1949
*Nov. 21
1950
*Feb. 7
*Mar. 27
*May 15

JOSEPH VERNON WELCH.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

*Criminal Law—Appeals—Autre fois acquit—Autre fois convict—Conviction for manslaughter on indictment for murder quashed for misdirection but new trial not ordered nor an acquittal directed—Fresh indictment preferred by Crown for manslaughter—Statutory authority given Court of Appeal to direct acquittal or a new trial, mandatory—Failure of court to exercise such authority precludes another trial under s. 873—The Criminal Code, R.S.C. 1927, c. 36, ss. 856, 873, 905-909, 951, 1014 (3).*

The Criminal Code provides:

"Section 1014 (3). Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(*b*) direct a new trial:

and in either case may make such other order as justice requires."

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

**Reporters Note:* The case was first argued on Nov. 21, 1949 before Rinfret C.J., Kerwin, Taschereau, Estey and Locke JJ. C. L. Dubbin for the appellant and W. B. Common, K.C., and J. D. Bell for the Crown. On Feb. 7, 1950, the Court directed a re-hearing of argument in particular on the effect under Canadian Law of a Court of Appeal quashing a conviction without ordering a new trial. The re-hearing on March 27, 1950, was heard by the full bench. G. A. Martin, K.C., and C. L. Dubbin for the appellant and W. B. Common, K.C., for the respondent.

*Held:* By the majority of the court (Rinfret C.J., Kerwin and Taschereau JJ., dissenting), that the exercise of the statutory authority given to the court of appeal under s. 1014 (3) to direct an acquittal to be entered, or to direct a new trial, and in either case to make such other order as justice requires, is not permissive but mandatory. The right of appeal being such an exceptional right, all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive and need not be expressly stated in the Statute. If therefore the court of appeal fails to exercise its authority and refrains from directing a new trial, another trial cannot be had by resorting to s. 873. The powers under that section are not absolute and cannot obtain in all circumstances. Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act.

*Per* Rinfret C.J. and Taschereau J., dissenting: The only competent authority in a case of misdirection to order a new trial is the Court of Appeal, but failure of that court to make such an order does not preclude the Crown from exercising its rights to prefer a fresh bill of indictment under s. 873. The proceedings under the fresh bill of indictment do not constitute a *new* trial, within the meaning of s. 1014, they initiate a *second* trial, entirely independent of the first on a new indictment. A "new trial" which alone the court of appeal has the power to order in a criminal prosecution, is the re-examination of a case on the *same information* or *indictment*. It supposes a completed trial, which for some sufficient reason has ben set aside, so that the issues may be litigated *de novo*. It is ordered so that the court may have the opportunity to correct errors in the proceedings at the first trial. Such is not the case here, and unless there are valid reasons to prevent the Crown to initiate a *second trial* as it did, this appeal must fail. We have to decide if the incomplete judgment of the Court of Appeal, is a bar to the exercise by the Crown of its unquestionable power to prefer a bill of indictment. A solid ground of defence would undoubtedly be a plea of *autre fois acquit* or *autre fois convict*, but this cannot be successfully argued. The appellant has neither been acquitted nor convicted, and it is only in such cases that an accused may say, if he is brought to trial again on the same charge, that he has been in "jeopardy" twice. *Rex* v. *Ecker and Fry*, 64 O.L.R. 1 at 3. The law does not allow that a man be tried a second time when he has already been convicted, or exposed to be convicted, when he has already been acquitted, but it does not forbid a second trial when the first did not come to a legal conclusion. Only the pleas of *autre fois acquit* or *autre fois convict* could be successfully raised by the appellant in the present case, and as they both fail, the appeal should be dismissed.

