ALFRED SLAUGHENWHITE..... APPELLANT; 1905

*March 2.
*March 3.

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Criminal Code, 1892, *ss.* 241, 242—*Wounding with intent—Verdict—Conviction—Crown case reserved.*

On an indictment for wounding with intent a verdict of "guilty without malicious intent" is an acquittal. Judgment appealed from (9 Can. Crim. Cas. 53) reversed, Davies and Idington JJ. dissenting.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), affirming, on an equal division of opinion, the conviction of the appellant on the verdict of the jury rendered at the trial.

The prisoner, appellant, was indicted "for that he, on the 18th day of May, 1904, at St. Margaret's Bay Road, in the County of Halifax, with intent to disable one William Hill, did unlawfully wound the said William Hill, by shooting at him, the said William Hill, with a loaded gun." On a reserved case stated by Mr. Justice Townshend, the judge at the trial, to the Supreme Court of Nova Scotia, the learned judge referred to the evidence and then proceeded as follows:

"I told the jury that under the evidence they could convict the prisoner of the charge laid in the indictment if they were satisfied he intended to disable Hill at the time he fired the gun, and that he fired with that object, and that they were at liberty to infer such intent from the facts in evidence. If they thought he

*Present:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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had no such intent at the time, still they could convict him of the lesser offence, under section 242, of unlawfully wounding Hill with the gun because of his unlawful act in pointing a loaded gun, and firing it at Hill, and it was for them to say whether the accused knew or ought to have known that it was loaded, and whether he did point it at Hill; that it was not necessary to constitute this offence to prove actual malice. It was enough that it was unlawful.

"The jury, after deliberation, returned a verdict of 'Guilty without malicious intent,' and that verdict I accepted, and it was recorded as found.

"The prisoner's counsel, Mr. Power, then requested me to reserve for the opinion of the Supreme Court of Nova Scotia, sitting as a Court of Appeal for Crown Cases Reserved, certain questions of law which I do now state and reserve. These questions are: (*a*) Whether or not upon the finding of the jury a verdict of acquittal should have been entered? (*b*) Were my instructions in law correct?

"I sentenced the prisoner to two years in Dorchester Penitentiary, but did not respite the execution of the sentence."

The reserved case was heard before the full court composed of all the judges of that court, including the trial judge, the result being an equal division in opinion, Weatherbe C. J. and Graham and Russell JJ. holding that the conviction should be quashed, while Townshend, Meagher and Fraser JJ. considered it valid. The questions argued upon the present appeal are stated in the judgments now reported.

John J. Power for the appellant.

Longley K. C., Attorney-General for Nova Scotia, for the respondent.

The judgment of the majority of the court was delivered by:—

GIROUARD J.—At the July Assizes, 1904, at Halifax, the appellant was indicted for that he, on the 18th May, 1904, at St. Margaret's Bay Road, in the County of Halifax, with the intent to disable one William Hill, did unlawfully wound the said William Hill by shooting at him with a loaded gun. The jury after deliberation returned a verdict of "guilty without malicious intent" and that verdict the trial judge accepted and, upon being recorded as found, he sentenced the prisoner to two years in the Dorchester Penitentiary and did not respite the execution of the sentence. At the same time at the request of prisoner's counsel, Mr. Power, the learned judge reserved two questions.

(*a*) Whether or not upon the finding of the jury a verdict of acquittal should have been entered? (*b*) Were my instructions in law correct?

The reserve case came before the court *in banco* with the result that the court was evenly divided, Weatherbe C. J., and Graham and Russell JJ. for quashing the conviction; Townshend J., who presided at the trial, Meagher and Fraser JJ. for affirming the conviction.

It is contended on the part of the appellant that the addition made by the jury to their verdict "guilty", of the words "without malicious intent", amounted to an acquittal. The majority of the court is of that opinion.

It is conceded by the judges affirming the conviction that the verdict is not a conviction of the offence mentioned in section 241 of the Criminal Code under which the prisoner was indicted. It is contended that it is valid under section 242 which provides that every one is guilty of an indictable offence and liable to three years imprisonment who

unlawfully wounds or inflicts any grievous bodily harm on any other person either with or without an instrument.

