1938

*June 6, 7.
*June 23.

HIS MAJESTY THE KING.....APPELLANT;

AND

JOHN A. COMBA.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Evidence—Conviction at trial for murder—Verdict resting solely on circumstantial evidence—The facts not inconsistent with rational finding of accused's innocence—Common law rule—On appeal, conviction quashed and acquittal ordered.

By the long settled rule of the common law—a rule by which courts in Canada are governed and which they are bound to apply—where a jury's verdict rests solely upon a basis of circumstantial evidence, the jury, before finding an accused guilty, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

Held, in the present case (where the jury found accused guilty upon an indictment for murder), that the facts adduced had not the degree of probative force that is required to satisfy the test formulated by said rule; and the trial Judge, on the application made by accused's counsel, should have told the jury that in view of the dubious nature of the evidence it would be unsafe to find the accused guilty, and have directed them to return a verdict of acquittal.

Judgment of the Court of Appeal for Ontario, [1938] O.R. 200, quashing conviction and ordering accused's acquittal, affirmed.

APPEAL by the Attorney-General for Ontario from the judgment of the Court of Appeal for Ontario (1), which (Latchford C.J.A. dissenting), on appeal by the accused from his conviction at trial before Chevrier J. and a jury on a charge of murder, quashed the conviction and ordered the accused's acquittal.

By the judgment now reported, the appeal to this Court was dismissed.

C. L. Snyder K.C., C. P. Hope K.C. and *H. B. Johnson K.C.* for the appellant.

R. H. Greer K.C. and *James A. Maloney* for the respondent.

The judgment of the court was delivered by

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

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THE CHIEF JUSTICE.—This is an appeal by the Crown against a judgment of the Court of Appeal for Ontario (1) by which that court quashed a conviction of the respondent, John A. Comba, after a verdict of guilty upon an indictment for murder, Latchford C.J.A. dissenting.

It was stated before us by counsel for the Crown that the Attorney-General, after reviewing the proceedings at the trial, had, because of certain rulings of the trial judge, decided that the verdict of the jury could not be allowed to stand and that a new trial would be necessary. The difference of opinion between the majority of the court and Latchford C.J.A. concerned solely the question whether there should be a further trial or, as the four judges who constituted the majority of the court unanimously held, the conviction should be quashed and the prisoner discharged on the ground that the proof adduced did not establish a case sufficiently free from doubt to justify a finding that the crime charged was committed by him.

Having examined the evidence minutely and weighed with care the argument addressed to us on behalf of the Crown, we think our judgment should be pronounced without further delay.

It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

We have no doubt that the facts adduced have not the degree of probative force that is required in order to satisfy the test formulated by this rule; which is one that courts of justice in Canada are governed by and are bound to apply.

We agree with the majority of the Court of Appeal, whose reasons for their judgment we find convincing and conclusive, that the learned trial judge ought, on the application made by counsel for the prisoner at the close of

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the evidence for the Crown, to have told the jury that, in view of the dubious nature of the evidence, it would be unsafe to find the prisoner guilty, and to have directed them to return a verdict of acquittal accordingly. It is not, and could not, with any plausibility, be suggested that the case for the Crown was in any way strengthened or improved by the evidence put before the jury on behalf of the defence.

The appeal is dismissed.

Appeal dismissed.

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

Solicitor for the respondent: *J. A. Maloney.*