*Per* Kerwin J., dissenting: The power given to the Court of Appeal under s. 1014 (3) is permissive as indicated by the use of the word "may" and includes the power to allow an appeal and set aside a conviction leaving the Crown free to prefer a new and different indictment, if it sees fit. The powers of the Court of Appeal are not circumscribed as are those of the Court of Criminal Appeal in England and the decisions of that Court are, therefore, of no assistance on the point under review. This appeal is to be decided under the provisions of the *Criminal Code*, *Rex* v. *O'Keefe*, 15 N.S.W.L.R. 1; *Rex* v. *Lee*, 16 N.S.W.L.R. 6,

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distinguished; *Rex* v. *Welch*, [1948] O.R. 884, *Rex.* v. *Pascal*, 95 C.C.C. 288, approved. *Gudmundson* v. *The King*, 60 C.C.C., distinguished. Where an accused upon an indictment for murder is convicted of manslaughter a court of appeal may properly under s. 1014 (3) allow the appeal and set aside such conviction. If it neither directs a verdict of acquittal to be entered, nor directs a new trial, s. 873 (1) is then wide enough to permit the preferring of a bill of indictment for manslaughter. In provinces where there is no grand jury, subsequent sub-sections of s. 873 takes care of the situation. The second ground of the appeal, that, "the accused was entitled in answer to the present indictment to the common law defence that a man should not be put twice in jeopardy for the same matter,"—is not a plea or defence, as the plea of *autre fois acquit* is grounded on the maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. *Hawkins, Pleas of the Crown*, 8th Ed. Vol. II, c. 35, s. 1. As to the 3rd and 4th grounds of appeal—(*a*) "s. 902 (2) was a bar to the present indictment;" (*b*) "the accused was entitled to succeed on his plea of *autre fois acquit* pursuant to s. 907."—The meaning of s. 907, may be gathered from the use of the word "lawfully" in s. 906 (3), this expresses what has been well understood for many years viz. that the defence of *autre fois acquit* applies only where the first trial has been concluded by an adjudication: *Reg.* v. *Charlesworth*, 121 E.R. 786; *Rex* v. *Ecker*, 64 O.L.R. 1. Here, the only adjudication was against the accused for manslaughter and that adjudication was merely set aside by the first order of the Court of Appeal. As to the first leg of s. 909 (2) "a previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter". This must mean a previous *general* conviction or acquittal.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing the appellant's appeal from a conviction by a judge and jury for manslaughter. The appellant had previously been indicted for murder and convicted of manslaughter, but the conviction was quashed on appeal. (2)

*G. A. Martin, K.C.*, and *C. L. Dubbin*, for the appellant.

*W. B. Common, K.C.*, and *J. D. Bell*, for the respondent.

The dissenting judgment of the Chief Justice and Taschereau J. was delivered by:—

TASCHEREAU J.:—The accused appellant was charged with the murder of his wife and his trial took place at the City of St. Thomas in the County of Elgin, in March, 1949. He was acquitted of the charge of murder but convicted of manslaughter.

(1) [1949] O.R. 592.

(2) [1948] O.R. 884.

The Court of Appeal of the Province of Ontario allowed the appeal, and set aside the conviction for manslaughter on the ground of misdirection by the trial judge. The Court however, did not direct a new trial, but in their reasons for judgment, Laidlaw and Hogg JJ. both made the emphatic statement that the accused *was not acquitted.* Mr. Justice Henderson, who also heard the case, was of the opinion that the appeal should be dismissed.

The reason for not ordering a new trial is that on a count charging murder, no count charging any other offence may be joined. (*Cr. Code,* sec. 856). The contention is that if the Court of Appeal had ordered a new trial, although manslaughter is an included offence in a count of murder, the accused would have had to face a second time an indictment charging murder, an offence of which he had previously been acquitted. (*Cr. Code* 951, para. 2). Vide: (*Rex* v. *McDonald,* (1); *Rex* v. *Anthony,* (2); *Rex* v. *Pascal,* (3), Part XX, 849).

A new indictment charging manslaughter was therefore preferred by the Crown, and before Mr. Justice Schroeder and the jury, the appellant pleaded *"autrefois acquit",* submitting that the Order of the Court of Appeal which did not direct a new trial, had the effect of an acquittal. A jury having been sworn dismissed this contention of the appellant following in this, the direction of the trial judge. The jury then found the accused guilty of manslaughter and he was sentenced to 10 years in penitentiary. The Court of Appeal unanimously dismissed his appeal.

It is now submitted before this Court that the accused, having once before been tried for murder arising out of the same homicide, and convicted of manslaughter, could not again be tried for manslaughter, because that conviction had been set aside by the Court of Appeal, which did not direct a new trial. It is claimed that he cannot be put twice in "jeopardy" for the same matter, and that, under the provisions of section 909, para. 2, his first acquittal on the indictment for murder, is a bar to a second indictment for the same homicide charging it as manslaughter.

