DELBERT R. WRIGHT .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968
*Nov. 13, 14, 15
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Non-capital murder—Drunkenness—Provocation—Whether jury properly instructed on provocation—Criminal Code, 1953-54 (Can.), c. 51, s. 203.

After an absence of some five years, the appellant returned to visit his parents. A few days after his arrival he purchased a revolver. This act infuriated his father who was still in an angry mood when he arrived home from work that night. The appellant, who had spent most of the day drinking beer with friends, telephoned home to say that he would spend the night with his grandfather. The father then went to the grandfather's home, walked in without knocking, went straight to his son and demanded the gun. The appellant replied that he was 21 and fired three shots at his father killing him. The appellant was charged with non-capital murder and was convicted of manslaughter. The Crown appealed on the ground particularly that the trial judge erred in his directions on the question of provocation. The Court of Appeal ordered a new trial on the charge of non-capital murder. The accused appealed to this Court.

Held: The appeal should be dismissed.

Assuming that there was any evidence of provocation, within the meaning of s. 203 of the Code, to go to the jury, the instructions given to the jury, with respect to the test governing provocation, were inadequate and the verdict might have been different had they been rightly directed in the matter. The determination of the question whether there had been any provocation sufficient to reduce the charge to manslaughter was subject to the dual test stated in s. 203(2) of the Code. The first is an objective test in which one must consider the effect, on an ordinary person, of the particular wrongful act or insult relied on. The character, background, temperament, idiosyncracies or drunkenness of the accused are excluded from the consideration on this first test. If that first test is satisfied, then the second, a subjective test, is to determine whether the accused acted actually upon the provocation, on the sudden and before there was time for his passion to cool. In the present case, one can hardly escape the conclusion that the jury must or may have been left with the impression that the test was whether the conduct of the appellant's father was of such a nature as to deprive—not the ordinary man but—the accused himself of the power of self control.

Droit criminel—Meurtre non qualifié—Ivresse—Provocation—Directives au jury sur la question de provocation non adéquates—Code criminel, 1953-54 (Can.), c. 51, art. 203.

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*PRESENT: Fauteux, Judson, Ritchie, Hall and Pigeon JJ.

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Après une absence de quelque cinq années, l'appelant est revenu visiter ses parents. Quelques jours après son arrivée, il a acheté un pistolet. Ceci a considérablement irrité son père qui était encore en colère lorsqu'il est arrivé chez lui ce soir-là après son travail. L'appelant, qui avait passé presque toute la journée à boire de la bière avec des amis, a téléphoné à la maison pour dire qu'il passerait la nuit chez son grand-père. Le père est alors allé chez le grand-père, est entré dans la maison sans frapper, s'est dirigé directement vers son fils et a demandé le pistolet. L'appelant a répondu qu'il avait 21 ans et a tué son père en lui tirant trois balles. L'appelant a été accusé de meurtre non qualifié et a été trouvé coupable d'homicide involontaire coupable. La Couronne s'est pourvue en appel pour le motif principalement que le juge au procès avait donné des directives erronées sur la question de provocation. La Cour d'appel a ordonné un nouveau procès sur l'acte d'accusation de meurtre non qualifié. L'accusé en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Prenant pour acquis qu'il y avait une preuve de provocation, dans le sens de l'art. 203 du Code, pouvant aller au jury, les directives données au jury sur le critère relatif à la provocation, n'étaient pas adéquates et le verdict aurait pu être différent si le jury avait reçu des directives appropriées. La détermination de la question de savoir s'il y a eu provocation suffisante pour réduire l'acte d'accusation à un d'homicide involontaire coupable dépend du double critère énoncé à l'art. 203(2) du Code. Le premier est un critère objectif dans lequel on doit considérer l'effet, sur une personne ordinaire, de l'action injuste ou de l'insulte en question. Le caractère de l'accusé, ainsi que ses antécédents, son tempérament, ses manies ou son ivresse sont exclus de la considération dans ce premier critère. Si ce premier critère est satisfait, alors par le second, un critère subjectif, on doit déterminer si l'accusé a agi actuellement en vertu de la provocation, sous l'impulsion du moment et avant d'avoir eu le temps de reprendre son sang-froid. Dans le cas présent, on peut difficilement éviter la conclusion que le jury doit ou peut avoir été laissé sous l'impression que le critère était de savoir si la conduite du père de l'appelant était de nature à priver—non pas l'homme ordinaire mais—l'accusé lui-même du pouvoir de se maîtriser.