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Girouard J.

Probably the jury could have returned a verdict under this section or a verdict of common assault, but they have not done so. Their finding that the offence committed by the prisoner, whatever it might be, was without "malicious intent", removed the essential requirement of a crime, whether malice is to be inferred from an unlawful act or is "express." We have the less hesitation in arriving at this conclusion because the Attorney General for the Province of Nova Scotia, (Hon. Mr. Longley), declared before us that he could not sustain the verdict as worded.

Without going further into the examination of the reasons of the learned judges pro and con, we order that the said conviction be quashed and the prisoner discharged from the said penitentiary.

DAVIES J. (dissenting):—This was an appeal upon a Crown case reserved by Mr. Justice Townshend. On the hearing the six judges were equally divided for and against sustaining the conviction. The two questions reserved were (*a*) Whether on the verdict rendered an acquittal should have been entered? and (*b*) Were the judge's instructions to to the jury correct?

I am of the opinion that a verdict of acquittal should not have been entered on the jury's finding and also that the judge's instructions were correct.

I would have been content to express my simple concurrence in the judgment prepared by my brother Idington were it not for the reference therein to the question of "common assault" which does not appear from the record to have been referred to at the trial or on the hearing of the case reserved and was not raised or touched upon by the prisoner's counsel before us. I do not wish to be understood as expressing any opinion upon the point discussed by my brother Idington. In all other respects I concur in his opinion.

The prisoner was indicted under the 241st section of the Code for wounding one Hill *with intent*. The trial judge told the jury, I think properly, that they could, under the provisions of the Code, convict the prisoner of the lesser offence simply of "wounding" under the 242nd section, if they were not satisfied he was guilty of the offence of *wounding with intent* specially charged against him under section 241 and that to find him guilty of the lesser offence it was not necessary for the Crown to prove or for them to find actual malice.

The jury returned a verdict of "guilty without malicious intent". I think that verdict means just what it says. The jury found the intent which is an essential element in the offence defined by section 241 to be wanting. The prisoner, therefore, was entitled to be acquitted of that offence. The finding of the absence of *malicious* intent negatived the existence of "actual malice" on the part of the prisoner about which the judge had instructed them. But it meant neither more nor less than that. I construe the verdict to mean—"We find the prisoner guilty of the lesser offence of wounding under the 242nd section as he had no malice and no intent"—or, as they put it, malicious intent. To complete the offence under the 242nd section "intent" or malicious intent was not an essential ingredient. It was such an essential element to complete the offence defined in the 241st section. The jury found that ingredient wanting but that the defendant was guilty. It seems to me, therefore, plain beyond reasonable doubt that he must be acquitted under the 241st section and convicted under the 242nd section of the offence without the intent pursuant to the power contained in the 713th section of the Code.

That is what the trial judge did and I think he was right. I agree with him that the case of *The Queen* v.

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Latimer, (2) decided unanimously by six judges all experienced in criminal law, is ample authority, if such was needed, for his decision.

It was said by one of the learned judges in the court below that we are not entitled to indulge in speculations as to the meaning of the jury's verdict. I agree, but think speculation as to this verdict quite unnecessary. On the other hand I do not think I am justified in giving effect to arguments which present themselves to my mind merely as subtle refinements upon words and which would nullify what appears to me a plain and clear verdict.

IDINGTON J. (dissenting):—The appellant was tried upon an indictment preferred under section 241 of the Code and found by the verdict of the jury who tried him, "guilty without malicious intent".

The learned trial judge upon this verdict sentenced the prisoner but reserved certain questions which as finally settled were:—

(*a*) Whether or not upon the finding of the jury a verdict of acquittal should have been entered? (*b*) Were my instructions in law correct?

I do not think that the verdict was one of acquittal.

I am, with due respect, unable to understand how such a contention can have any solid foundation in law, when regard is had to the provisions of section 713, where it is said:—

Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included, which is proved, although the whole offence charged is not proved; etc., etc.

This was intended to avoid the necessity of repeating in a needless multiplication of counts, as ancient

(1) 17 Q. B. D. 359.

learning rendered necessary, substantially the same or a minor cognate offence but having otherwise a slight variation in degree of criminality.