It is an elementary principle of criminal law that when an accused charged of a crime has been convicted or acquitted by a jury, he cannot be charged a second time for

(1) [1943] O.R. 158.
(2) [1943] O.W.N. 778.
(3) [1949] 2 W.W.R. 849.

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the same crime, and it is also clear that if on a charge of murder, an accused is acquitted and not found guilty of manslaughter, he cannot be charged of manslaughter, because under the provisions of section 907, para. 2, *Cr. Code,* the accused *might* on the former trial have been convicted of manslaughter, and this is obviously a bar to a new charge of manslaughter.

But in the present case, the accused was acquitted of murder and found guilty of manslaughter, and the Court of Appeal, although it found that there had been misdirection, *did not acquit the appellant.* The Order of the Court was that the trial was not a fair one, but the reasons of Laidlaw and Hogg JJ. clearly indicate that the accused was not acquitted. The majority of the Court thought that a new trial could not be ordered, but left it to the Crown to take the proper steps, if found opportune, to bring the accused before the courts once more.

I had the advantage of reading the reasons for judgment of my brother Fauteux, and I agree with him, that when the Court of Appeal allows an appeal against a conviction, in a case like the one at bar, it has only two alternatives. It may quash the conviction and direct a verdict of acquittal, or direct a new trial, and it is only when one of these two courses has been followed that it *may* make such other order as justice requires. It is however *imperative* and not only *permissive,* that there should be an acquittal or that a new trial should be directed.

I entertain no doubt that the Court of Appeal had power by virtue of section 1014 (3) of the *Cr. C.,* after having quashed the conviction, to direct a new trial limited exclusively to the charge of manslaughter. This would have clearly been an order authorized by the concluding part of section 1014 (3) *Cr. C.*

But the Court of Appeal did not give such an order, with the result, that the accused has neither been acquitted nor convicted, and as there was no jurisdiction upon this Court to apply the proper remedy, it necessarily follows that for all practical purposes the first indictment cannot be acted upon any further. These proceedings have come to an end, as there can be found nothing in the law to authorize the revival of this first trial.

I fully concur in the view expressed that the only competent authority, in a case of misdirection, to order a *new* trial is the Court of Appeal, but I do not agree that the failure by the court to make such an order had the effect of precluding the Crown from exercising its rights to prefer a fresh bill of indictment under 873 *Cr. C.* as it has been done in the present case.

The proceedings under the fresh bill of indictment do not constitute a *new* trial, within the meaning of section 1014; they initiated a *second* trial, entirely independent of the first, on *a new indictment.* "A new trial" which alone the Court of Appeal has the power to order in a criminal prosecution, is the re-examination of a case on the *same information* or *indictment.* It supposes a completed trial, which for some sufficient reason has been set aside, so that the issues may be litigated *de novo.* It is ordered so that the court may have an opportunity to correct errors in the proceedings at the first trial.

But such is not the case here, and unless there are valid reasons to prevent the Crown to initiate a *second trial* as it did, this appeal must fail. We have to decide if the incomplete judgment given by the Court of Appeal, is a bar to the exercising by the Crown of its unquestionable power to prefer a bill of indictment.

A solid ground of defence would undoubtedly be a plea of *"autrefois acquit"* or *"autrefois convict",* but I am satisfied that this cannot be successfully argued. The appellant has neither been acquitted nor convicted, and it is only in such cases that an accused may say, if he is brought to trial again on the same charge, that he has been in "jeopardy" twice. As Chief Justice Latchford said in *Rex* v. *Ecker and Fry* (1) (at page 3):—

> This Court was of the opinion that "in jeopardy twice"—the *bis vexari* of the legal maxim—has not the meaning of subjection twice to a trial for the same offence except in cases where the first trial has been concluded by an adjudication or judgment declaring *the accused acquitted or convicted.* Not otherwise could the plea of *autrefois acquit* or *autrefois convict* prevail.

I fully agree with this statement of the law, and I may add that there are a great number of cases, where accused have undergone second trials, when it was established that the plea of *"autrefois acquit"* or *"autrefois convict"* could not be successfully raised. The law does not allow that a

(1) (1929) 64 O.L.R. 1.

