WILLIAM MANCHUK ....APPELLANT;

AND

HIS MAJESTY THE KING ....RESPONDENT.

1938

* June 13, 14.
* June 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal—Trial on charge of murder—Misdirection to jury—Provocation—Onus in general—Power of court on appeal—Substitution of verdict of manslaughter for jury's verdict of murder—Cr. Code, ss. 1016, 1024; Supreme Court Act, R.S.C., 1927, c. 35.

On the occasion of a quarrel between appellant and S., appellant killed S., and then killed S.'s wife who had not been present at the quarrel or the killing of S. but on hearing shouts had appeared at her house door a few feet away. Appellant was tried on the charge of murder of S. and was found guilty of manslaughter and sentenced to 20 years penal servitude. He was later tried on the charge of murder of Mrs. S. and was convicted of the crime charged. This conviction was set aside and a new trial ordered on the ground that the trial Judge had misdirected the jury on the question of provocation ([1937] O.R. 693; [1938] S.C.R. 18). Appellant was then tried again on the charge of murder of Mrs. S. and convicted of the crime charged. An appeal to the Court of Appeal for Ontario was dismissed ([1938] O.R. 385), but two Judges dissented, holding that there was error in certain respects in the trial Judge's charge to the jury and there should be a new trial. Appellant appealed to this Court.

Held (allowing the appeal): There was a mistrial. The conviction should be set aside.

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

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The putting before the jury, in the trial Judge's charge, of a sentence, taken from the judgment of one of the Judges of the Court of Appeal on the appeal from the first conviction of appellant of murder of Mrs. S., that the said Judge in Appeal was "far from suggesting that the conduct of the accused would not justify a verdict of wilful murder," constituted, in the circumstances, error of such gravity as to vitiate the verdict. While the trial Judge was entitled, if so advised, to express his own opinion as to the effect of the evidence actually before the jury, it was inadmissible to present to them the opinion of any one that on the former trial the evidence was sufficient to justify a conviction for murder. Moreover, the effect of this was probably accentuated by the record of appellant's conviction of the murder of Mrs. S. endorsed on the indictment which was put in the jury's hands, said record being "Guilty—Sentenced to be hanged, May 31, 1937." In the circumstances of the case, said record should have been withheld from them; a copy of the indictment with the endorsement omitted would have served every legitimate purpose.

Another serious objection was that the trial Judge, in answering a question from the jury with regard to provocation, did not direct them in the precise and unambiguous terms in which they ought to have been instructed. Moreover, the terms in which the jury's question was expressed manifested an erroneous impression that, in proving the killing, the Crown had disposed of the presumption of accused's innocence and that they must find him guilty of murder unless he affirmatively established to their satisfaction provocation in the pertinent sense; and their question should have been answered in such a manner as to remove this error from their minds; it ought to have been made clear to them that in the last resort the accused could not properly be convicted of murder if, as the result of the evidence as a whole, they were in reasonable doubt whether or not he was guilty of that crime.

As to an objection taken by the dissenting Judges in the Court of Appeal to the effect that the trial Judge erred in instructing the jury that they were not concerned with the fact that appellant had been acquitted of the charge of murder of S. and found guilty of the less grave offence of manslaughter:

Held per Duff C.J., Cannon, Davis, Kerwin and Hudson JJ.: (1) Plainly, the trial Judge would have committed an error in law if he had told the jury that a finding of provocation in appellant's trial for murder of S. was conclusive upon the issue of provocation then before them; the issue of provocation was not the same in the two cases. (Opinion expressed that said dissenting Judges had not meant to suggest otherwise on this point).

