prisoner. Had she been so described, the proof of identity afforded by this evidence would have been complete, without proving that her name was Agnes. One description would have been established sufficient to identify the person described with the person killed, and no conflict of proof would have arisen from the mere absence of evidence touching the alternative description.

It may be plausibly argued that that illustration is not quite parallel to the description in hand, but I am unable satisfactorily to distinguish them.

But the case is stronger than one where there is no evidence to prove the alternative description. We have, as I have remarked, evidence from the witnesses that the name of the deceased was Jacobs. It was proved before the jury that she was the wife of the prisoner, who therefore knew her real name and who called witnesses, and could by those or some other

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witness have shown, if the fact was so, that the person called Kaowakeri Karonhienhawîtha was not Agnes. The proof of the proceedings before the coroner is to me a new feature in the ordinary evidence at a trial for murder. Whatever was the object of the proof, the effect was that there was before the court and jury a record touching the crime in question, though not an adjudication in any sense binding on the prisoner. In it the deceased was described by both names. That description may be conceded to have been evidence of the faintest kind and of no weight against contradictory evidence adduced at the trial; but the evidence, in place of contradicting, bore out, as far as it went, the allegations of the return; the return itself was put in evidence, without objection, as something relating to the same offence for which the indictment was preferred; and no attempt was made on the part of the prisoner to question, by evidence, the identity.

On the whole I am not prepared to say that a specific finding that the deceased was the person called Agnes Jacobs would have been unsupported by evidence.

In my opinion we should dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Ouimet, Cornellier & Emard.*

Solicitors for respondent: *Trenholme, Taylor & Buchan.*