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man be tried a second time when he has already been convicted, or exposed to be convicted, when he has already been legally acquitted, but it does not forbid a second trial when the first did not come to a legal conclusion.

Only the pleas of *"autrefois acquit"* or *"autrefois convict"* could be successfully raised by the appellant in the present case, and as they both fail, the appeal should be dismissed.

KERWIN J., dissenting:—By leave granted under subsection 1 of section 1025 of the *Criminal Code* as enacted by section 42 of chapter 39 of the Statutes of 1948, the accused, Welch, appeals against a judgment of the Court of Appeal for Ontario dismissing his appeal against his conviction for manslaughter. He had been previously convicted of manslaughter after his trial upon an indictment for murder, arising from the death of the same person. The Court of Appeal allowed an appeal against that conviction on the ground of misdirection of the jury by the trial judge. The terms of that order and the reasons therefor are succinctly set forth in the following extract from the reasons of the Chief Justice of Ontario for the decision now appealed against:—

> In his reasons for judgment in disposing of the appeal, Mr. Justice Laidlaw, referring to the jury's verdict of guilty of manslaughter, said "That verdict, having been reached after such misdirection, is not a valid conviction and must be set aside. At the same time, I make it clear that the accused has not been acquitted of the offence of manslaughter and I express no opinion as to what further proceedings the Crown can or ought to take against the appellant in the particular circumstances." Mr. Justice Hogg, who concurred in setting aside the conviction said "I agree with the observations made by my brother Laidlaw that the appellant has not been acquitted of the crime of manslaughter." Mr. Justice Henderson, who, with Mr. Justice Laidlaw and Hogg, made up the Court that heard the appeal, was of the opinion that the appeal should be dismissed. The formal certificate of the Court's order, after a recital, was in these words, "This Court did order that the said appeal should be and the same was allowed and that the said conviction should be and the same was vacated and set aside."

A new indictment charging manslaughter was preferred and upon his arraignment the accused pleaded *autrefois acquit*. On the trial of that issue, the jury on the judge's instruction found against the accused. He thereupon pleaded not guilty but was convicted and sentenced to ten years' imprisonment. The appeal to the Court of Appeal

followed, and, upon the affirmance of the conviction, leave to appeal was granted. The points upon which that leave was granted are set forth in the appellant's factum as follows:—

(*a*) The accused having once before been tried for murder, arising out of the same homicide, and convicted of manslaughter, and whose conviction had been set aside by the Court of Appeal, could not again be tried for manslaughter without a formal order of the Court of Appeal directing a new trial.

(*b*) The accused was entitled in answer to the present indictment to the common law defence that a man should not be put twice in jeopardy for the same matter.

(*c*) Section 909 (2) of the *Criminal Code* was a bar to the present indictment.

(*d*) The accused was entitled to succeed on his plea of *autrefois acquit* pursuant to Section 907 of the *Criminal Code*.

It was argued that the Court of Appeal had no power merely to set aside the first conviction and that, therefore, its order must be taken to be an acquittal of manslaughter under the indictment for murder. That argument is based upon the provisions of subsection 3 of section 1014:—

3. Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(*b*) direct a new trial;

and in either case may make such other order as justice requires.

The contention is that when the Court of Appeal allows an appeal against conviction it must either (1) formally allow the appeal; and (2) quash the conviction and direct a judgment and verdict of acquittal to be entered; and (3) make such other order as justice requires; *or* (1) formally allow the appeal; and (2) direct a new trial; and (3) make such other order as justice requires. The argument amounts to a contention that if the Court merely allows an appeal and quashes the conviction, the case falls within the first alternative. To that argument I am unable to accede. While some plausibility is lent to it by the expression "in either case", the power given to the Court of Appeal is permissive as is indicated by the use of the word "may" and includes the power to allow an appeal and set aside a conviction leaving the Crown free to prefer a new and different indictment, if it sees fit.

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The powers of the Court of Appeal are not circumscribed as are those of the Court of Criminal Appeal in England and the decisions of that Court are, therefore, of no assistance on the point under review.

On the reargument of this appeal before the full Court, a discussion took place as to the powers exercised in England before 1904 of granting a writ of *venire de novo* and as to the powers of a Court of Error. I have considered these arguments and the practice and law prevailing as to each of these matters and particularly the two cases in New South Wales referred to, *Rex* v. *O'Keefe* (1), and *Rex* v. *Lee* (2), but have been unable to gain any assistance from any of these in coming to a conclusion. This appeal is to be decided under the provisions of the *Criminal Code*.