2. As to the suggestion that the trial Judge ought to have told the jury that they must take it as an established fact that the acts of S. constituted sufficient provocation to reduce the homicide committed upon him to manslaughter, and, starting from that point, consider the issue of provocation in its bearing upon the charge against appellant of murder of Mrs. S.: Such a direction would probably be calculated to confuse and mislead the jury in respect of the actual issue upon which it was their duty then and there to pass. Moreover, such a direction would have been wrong; the evidence given at the earlier trial (for the killing of S.) was not placed fully before the court nor was the trial Judge's charge; nor, with such material before him, could the trial Judge (on the trial for the kill-

ing of Mrs. S.) have been warranted in directing the jury that at said earlier trial any issue of provocation had been decided; the jury may on that (earlier) trial have thought, without passing upon any such issue, that the evidence raised a sufficient doubt as to accused's guilt in respect of the charge of murder to require an acquittal on that charge.

Crocket J., in view of the principle as to the question of provocation which he took to be clearly deducible from this Court's decision in *The King* v. *Manchuk,* [1938] S.C.R. 18, in view of the established fact that appellant, on his trial for murder of S., had been found guilty of manslaughter only, and in view of the circumstances attending the killing of S. and Mrs. S., and it being quite apparent (as he held) that appellant in attacking Mrs. S. was acting upon the same impulse as that which caused him to attack S., was strongly inclined to agree with the reasoning of the dissenting Judges in the Court of Appeal on the applicability of the principles of *res judicata.*

As to the order that ought to be made by this Court:

Per Duff C.J., Cannon, Davis, Kerwin and Hudson JJ.: It was clear that the jury must have been satisfied of the facts necessary to constitute manslaughter; and the Court of Appeal would have authority under s. 1016, *Cr. Code,* to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon appellant (*Rex* v. *Hopper,* [1915] 2 K.B. 431). By force of s. 1024 *Cr. Code,* coupled with the enactments of the *Supreme Court Act* (R.S.C., 1927, c. 35), this Court has authority, not only to order a new trial, or to quash the conviction and direct the prisoner's discharge, but also to give the judgment which the Court of Appeal was empowered to give in virtue of s. 1016 (2), *Cr. Code.* Under the exceptional circumstances of the case the last mentioned course is the proper one. The conviction should be set aside, a verdict of manslaughter substituted for the jury's verdict and appellant sentenced to imprisonment for life.

Per Crocket J. (dissenting on this point): Considering the proceedings already undergone and in the anomalous circumstances of the case, justice would best be served by quashing the present conviction absolutely. Further, there is no doubt as to this Court's right to quash the conviction; there may be some doubt as to its right to enter a judgment which necessarily involves its rendering a verdict in a criminal case and itself passing sentence upon it; the wisdom of the latter course is very doubtful; it would signalize an entirely new departure in the exercise of the jurisdiction of this Court in criminal cases.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) sustaining (Middleton and Gillanders JJ.A. dissenting) his conviction, on trial before Hope J. and a jury, of the murder of Amy Seabright at St. Catharines, Ontario, on June 8, 1936.

Just before the accused killed Amy Seabright, he had killed her husband, John Seabright, in a quarrel. Accused was tried on the charge of murder of John Seabright and was found guilty of manslaughter and sentenced to 20 years

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penal servitude. He was later tried on the charge of murder of Amy Seabright and was convicted of the crime charged. This conviction was set aside and a new trial ordered on the ground that the trial judge had misdirected the jury on the question of provocation (1). Accused was tried again on the charge of murder of Amy Seabright and convicted of the crime charged. An appeal by the accused to the Court of Appeal for Ontario was dismissed (Middleton and Gillanders JJ.A. dissenting) (2). From that dismissal the present appeal to this Court was brought. The dissent in the Court of Appeal was, as expressed in the formal judgment of that Court, on the question as to whether there was error in the charge of the learned trial judge, and whether such error amounted to a substantial wrong or miscarriage of justice. The dissenting judges held that there should be a new trial.

By the judgment now reported, the appeal to this Court was allowed; the judgment of the Court of Appeal was set aside; the Court directed that the verdict of murder be quashed and a verdict of manslaughter be entered. Crocket J., dissenting, would quash the conviction absolutely. The appellant was sentenced to imprisonment for life.

