1937

*Nov. 1.
*Dec. 7.

HIS MAJESTY THE KING .....APPELLANT;

AND

WILLIAM MANCHUK .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Culpable homicide—As to reduction from murder to manslaughter—Provocation—Cr. Code, s. 261—Acts of third person—Directions to jury—Questions for jury.

An appeal by the Crown from the judgment of the Court of Appeal for Ontario, [1937] O.R. 693, ordering a new trial of accused (who had been convicted at trial on a charge of murder) on the ground of misdirection or failure of proper direction by the trial judge in charging the jury on the question of provocation, was dismissed.

The law with regard to provocation as embodied in s. 261 of the *Cr. Code* does not contemplate the extension of the relative lenity (in reducing culpable homicide from murder to manslaughter) to a case in which provocation received from a third person becomes the occasion of an act of homicide against a victim who, as the offender knows and fully realizes, was not in any way concerned in the provocation. But acts of provocation committed by a third person, which might be sufficient to reduce the offence to manslaughter if the victim had in fact participated in them, may have the same effect where the offence against the victim is committed by the accused under the belief that the victim was a party to those acts, although the victim was not implicated in them in fact. (*Brown's* case, 1 Leech C.C. 148, and *Hall's* case, 21 Cr. A.R. 48, cited and discussed.)

In the present case, the trial judge ought to have asked the jury to consider whether, in the blindness of his passion aroused by his quarrel with the husband of Mrs. S., the accused, suddenly observing Mrs. S. (the victim of the act now in question) within a few feet of the scene of the quarrel and of his mortal assault on the husband, attacked her on the assumption that she was involved in the acts of the husband and daughter. It was a question for the jury whether (*a*) the acts relied upon as constituting provocation were calculated to deprive an ordinary man of self-control to such an extent as to cause an attack upon Mrs. S. of such a character as that delivered by the accused, and (*b*) whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack upon Mrs. S. was acting upon such provocation on a sudden and before his passion had time to cool, and under the assumption that she was involved therein.

APPEAL by the Attorney-General of Ontario (under s. 1023 (2) of the *Criminal Code,* as amended by 25-26 Geo. V (1935), c. 56, s. 16) from the judgment of the Court of Appeal for Ontario (1) which (Fisher and Henderson JJ.A. dissenting) allowed the accused's appeal

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] O.R. 693; [1937] 3 D.L.R. 343; 68 Can. Crim. Cas. 362.

against his conviction of murder at his trial before McFarland J. with a jury and set aside the conviction and ordered a retrial, on the ground of misdirection or failure of proper direction by the trial judge in addressing the jury on the question of provocation.

W. B. Common K.C. and *E. H. Lancaster K.C.* for the appellant.

Peter White K.C. and *H. M. Rogers* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—We have come to the conclusion that the order directing a new trial should not be disturbed. As there is to be a new trial, we think it better to abstain from a discussion of the facts.

The controversy on the appeal concerns the application of section 261 of the *Criminal Code,* the text of which we quote:

> Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> 2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
>
> 3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

We think it right to emphasize that this section deals with the conditions under which "culpable homicide, which would otherwise be murder, may be reduced to manslaughter," because the act of the accused was committed "in the heat of passion caused by sudden provocation."

The provocation contemplated by the section neither justifies nor excuses the act of homicide. But the law accounts the act and the violent feelings which prompted it less blameable because of the passion aroused by the provocation, leaving the offender in a condition in which he was not at the critical "moment the master of his own understanding," to quote the phrase of Tindal C.J. in

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Hayward's case (1), adopted by the Court of Criminal Appeals in *Hall's* case (2); though still sufficiently blameable to merit punishment—and it may be punishment of high severity—but not the extreme punishment of death. We do not think that the law, as embodied in section 261, contemplates the extension of this relative lenity to a case in which provocation received from one person becomes the occasion of an act of homicide against another who, as the offender knows and fully realizes, was not in any way concerned in the provocation. We do not think section 261 contemplates such a case, for example, as *Simpson's* case (3).

On the other hand, the law has recognized that an offender under the dominion of a passion provoked by wrong or insult may in some circumstances attack a person not in any way concerned with the act of provocation, under the full belief that he has been so; and such circumstances have been held to be sufficient to reduce the crime from murder to manslaughter.

Brown's case (4) would appear, from the report in 1 East's Pleas of the Crown, at p. 246, to have proceeded upon this ground.

Hall's case (5) may have been decided upon similar considerations. There is nothing in any of the reports of the case indicating that there was any direct evidence of the participation of the victim in the attack on the accused upon which the latter relied as constituting provocation, or even that the victim was present at the time. It was held that the jury ought to have been asked to consider the issue of provocation and, accordingly, the court reduced the verdict of murder to manslaughter, although, obviously, as Lord Hewart observes, there were grave difficulties in the way of this defence. There was evidence from which it might have been inferred, if the story of the accused was accepted, that the offender acted upon the assumption that the victim had been one of his assailants. We are disposed to think, after considering the judgment with care, that the Court of Criminal Appeals did not regard the

(1) *Rex* v. *Hayward*, (1833) 6 C. & P. 157, at 159.
(2) (1928) 21 Cr. A.R. 48, at 54.
(3) (1915) 11 Cr. A.R. 218.
(4) *The King* v. *Brown*, (1776) 1 Leech C.C. 148.
(5) (1928) 21 Cr. A.R. 48.

actual participation by the victim in the alleged assault upon the accused as an essential element in the defence of provocation.

True it is that in these cases there was an affray and, both in *Brown's* case (2) and in *Hall's* case (1), the alleged provocation consisted in a violent assault upon the accused. We think, however, that section 261 of the *Criminal Code* leaves exclusively to the tribunal of fact, as an issue of fact, the question whether any particular "wrongful act or insult" is of such a character as to constitute provocation for the purposes of the section; at least subject to the condition expressed in the proviso to the third subsection. And we think, moreover, as regards the source from which the provocation proceeds, that acts of provocation committed by a third person, which might be sufficient to reduce the offence to manslaughter if the victim had in fact participated in them, may have the same effect where the offence against the victim is committed by the accused under the belief that the victim was a party to those acts, although not implicated in them in fact.

We think the trial judge ought to have asked the jury to consider whether, in the blindness of his passion, aroused by the quarrel with the husband, the accused, suddenly observing the wife within a few feet of the scene of the quarrel and of his mortal assault on the husband, attacked her on the assumption that she was involved in the acts of the husband and daughter.

We think it was a question for the jury whether (*a*) the acts relied upon as constituting provocation were calculated to deprive an ordinary man of self-control to such an extent as to cause an attack upon Mrs. Seabright of such a character as that delivered by the accused; and (*b*) whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack upon Mrs. Seabright was acting upon such provocation on a sudden and before his passion had time to cool, and under the assumption that she was involved therein.

At the new trial the presiding judge will, no doubt, impress upon the jury the importance of considering with great care the first of these questions; but he will, of course, instruct the jury that, on the ultimate issue, they must be

(1) (1928) 21 Cr. A.R. 48. (2) (1776) 1 Leech C.C. 148.

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satisfied beyond reasonable doubt that the accused was guilty of murder before convicting him of that crime.

For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: *I. A. Humphries.*

Solicitor for the respondent: *H. M. Rogers.*