In *Rex* v. *Pascal* (3), the Court of Appeal for British Columbia, by a majority, followed the decision of the Ontario Court of Appeal on the first appeal by Welch to it (4). Mr. Justice O'Halloran dissented and came to the conclusion that the proper order to make in circumstances such as existed in that and the present case was for the Court of Appeal, after setting aside the conviction, to direct a new trial upon the charge of manslaughter, of which the accused had been convicted and which conviction was set aside by the Court of Appeal. That learned judge realized the difficulty in coming to that conclusion in view of the provisions of section 909 (2) of the Code and of the obstacle of arraigning an accused on the same indictment, but concluded that because of his view as to the meaning of 1014 (3), the Court of Appeal had the power to direct a new trial on the charge of manslaughter since, while by section 856, to a count in an indictment charging murder, no count charging any other offence shall be joined, 951 (2) provides:—

> 2. On a count charging murder, if the evidence proves manslaughter but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

With respect I am unable to agree with Mr. Justice O'Halloran's view of section 1014 (3) and in my opinion the proper course to follow is that adopted by the Ontario

(1) (1894) 15 N.S.W.R. 1.
(2) (1895) 16 N.S.W.R. 6.
(3) (1949) 95 C.C.C. 288.
(4) [1948] O.R. 884.

Court of Appeal and followed by the British Columbia Court of Appeal. Section 873 (1) is then wide enough to permit the preferring of a bill of indictment for manslaughter. In provinces where there is no grand jury, subsequent subsections of section 873 take care of the situation. It may be that in some cases, if an accused is charged with murder and convicted of manslaughter and this conviction is set aside, then, on a new indictment for manslaughter, the accused might be found by the second jury not guilty of manslaughter but guilty of some included offence. This, in my opinion, is not an objection either to what I deem is the proper construction of section 1014 (3) or to the possibility of the accused being found guilty of such included charge which would not have been possible under the first indictment for murder. That possibility does not alter my view as to the correct interpretation of section 1014 (3) nor, in the event of that occurring, would it place an accused in double jeopardy since, on the first indictment, he could not have been found guilty of such included charge.

It was also argued that what the Court of Appeal did was based upon its former decisions in *Rex* v. *MacDonald* (1), and *Rex* v. *Antony* (2), and that these are in conflict with the decision of this Court in *Gudmondson* v. *The King* (3). As appears from an examination of the case and factums in that case, the accused had asked that his conviction be quashed and a new trial not ordered. This Court was not prepared to say that a verdict of acquittal should be entered and, as the point now under discussion was not argued or considered, the decision cannot be taken as being in conflict with the orders made by the Court of Appeal in the cases mentioned. Furthermore, a mere reading of the reasons for judgment on Welch's first appeal shows that the Court did not direct a verdict of acquittal. This disposes of the first ground of appeal.

As to the second ground, it is sufficient to point out that former jeopardy is not a plea or defence as the maxim *nemo debet bis vexari pro una et eadem causa,* or as it is sometimes expressed, *nemo debet bis puniri pro uno delicto,* is merely the basis for the plea of *autrefois acquit.* "The plea of *autrefois acquit* is grounded on this maxim,

(1) [1943] O.R. 158.
(2) [1943] O.W.N. 778.
(3) (1933) 60 C.C.C. 332.

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that a man shall not be brought into danger of his life for one and the same offence, more than once." Hawkins' *Pleas of the Crown,* 8th ed. vol. II, c. 35, s. 1.

The third and fourth grounds may be considered together. Sections 905 to 908 inclusive of the Code deal with the special pleas of *autrefois acquit* and *autrefois convict.* The meaning and effect of section 907, referred to by the appellant, may be better gathered from the use of the word "lawfully" in subsection 3 of section 906.

> 3. In any plea of *autrefois acquit* or *autrefois convict* it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction.

This expresses what has been well understood for many years, viz., that the defence of *autrefois acquit* applies only where the first trial has been concluded by an adjudication: *Reg.* v. *Charlesworth* (1), *Rex* v. *Ecker* (2). Here, the only adjudication was against the accused for manslaughter and that adjudication was merely set aside by the first order of the Court of Appeal. Nor is the appellant assisted by the first leg of subsection 2 of section 909 upon which he relies:—

> A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter.