J. C. McRuer K.C. and *J. J. Bench K.C.* for the appellant.

W. B. Common K.C. and *C. P. Hope K.C.* for the respondent.

The judgment of the majority of the Court (The Chief Justice and Cannon, Davis, Kerwin and Hudson JJ.) was delivered by

THE CHIEF JUSTICE.—On the 8th of June, 1936, the appellant William Manchuk killed, first, John Seabright, and, shortly afterwards, his wife, Amy Seabright. Evidence was given by Mrs. Lewis, the daughter of John and Amy Seabright, that, after killing her father, and before the attack upon her mother, Manchuk attempted an attack upon her with the axe with which he killed her parents, but she succeeded in escaping.

(1) [1937] O.R. 693; [1938] S.C.R. 18.
(2) [1938] O.R. 385.

These tragic events were the culmination of a dispute about the location of a line fence between the properties respectively occupied by the Seabrights and the Manchuks. On the day on which the homicides occurred, John Seabright was engaged in excavating post holes and setting up posts for a fence which would encroach upon property that Manchuk believed to be exclusively his. Manchuk and his wife protested against these proceedings in violent and threatening language and, eventually, Manchuk who, as the evidence shows, notwithstanding his wife's incitements to violence, had for a time succeeded in keeping himself under control, yielded to a passion of rage and committed the fatal assault on John Seabright, killing him by blows delivered with an axe.

The scene of the killing of John Seabright is only a few feet from the porch of the Seabrights' house. Mrs. Seabright had been within the house during the occurrences just described and had no visible connection with them. She appeared at the door on hearing the shouts of her daughter and was immediately attacked by Manchuk who, with the same weapon, inflicted upon her wounds from which she died shortly afterwards.

Manchuk was tried for the murder of John Seabright, and John Seabright's acts, already mentioned, were relied upon as constituting provocation. The jury found Manchuk guilty of manslaughter and he was accordingly sentenced to twenty years penal servitude. Manchuk was then tried under an indictment charging him with the murder of Amy Seabright and was convicted of the crime charged. This conviction was set aside and a new trial ordered (1). The learned trial judge had (it was held by this Court (2), confirming a judgment of the majority of the Ontario Court of Appeal) erroneously directed the jury that there was no evidence upon which they could properly find the attack upon Amy Seabright to have been delivered under such provocation as to justify a finding of manslaughter.

In the judgment of this Court, the law concerning the nature of provocation in the relevant sense and its effect in justifying a verdict of manslaughter, when in its absence

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the proper verdict would be one of murder, was in its application to the circumstances of this case explained for the guidance of the trial judge at the new trial. In effect it was stated that, on the issue of provocation, the jury ought to be directed to consider, first, whether the acts of provocation, which proceeded immediately from John Seabright, were of such a character as to deprive a normal person of his self-control to such a degree as might lead such a person to commit an attack upon Mrs. Seabright of the character of that of which Manchuk was guilty; and, second, whether Manchuk in fact did act under such provocation while still under the dominion of the passion excited thereby and under the belief that she was concerned in the acts of provocation relied upon. But the judgment proceeded to say that the learned trial judge would, of course, warn the jury that, on the ultimate issue (raised by the charge of murder), unless they were satisfied beyond reasonable doubt that Manchuk was guilty of the more heinous crime, it would be their duty not to convict him upon that charge.

At the new trial, the accused was found guilty of the murder of Amy Seabright and convicted and sentenced accordingly. An appeal to the Ontario Court of Appeal was dismissed (Mr. Justice Middleton and Mr. Justice Gillanders dissenting) (1) and the case now comes before this Court on appeal from that judgment.