APPEL d'un jugement de la Cour d'appel de la Saskatchewan[1], ordonnant un nouveau procès. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], ordering a new trial. Appeal dismissed.

Brian A. Crane, for the appellant.

Serge Kujawa, for the respondent.

The judgment of the Court was delivered by

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[1] (1968), 3 C.R.N.S. 136, [1968] 3 C.C.C. 168.

FAUTEUX J.:—The appellant has been charged that he did, on the 20th day of December 1966, at Moosomin, Saskatchewan, unlawfully kill his father, Frank Albert Wright, thereby committing the offence of non-capital murder. Tried at Moosomin, in April 1967, before Davis J. and a jury, he was acquitted of this offence and found guilty of the lesser offence of manslaughter.

Pursuant to s. 584(1)(*a*) Cr. C., the Crown appealed from this verdict to the Court of Appeal for Saskatchewan. By a unanimous judgment, the Court of Appeal[2] allowed the appeal, set aside the verdict of manslaughter and ordered a new trial on the charge of non-capital murder.

Appellant now appeals from this Order pursuant to s. 597(2)(*a*) of the *Criminal Code*.

It is convenient to say immediately that we all agree that, for the reasons hereafter stated, there should be a new trial. In these circumstances, only what is essential to our decision should be said.

The evidence shows, beyond per adventure, that the father died as the result of being shot three times by his son, in the early hours of the 20th of December 1966. The circumstances leading to this tragedy are set out in detail in the reasons for judgment of the learned Chief Justice of Saskatchewan who delivered the judgment of the Court of Appeal. For the purpose of our decision, the following summary will, I think, be sufficient. Appellant was then 25 years old, married with one child. A few days before the fatal occurrence, namely on the 11th of December, he had returned from British Columbia to Moosomin, to visit his parents whom he had not seen since he had left for British Columbia in 1961. Prior to 1961, he was living with them in Moosomin and there is some evidence that, during that period, there were difficulties between him and his father who is said to have been a bad tempered and violent man and to have, on many occasions, abused and slapped his son. However, during this visit, the relationship was and remained happy and cordial until some time after 9.30 p.m. on December the 19th when, at

[2] (1968), 3 C.R.N.S. 136, [1968] 3 C.C.C. 168.

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the beverage room of the Queen's Hotel where he was employed as a tapman, the father was informed by one Bernie Myers, a friend of the appellant, that his son had just bought a revolver from him. The father then became infuriated and was still in an angry mood when he arrived home shortly after midnight accompanied by one Norman Hoey. He and his wife were worried that their son might commit suicide. Concerned with the whereabouts of his son, the father had enquiries made at the residence of the latter's maternal grandfather, Henry Hnatyczyn, and also at the residence of Myers. The appellant who had spent most of the day drinking beer with friends at the Queen's Hotel beer parlour and other places, arrived at his grandfather's home at about 2.15 in the morning of December 20th, after having had a late meal. He telephoned to his parents' place and informed his mother, who answered the call, that he would spend the night at his grandfather's. The mother testified that before she could hang up the telephone, the father shoved her, grabbed the telephone, said a few words and became furious as the son hung up on him. And the mother added that her husband then said *I am going down there to get that goddam gun and I'll beat some brains into him that should have been done when he was a kid.* Thereupon, appellant's father left, drove Hoey home and went to Hnatyczyn's residence. He entered the house through the porch door, without knocking, went straight to his son and with a voice showing authority and anger, said *give me the gun.* To this, appellant replied *I am twenty-one* and he then fired the three shots at his father. A few minutes later, appellant called the police and said *I shot my father, come and get me.*

In defence, the accused pleaded that he was affected by alcohol to a point of losing the capacity to form the intent requisite in a case of non-capital murder and he also pleaded that he killed his father in the heat of passion caused by sudden provocation. On either grounds, the jury were invited by defence counsel to return—as they subsequently did—a verdict of manslaughter and not of non-capital murder. Hence the appeal of the Crown against this verdict.