This must mean a previous *general* conviction or acquittal. The appellant does not, of course, contend that he was convicted and, as the Chief Justice of Ontario points out, the suggestion that he was acquitted is precisely the same contention advanced in support of the plea of *autrefois acquit.*

The appeal must be dismissed.

The judgment of Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ. was delivered by:—

FAUTEUX J.:—This is an appeal from a unanimous judgment of the Court of Appeal of Ontario (Robertson C.J.O., Laidlaw and Roach JJ. A.) (3) dismissing, on March 17, 1949, an appeal from the conviction of the appellant on a charge of manslaughter. The appellant had been previously tried on an indictment for murder, arising

(1) (1861) 121 E.R. 786.
(2) (1929) 64 O.L.R. 1.
(3) [1949] O.R. 592.

from the death of the same person. Upon this first trial, the jury brought in a verdict of manslaughter. An appeal from this conviction was allowed under section 1014, on the ground of misdirection. The formal certificate of the Court's order, after a recital, is in these words:—

> This Court did order that the said appeal should be and the same was allowed and that the said conviction should be and the same was vacated and set aside.

In his reasons for judgment, Laidlaw J.A., with reference to the jury's verdict of "guilty of manslaughter" said:—

> That verdict having been reached after such misdirection is not a valid conviction and must be set aside. At the same time, I make it clear that the accused has not been acquitted of the offence of manslaughter and I express no opinion as to what further proceedings the Crown can or ought to take against the appellant in the particular circumstances.

Concurring in setting aside the conviction, Hogg J.A., said:—

> I agree with the observations made by my brother Laidlaw that the appellant has not been acquitted of the crime of manslaughter.

Henderson J.A., expressed the opinion that the appeal should be dismissed.

No direction was then made by the Court of Appeal either to enter a judgment and verdict of acquittal or for a new trial. The Court of Appeal did not in either respect exercise its authority under section 1014 (3). Confronted with this situation, the Crown first moved to appeal this judgment to this Court but, for reasons of jurisdiction, leave was refused.

It was in these circumstances that a fresh bill of indictment charging the appellant with manslaughter was subsequently preferred by the Crown under the provisions of section 873 of the *Criminal Code*. A true bill was found by the grand jury, the appellant was brought to trial and, eventually, found guilty of the offence charged. His appeal against this conviction was unanimously dismissed by the judgment now before us for review.

As a new trial was not directed by the first judgment of the Court of Appeal, it is manifest that the *sub stratum* of jurisdiction for all the proceedings leading to the conviction of the appellant and eventually to the present appeal can stem only from this fresh bill of indictment preferred under section 873 in the circumstances above

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related. In the present instance, this question of jurisdiction is twofold. Once the appeal is allowed for misdirection and the conviction is quashed by the Court under section 1014, is the statutory authority vested in the Court of Appeal to direct a verdict of acquittal to be entered or to direct a new trial, mandatory or simply permissive? And if this authority is mandatory, can another trial,—notwithstanding the express lack of direction for a new trial by the judicial body solely empowered to make it,—be had by resorting to the provisions of section 873?

Dealing with the first point. The relevant provisions of section 1014 were enacted by Parliament in 1923 (13-14 George V, chap. 41, s. 9). They read:—

1014.

3. Subject to the special provisions contained in the following sections of this Part, when the Court of appeal allows an appeal against conviction it may

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(*b*) direct a new trial;

and in either case may make such other order as justice requires.

The corresponding section of the English Criminal Appeal Act of 1907 (7 Edward VII, c. 23, art. 4) from which the above were taken reads:—

4.

(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

The above juxtaposition of the two sets of provisions makes it clear that the differences between them, as well as the different manner in which each is set up, are attributable to the existence of an alternative course,—a new trial,—which our Courts only, in a proper case, must, as I propose to show, direct. That in the process of thus amending our law, the indented letter (*a*) has been misplaced before the words "quash the conviction and", rather than being properly placed after them, cannot alter the true meaning and the only possible construction of the section. For it is clear that if the appeal against a conviction is allowed, of necessity the conviction must be quashed. No other purpose can be served by the allowance of the appeal. And it is then, and then only, that

the occasion to exercise the further statutory authority related to the election between a verdict of acquittal or a new trial, may arise.