The appeal is by law necessarily limited to the grounds upon which those learned judges dissented. Those grounds are three in number. First, the learned judge erred (the learned dissenting judges held) in instructing the jury that they were not concerned with the fact that Manchuk had been acquitted of the charge of murder of John Seabright and had found him guilty of the less grave offence of manslaughter. If we read the judgment of the learned judges rightly, it seems to say that the learned trial judge ought to have told the jury that they must take it as an established fact that the acts of John Seabright constituted sufficient provocation to reduce the homicide committed upon him to manslaughter; and, starting from that point, consider the issue of provocation in its bearing upon the charge against the accused of the murder of Amy Seabright. It sufficiently appears from what has already been said that

(1)]1938] O.R. 385.

the issue of provocation was not the same in the two cases, and, plainly, the trial judge would have committed an error in law if he had told them that a finding of provocation in the trial of Manchuk for the murder of John Seabright was conclusive upon the issue of provocation then before them, and we do not think the learned dissenting judges meant to suggest this.

Putting other considerations aside for the moment, we should have been disposed to think that such a direction as that suggested would be calculated to confuse and mislead the jury in respect of the actual issue upon which it was their duty then and there to pass; it would, as we are inclined to think, demand from the jury the application of a degree of critical acumen which they could hardly be expected to exercise; and would probably have nullified the judgment of this Court as applicable to this case.

Moreover, such a direction would, in our opinion, have been wrong. The evidence given at the earlier trial was not placed fully before the court nor was the charge of the learned trial judge. Nor, with such material before him could Mr. Justice Hope have been warranted in directing the jury that at the first trial any issue of provocation had been decided. The jury may on that trial have thought, without passing upon any such issue, that the evidence raised a sufficient doubt as to the guilt of the prisoner in respect of the charge of murder to require an acquittal on that charge.

We think, however, that the two other grounds of dissent are well taken and, accordingly, that there was a mistrial.

The first of these arises in this way: The learned trial judge put before the jury the following sentence taken from the judgment delivered by Mr. Justice Middleton on the last occasion when the case was before the Court of Appeal for Ontario:—

> In the case in hand I am far from suggesting that the conduct of the accused would not justify a verdict of wilful murder.

This, we think, constituted in the circumstances error of such gravity as to vitiate the verdict.

While the learned trial judge was entitled, if he had been so advised, to express his own opinion as to the effect of the evidence actually before the jury, we can have no doubt that it was inadmissible to present to the jury the

opinion of any one that on the former trial the evidence was sufficient to justify a conviction of the accused of the murder of Amy Seabright. The mischief was enhanced by the circumstance that this opinion was ascribed to an eminent judge whose authority would naturally carry great weight with the jury. We think nothing said in the charge, either before or later, had or could have the effect of neutralizing this statement of the learned trial judge and rendering it innocuous.

We think, moreover, that the effect of it was probably accentuated by the record of the conviction of Manchuk of the murder of Amy Seabright endorsed on the indictment which was put in the hands of the jury. The record was in these words, "Guilty—Sentenced to be hanged, May 31, 1937." We agree with the dissenting judges that, in the circumstances of the case, this record should have been withheld from them. A copy of the indictment with the endorsement omitted would have served every legitimate purpose.

We attach even greater importance to another ground upon which the learned dissenting judges proceeded. The jury, having had the case under consideration for some time, requested the assistance of the learned trial judge upon a difficulty which they explained in the following question:—

> In order to reduce a murder charge to a manslaughter charge, is it necessary to establish the fact that the person killed committed the act of provocation?

In the opinion of the dissenting judges, the jury were not given a direction in the precise and unambiguous terms in which they ought have been instructed in answer to their request; and we find ourselves in agreement with them. The learned trial judge appears to have read, interlarded with comments of his own, nearly the whole of the judgment of this Court, but with the significant exception presently to be noted, on the appeal already mentioned. The judgment contained a considerable amount of discussion of principle and authority as touching the point on which we found ourselves unable to accept the view of the majority of the Court of Appeal for Ontario. In the earlier part of his charge the learned trial judge had discussed the subject of provocation in a manner calculated to convey an impression that there were differences of

opinion among Canadian judges upon the very question which the jury had addressed to him. We are not satisfied that the lengthy answer of the learned trial judge, expressed as it was in general terms, was calculated to convey to the jury a right conception of what might constitute provocation under the law.