The indictment charged that the prisoner

with intent to disable one William Hill, did unlawfully wound the said William Hill by shooting at him.

The indictment, if the intent had been stricken out, would have been a perfectly good indictment charging accused with "unlawful wounding" and such charge was, in the language of section 713, included in the charge as described and would have been included in the commission of the offence charged and as described, and when and if the proof of intent fell short of establishing the charge as laid but proved the charge without the intent it became the duty of the jury to acquit the accused of the offence as charged and find him guilty of the unlawful wounding.

This, I take it, is clearly the evolution of law that the Code in this regard is intended to express and declare to be the law in substitution of what had gone before.

It is not an uncommon thing for juries to return such verdicts, with simply stating without intent, and I think it can make not the slightest difference that they used an adjective that aptly described the sort of intent that was here charged, and may mean and I think was intended by the jurors to mean, more than the mild form of malice that the law imputes to every man who infringes even in the most trifling manner the criminal law.

The intent to disable another carries with it actual deliberation that may be well designated malicious in the wilful sense of the word, and to discriminate that from the legal malice implied in unlawful wounding is all that the jury no doubt meant.

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To impute to them something else is, I submit, with due respect, a clear departure from the canons of construction that require words to be read and interpreted in the light of the surrounding facts and circumstances and by their plain and ordinary meaning.

To interpret such a verdict as an acquittal seems to me to treat the jurors' verdict differently from what we would the expressions of other ordinary people, trying to express their meaning.

As to the proper interpretation to be put upon these words we are not, by the case, left free to determine otherwise than as to whether or not an acquittal. If not an acquittal our duty as to that ends.

I am not quite free from doubt as to whether it might not be said that as the statute allows a verdict of assault to be rendered upon such a count the jury might not, *if properly directed*, have found prisoner guilty of assault. This, however, is not what I would draw from reading the charge as laid and the verdict without looking beyond. And if we turn to the judge's charge, as I think we can here to any part of the case submitted, and see no allusion to the third alternative of an assault, it seems less chance exists for having any doubt as to the meaning of the jury.

This is not a case where, as in *Reg.* v. *Gray*, (1) the jury expressly negatived fraud which was of the essence of the crime there charged and, therefore, clearly in law shewed that the prisoner was not guilty ; or *Reg.* v. *Healey*, (2) where a verdict of guilty of murder had added thereto, that there was no evidence to shew malice aforethought and premeditation, which was found too ambiguous to allow judgment to pass upon it. The foundation of the conviction was taken away.

This finding without intent or malicious intent does not meet the case and mean acquittal, where a man may

(1) 17 Cox 299.

(2) 3 N. S. Rep. 331.

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be found guilty without intent of any kind, nay, as in *the Queen* v. *Latimer*, (1) against the actual intentions of the accused.

As to the instructions given the jury by the learned judge, I do not think that so far as he went they contained error of law ; but I think he ought to have gone further and explained to the jury the three alternatives open to them upon such an indictment as was preferred here.

I think, though no statutory requirement may exist in regard to this, in respect of more than one or two specified cases, that proper practice requires a verdict of acquittal, where that is intended, in respect of the higher offence as laid, and a conviction found in respect of the lower, just as if there had been two counts in the indictment dealing respectively with each charge.

In regard to that, however, *Latham* v. *The Queen* (2) shews that even where there were separate counts the omission of a finding on the first count did not prevent the judgment going on an appropriate finding of guilty on, or applicable to, a subsequent count.

That shows that what was omitted to be done here would not vitiate the proceedings so as to render the conviction liable to be quashed.

I may point out that much of the interesting argument addressed to this court is in light of sections 743 and 745 no longer valid, and that cases such as this are governed by these much wider provisions than prevailed so late as *Reg.* v. *Gibson*, (3) which, however, as indicated in the opinion of the court there a right beyond what was contended for here, in regard to what could be looked at, to interpret the proceedings calle n question.

Appeal allowed.

Solicitor for the appellant : *John J. Power.*

Solicitor for the respondent : *The Attorney General for Nova Scotia.*

(1) 17 Q. B. D. 359.

(2) 5 B & S. 635.

(3) 16 O. R. 704.