That there will be cases where the Court of Appeal will not order one or other of the alternatives is certain. Thus a conviction on an indictment signed by an unauthorized person cannot be sustained and must be quashed. And in such a case, an order, either directing a verdict of acquittal to be entered or a new trial, would be meaningless and senseless. It cannot, therefore, be stated that this further authority is given with respect to trials affected with such complete and fatal nullity. On that point, our law is not at variance with the law in England even if, in the relevant provisions of the latter, the word "shall" and not the word "may" is used to govern the construction of the statutory power (*Crane* v. *Director of Public Prosecutions* (1), *Brodie* v. *Rex* (2).) In like cases, the accused, having never been in peril of conviction, could not subsequently if and when validly indicted, plead *autrefois acquit* on the occasion of a trial which, if truly the second in fact, would be the first in law.

However, in a case where the appeal is allowed on ground of misdirection and the conviction is quashed, then necessarily arises the occasion to exercise the further statutory authority. In England, the Court of Appeal, having no power to direct a new trial, "shall" then direct a verdict of acquittal to be entered,—"even though the prisoner be clearly guilty".—(Kenny, *Outlines of Criminal* Law, 13th Ed., foot note page 500). In Canada, the Court of Appeal must equally exercise the further statutory power and order, either a verdict of acquittal to be entered, or direct a new trial. For, until such an order is made, there is still pending before the Court of Appeal a valid indictment upon which there is no final adjudication. And the very procedure to that end is provided for. The accused, for one, has, in such circumstances and under our law, a clear and unimpeachable right to such judicial pronouncement with respect to the election between two courses,—one of which resulting in his acquittal,—on the sole and very basis of the case as then under review and that, according to well established principles.

(1) [1921] 2 A.C. 299.
(2) [1936] S.C.R. 188.

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The expression "may" related to this further authority of the Court is not and cannot, in the context of the section read in the light of paramount principles of our criminal procedure, be permissive. It is mandatory. In *M'Dougall* v. *Patterson* (1), it was held that

> * * * when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority, when the case arises and its exercise is duly applied for by a party interested, and having the right to make the application. For this reason, we are of the opinion that the word "may" is not used to give a discretion but to confer a power upon the Court and Judges and that the exercise of such power depends, not upon the discretion of the Court or Judges, but upon the proof of the particular case out of which such power arises.

That a like reasoning and meaning is to obtain with respect to the same word "may" in the last member of this section clearly stems from the context "and in either case may make such order as justice requires". For new and extraordinary would be a rule of construction stating that, being empowered to make an order required by justice, a Court of justice would be free to refrain from making it when the occasion to do so arises. In *Reg.* v. *Bishop of Oxford* (2), it was held that

> so long ago as the year 1693 it was decided in the case of *R.* v. *Barlow* (3), that when a statute authorizes the doing of a thing for the sake of justice or the public good, the word "may" means "shall" and that rule has been acted upon to the present time * * *."

With like powers, or rather duties, I fail, I must say with deference, to appreciate the alleged obstacles standing in the way of the Court of Appeal to exercise its authority if, as suggested, the majority judges wanted to direct a new trial only on this sole undisposed of part of the indictment, that is, the lesser charge of manslaughter. Legal and sufficient it would have been to direct a new trial on the offence of manslaughter exclusively and to further order that the original indictment of murder be, to that end, amended. Thus, on this new trial, the accused could only be found guilty or not guilty of manslaughter. The language of the statute is broad enough to embrace the authority to make such "other order", if the justice of the case suggests no other. And I know of no principles of law which could have then been violated by such order. I must, therefore, conclude that

(1) (1851) 6 Exch. 335, footnote to *Palmer* v. *Richards* at 340.

(2) (1879) 4 Q.B.D. 245 at 258.

(3) 2 Salk. 609.

the exercise of the statutory authority given to the Court of Appeal, under section 1014 (3), to direct an acquittal to be entered or to direct a new trial and in either case, to make such other order as justice requires, is not permissive but mandatory.

Dealing with the second point, the Court having failed to exercise its authority in the first appeal and having refrained from directing a new trial by a judgment which, though substantially incomplete, remains undisturbed, could another trial be had by resorting to section 873?