The dissent of the learned dissenting judges, moreover, embraces another objection to this part of the charge, which, in our opinion, is, perhaps, still more serious. The terms in which the question is expressed manifest plainly that (notwithstanding some observations in the earlier part of the charge as to the burden resting upon the Crown up to the end of the case of establishing guilt beyond a reasonable doubt) they had fallen into the very natural error of thinking that, in proving the killing, the Crown had disposed of the presumption of the prisoner's innocence and that they must find the prisoner guilty of murder unless he affirmatively established to their satisfaction provocation in the pertinent sense. The interrogatory of the jury ought to have been answered in such a manner as to remove this error from their minds. It ought to have been made clear to them that in the last resort the prisoner could not properly be convicted of murder if, as the result of the evidence as a whole, they were in reasonable doubt whether or not he was guilty of that crime. The last sentence of the judgment of this Court which was put before the jury almost in its entirety, deals with this point and that sentence was not even read to them (*Woolmington* v. *Director of Public Prosecutions* (1)).

There remains for consideration the grave question as to the order that ought to be made by this Court. We have concluded, after full consideration, that, by force of section 1024, coupled with the enactments of the *Supreme Court Act,* this Court has authority, not only to order a new trial, or to quash the conviction and direct the discharge of the prisoner, but also to give the judgment which the Court of Appeal for Ontario was empowered to give in virtue of s. 1016 (2); and we have no doubt that this last mentioned course is the proper one in the very exceptional circumstances of this case.

(1) [1935] A.C. 462.

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The accused has been tried three times under charges of murder arising out of a succession of occurrences which occupied in time not more than a few minutes. The last two convictions have both been set aside by reason of the irregular conduct of the trials leading to those convictions; the first by a judgment of the Court of Appeal for Ontario affirmed by this Court; and, now, the second, by the judgment of this Court. We cannot think that to order a fourth trial would be entirely consonant with the spirit of our criminal procedure; and we think the ends of justice will be met by the judgment we now pronounce.

The finding makes it clear that the jury must have been satisfied of the facts necessary to constitute manslaughter, and we are, consequently, of opinion that the Court of Appeal would have authority under s. 1016 to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon the prisoner (*Rex* v. *Hopper* (1)).

The conviction should be set aside, a verdict of manslaughter should be substituted for the verdict of the jury and the accused sentenced to imprisonment for life.

CROCKET J. (dissenting as to the order to be made)—In December last this Court on an appeal by the Crown affirmed a judgment of the Ontario Court of Appeal setting aside a conviction of Manchuk for the murder of one, Amy Seabright, and ordering a new trial on the ground that the trial judge by instructing the jury that there must be provocation by the victim had withdrawn from their consideration the question of provocation (2). The clear implication of this decision, as I view it, is that, notwithstanding there was no evidence of any provocation whatever on the part of the victim herself, there nevertheless was evidence upon which the jury might reasonably have found that in attacking her as he did he did so in the heat of passion caused by sudden provocation within the meaning of s. 261 of the *Criminal Code,* that is to say, caused by any wrongful act or insult of such a nature as to deprive an ordinary person of the power of self-control, if the offender acts upon it on the sudden and before there has been time for his passion to cool. No other principle, to

(1) [1915] 2 K.B. 431.

(2) See [1938] S.C.R. 18.

my mind, is fairly deducible from that decision as regards the question of provocation than that it is not always necessary to constitute provocation under s. 261 of the *Criminal Code* that it should proceed immediately and directly from the victim herself, but that, on the contrary, a wrongful act or insult, committed or given by a third person under such circumstances as the evidence in this case disclosed, may constitute such provocation if the offender in his attack upon the victim acted upon it on a sudden and before his passion had time to cool and under the belief that the victim was a party to any such act, although not implicated in it in fact.

It was admitted by counsel for the Crown and for the appellant that the evidence on the second trial, bearing on the crucial issue of provocation, was to all intents and purposes the same as that on the first trial.