In the Court of Appeal, the Crown's complaints were directed particularly to the matter of provocation as to which it was submitted (i) that the trial Judge had erred in law in holding that there was some evidence of a wrongful act or insult, within the meaning of s. 203 of the *Criminal Code,* upon which the defence of provocation could be founded, and (ii) alternatively, that the trial Judge had erred in law in failing to instruct the jury adequately as to the test to be applied in the consideration of a plea of provocation. On the first submission, the Court of Appeal held that the evidence upon which the trial Judge relied, and upon which he instructed the jury, was not evidence of provocation within s. 203 Cr. C., but declared that it was not saying that there may not have been, in evidence, evidence of provocation to go to the jury. On the second and alternative submission, the Court of Appeal found that there was a serious error in law in the trial Judge's charge, in that, in dealing with the question whether the provocative conduct of the victim was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, he failed to instruct the jury that no consideration should be given to the quality of the relationship between the son and his father, or to the mentality of the son or to the fact that his mind may have been affected by alcohol. And the Court of Appeal, being satisfied that had there been no such error the verdict of the jury would not necessarily have been the same, directed the verdict of manslaughter to be set aside and ordered a new trial on the charge of non-capital murder.

We find it unnecessary to say anything and we are saying nothing on the question whether, as contended for by counsel for the appellant, there was, in evidence, any evidence of provocation—*within the meaning of section 203* —to go to the jury for, assuming that there was any, we are, for the reasons hereafter stated, in respectful agreement with the Court of Appeal that the instructions given to the jury, with respect to the test governing provocation, were inadequate and that the verdict might have been different had they been rightly directed in the matter.

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The determination of the question whether there had been any provocation sufficient to reduce a culpable homicide from non-capital murder to manslaughter is subject to the dual test stated in s. 203(2):

> 203.(1) . . .
>
> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

One must then first consider the effect, on an *ordinary person,* of the particular wrongful act or insult relied on. In the words of Lord Simonds, L.C., the purpose of this objective test is . . . *to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. Bedder v. Director of Public Prosecutions*[3]. It is not enough, therefore, that an accused acted in a blind rage, if this first requirement of s. 203(2) is not satisfied. If it is satisfied, then the second branch of the enquiry, or the subjective test, is to determine whether the accused acted actually upon the provocation, on the sudden and before there was time for his passion to cool. While the character, background, temperament, idiosyncracies, or the drunkenness of the accused are matters to be considered in the second branch of the enquiry, they are excluded from the consideration in the first branch. A contrary view would denude of any sense the objective test. On this aspect of the matter, one may refer to what was said by Lord Simonds, L.C., at page 804, in the *Bedder* case, *supra:*

> It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in Mancini's case (1) to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did.

[3] [1954] 2 All E.R. 801 at 804, 38 Cr. App. R. 133.

In *Salamon v. The Queen*[4], this Court, with a similar view of the law as to this aspect of the matter, indicated that, on the first branch of the enquiry, the jury should be directed that no consideration should be given to the peculiar or abnormal characteristics with which the accused may personally be invested. In the present case, nowhere either in the charge or the re-charge, can such a direction be found. On the contrary and notwithstanding that the provisions of s. 203(2) were read to the jury, on a consideration of all that was said to them by the trial Judge, one can hardly escape the conclusion that they must or may have been left with the impression that the test was whether the conduct of appellant's father was of such a nature as to deprive—not the ordinary man but—the accused himself of the power of self-control.

For these reasons, we cannot accede to appellant's submissions that the jury were adequately directed with respect to the test governing provocation.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: The Attorney General of Saskatchewan, Regina.

[4] [1959] S.C.R. 404, 30 C.R. 1, 123 C.C.C. 1, 17 D.L.R. (2d) 685.