It cannot be disputed that, had either one of the courses, which the Court of Appeal was bound to direct, been directed, this fresh bill of indictment would never have been preferred in fact. And never then could, in law, a fresh bill of indictment be authorized under section 873. For on the one hand, the entry of a verdict of acquittal by the Court of Appeal would have brought the case to an end.

On the other hand, had the Court of Appeal directed a new trial, a fresh bill of indictment could no more, in law, have been preferred. For such a course would have subjected the order of the Court to the finding of a true bill by a grand jury. On a new trial being ordered, the accused is not even required to plead. The trial proceeds immediately on the original or amended indictment.

These considerations suffice to indicate that, general and unrestricted as they may appear, the powers under section 873 are not absolute and cannot obtain in all circumstances. Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act.

Again, the relevant provisions of section 873 were enacted much before those of section 1014 (3) and then, not in relation to the latter. It cannot be contended, therefore, that they were meant, when enacted, to provide a mode of redress,—left, furthermore, at the discretion of the Attorney General or of the trial Judge,—against the failure of a Court of Appeal,—a higher authority,—to comply with the imperative provisions of section 1014 (3).

Our criminal law clearly prescribes two methods leading to the holding of a trial. One is by way of an information

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or complaint and the other is by way (in the province of Ontario) of a preferred bill of indictment. There are no other methods.

Whatever be the method adopted, if on a valid indictment, the trial proceeds, with no defect as to jurisdiction, to verdict and judgment, then the procedure provided by the law for the trial of that issue,—or included issues,—is exhausted and the trial is brought to an end, unless there is an appeal. The legislature does not, in addition to the above procedure, contemplate or authorize,—either by laying another information or complaint, or preferring another bill of indictment under 873,—such a thing as the actual holding of another trial on the same issue, or included issues, parallel to or independently of the first trial and irrespective of the juridical consequences developing and rights accruing thereby to either of the parties, according to law in the course of the latter. For such duplication would, to say the least, render one course futile. So if a trial has been had following the laying of an information, the provisions of section 873 could have no application with respect to the issue, or included issues, therein.

If, the case being concluded in first instance, there is an appeal, for the same reason, like duplication of the procedure cannot obtain. And the matter must, from then on, be considered in the light only of the provisions relating to the appeal.

The right of appeal is an exceptional right. That all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive, need not be expressly stated in the statute. That necessarily flows from the exceptional nature of the right.

In Craies, on *Statute Law,* 4th Edition, p. 236, it is stated:—

> In Viner's Abr. (*m*) the following rule is laid down: "Every statute limiting anything to be in one form, although it be spoke in the affirmative, yet includes in itself a negative"; and in Bacon's Abr. (*n*), the rule given is, that "if an affirmative statute which is introductive of a new law direct a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

In *Rex* v. *Howell* (1), an accused person was charged with an indictable offence and when brought before the Magistrate, the latter failed to state to him the matters

(1) (1910) 19 Man. R. 317.

required by the then section 778, subsection 2, of the Code. The accused having elected for a summary trial was found guilty but on appeal the conviction was set aside. Cameron J.A. said in part:—

> Though ss. 2 of sec. 778 of the *Criminal Code,* as it now stands, amended by 8 & 9, Ed. VII, c. 9, is affirmative in form, it must be treated as implying a negative on the principle that "if an affirmative statute which is introductive of a new law directs a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

It was for the Court of Appeal acting under the powers vested in it by subsection 3 of section 1014 to direct a new trial and not for counsel for the Crown, with the consent of the learned trial judge, or for the Attorney-General, to decide that there should be a second trial for the same offence. When the accused was arraigned before Mr. Justice Schroeder, counsel on his behalf contended that, in the absence of an order for a new trial made by the Court of Appeal, the accused could not be tried again for the same offence. As for the reasons above expressed, I think a new trial for the same offence was, in the absence of such an order, prohibited by the statute, effect should have been given to this objection. I express no opinion upon the other grounds of appeal which were argued before us.

I would allow the appeal, quash the conviction and direct the discharge of the accused.

*Appeal allowed.*

*Solicitors for the Appellant: Kimber & Dubbin.*

*Solicitor for the Respondent: C. R. Magone.*