This shews that Manchuk had been previously tried on an indictment charging him and his wife jointly with the murder of John Seabright on June 8th, 1936, upon which he was found guilty of manslaughter only; that during the forenoon of that day, while John Seabright was attempting against the protests of both Mr. and Mrs. Manchuk to replace a post of a board fence, which a sworn surveyor had found to encroach between one and two feet on Manchuk's home property and which as a consequence had recently been removed, the accused, after having succeeded in restraining his wife from attacking Seabright with a stone and later with an axe which he took away from her, and after having himself requested Seabright to desist and go home, finally became so enraged at Seabright's determined defiance of his property rights, that, while the latter's daughter (Mrs. Lewis) was standing by the post hole with a hammer in her hand, he struck him three times in rapid succession with the axe he still had in his hand, and killed him; and that within the course of a moment or two at the most, after first attempting an attack upon Mrs. Lewis, who yelled and ran away, he rushed across the driveway to the back porch of the Seabright house, in which Mrs. Seabright had suddenly appeared, and there on or in front of the steps at a distance of but 11 feet from the spot where he had killed her husband, struck her with the same axe and caused her death.

There is absolutely nothing to shew that Mrs. Seabright said or did anything before Manchuk saw her that morning, and it is quite apparent that in attacking her he was acting upon the same impulse as that which caused him to attack her husband at the post hole. This obviously is the view of Mr. Justice Middleton, and the basis on which he has so interestingly dealt with the question of the applicability of the principles of *res judicata*. While I am strongly inclined to agree with his reasoning in this regard, it does not seem to be necessary to consider it beyond its possible bearing on the question of the final disposition of this appeal. If it were recognized in this case that the rule that a question of fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent proceeding between the same parties or their privies was as applicable to criminal as well as to civil proceedings, it would have the merit, at least, of rendering impossible the repetition of such an extraordinary and anomalous development as that which this unfortunate and tragic case illustrates.

With great respect, I should be disposed to think that a person who has been tried on an indictment charging him with murder in the killing of S. and found guilty, not of murder but of manslaughter only—clearly on the ground of provocation—and sentenced therefor to 20 years penal servitude; has subsequently undergone a trial on another murder indictment for the killing of S.'s wife practically at the same time and within but a few feet of the spot where he slew her husband, and apparently acting upon the same provocation, and nevertheless been convicted on that indictment for murder and undergone the ordeal of waiting for the infliction of the necessary death penalty; and then, in consequence of this conviction having been set aside on the ground that the all important question of provocation was improperly withdrawn from the jury, having undergone a second trial on the same indictment, and been again erroneously convicted and sentenced to death while still serving a sentence of 20 years imprisonment for killing Seabright in the heat of passion caused by sudden provocation—has surely suffered adequate punishment for the crime to which he was provoked under such circumstances and which in those circumstances can be

treated as two separate and distinct offences only by the application of the strictest rules of law.

In my opinion, as this Court has unanimously decided that there was such error in the conduct of the second trial as to vitiate the verdict for the reasons stated in the judgment of my Lord the Chief Justice, justice will best be served in the anomalous circumstances of this case by quashing the present conviction. To send the accused back on what will really be his fourth trial for murder is so repellent that it ought to be avoided, if at all possible. I confess that I have great doubt as to the wisdom of this Court entering a judgment which necessarily involves our rendering a verdict in a criminal case and ourselves passing sentence upon it. There may possibly be some doubt as to our right to do so. There can be none as to our right to quash the conviction.

If a new conviction is now found by us, it can only be for manslaughter in causing the death of Mrs. Seabright by reason of the accused having attacked her while still in the heat of passion caused by the same provocation under which he slew her husband. The infliction upon him now of any further term of imprisonment to run concurrently with that of the 20-year sentence he is now serving would really add nothing to his punishment, while it would signalize an entirely new departure in the exercise of the jurisdiction of this court in criminal cases.

Appeal allowed; the judgment of the Court of Appeal set aside; direction that the verdict of murder be quashed and a verdict of manslaughter entered; appellant sentenced to imprisonment for life.

Solicitor for the appellant: *J. J. Bench.*

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