1966

*June 13
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ROGER ALLAN FULTON ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

Criminal law—Capital murder—Instruction to jury regarding clemency—Criminal Code, 1953-54 (Can.), c. 51, ss. 206, 597A, 642A.

The appellant was convicted of capital murder. The only issue raised by the defence at trial was that the jury should make a recommendation in favour of clemency. Defence counsel's whole address to the jury was devoted to this issue. The trial judge made no reference to it in his address to the jury before they retired to consider the verdict, but after the verdict of guilty had been rendered, he addressed the jury on s. 642A of the Code and read them a summary of the evidence of one psychiatrist. The jury returned an eleven to one recommendation against clemency. The appeal against sentence and conviction was dismissed by a unanimous judgment of the Court of Appeal. An appeal was launched to this Court.

Before this Court and the Court of Appeal, the appellant argued that there had been a miscarriage of justice in that:

(1) The trial judge failed to explain adequately to the jury the considerations that they could apply in arriving at a decision on the question of clemency;

(2) The trial judge erred in failing to define and explain what clemency is, and the extent of the right that the jury had to recommend it;

(3) The trial judge erred by directing the jury on the evidence given by only one of the witnesses on that issue.

In this Court, the Crown raised the question of jurisdiction on the ground that the appeal referred not to the conviction but to the question of sentence.

APPEAL from a judgment of the Court of Appeal for British Columbia,[1] affirming a conviction for capital murder. Appeal dismissed.

Samuel Martin Toy, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

[1] (1966), 55 W.W.R. 427.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—We are all of opinion that there is no merit in the present appeal. In a capital case the trial must be conducted without regard to s. 642A of the *Criminal Code*. After a verdict of guilty is given, all that the judge is required to do, and all that he should do, is to put to the jury the question in the terms of that section. In the light of this conclusion, it is not necessary to deal with the issue of jurisdiction raised by counsel for the respondent.

The appeal is dismissed.

Droit criminel—Meurtre qualifié—Adresse du juge au jury concernant la clémence—Code criminel, 1953-54 (Can.), c. 51, arts. 206, 597A, 642A.

L'appelant a été trouvé coupable de meurtre qualifié. Lors du procès, la défense n'a soulevé qu'un seul point, à savoir que le jury devait faire une recommandation à la clémence. Toute l'adresse du procureur de l'appelant au jury fut consacrée à cette question. Le juge au procès n'a pas référé à cette question dans son adresse au jury avant qu'il se retire pour considérer le verdict, mais après la déclaration de culpabilité, le juge, dans une nouvelle adresse au jury, a traité de l'art. 642A du Code et a lu un sommaire du témoignage d'un psychiatre. Onze des jurés ont déclaré qu'ils s'opposaient à une recommandation à la clémence. Un appel contre la sentence et contre la déclaration de culpabilité a été rejeté par un jugement unanime de la Cour d'Appel. D'où le pourvoi devant cette Cour.

Devant cette Cour et la Cour d'Appel, l'appelant a soumis qu'il y avait eu erreur judiciaire lorsque:

1) Le juge au procès n'a pas expliqué adéquatement au jury les questions qu'il pouvait considérer pour en arriver à une décision sur la question de clémence;
2) Le juge au procès a erré en ne définissant pas et en n'expliquant pas ce qu'était la clémence, ainsi que l'étendue du droit que le jury avait de la recommander;
3) Le juge au procès a erré en référant le jury au témoignage donné par un seul des témoins sur cette question.

Devant cette Cour, la Couronne a soulevé la question de juridiction en se basant sur le fait que l'appel portait non pas sur la déclaration de culpabilité mais sur la question de sentence.

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FULTON
v.
THE QUEEN

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique,[1] confirmant une déclaration de culpabilité pour meurtre qualifié. Appel rejeté.

Samuel Martin Toy, pour l'appelant.

W. G. Burke-Robertson, Q.C., pour l'intimé.

Lorsque le procureur de l'appelant eut terminé sa plaidoirie, la Cour a rendu le jugement suivant:

THE CHIEF JUSTICE (*orally for the Court*):—We are all of opinion that there is no merit in the present appeal. In a capital case the trial must be conducted without regard to s. 642A of the *Criminal Code*. After a verdict of guilty is given, all that the judge is required to do, and all that he should do, is to put to the jury the question in the terms of that section. In the light of this conclusion, it is not necessary to deal with the issue of jurisdiction raised by counsel for the respondent.

The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Boyd, King & Toy, Vancouver.

Solicitor for the respondent: N. A. McDiarmid, Victoria.

[1] (1966), 55 W.W.R. 427.