1955

*Jan. 28, 31
Feb. 1

*Mar. 7

HER MAJESTY THE QUEEN .....APPELLANT;

AND

MICHAEL KUZMACK .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Murder—Defence of accident or self-defence—No charge to jury as to manslaughter—Whether there was material to call for charge with respect to manslaughter—Criminal Code, s. 259 (a), (b).

The respondent was convicted of the murder of a woman. He and the deceased were alone in a house when the occurrence took place. His defence was accident or self-defence in a struggle over a knife said by the respondent to have been in the hand of the victim. Apart from his evidence, there was nothing to show the particulars of what took place. There was evidence that the respondent and the deceased had agreed upon marriage and that there had been prior dissension between them over the mode of life led by the deceased. Shortly before the fatal act, they were heard quarrelling.

The trial judge did not charge the jury as to manslaughter. The Court of Appeal ordered a new trial and the Crown appealed to this Court.

Held (Locke J. dissenting): that the appeal should be dismissed.

Per Kerwin C.J., Taschereau, Rand, Kellock, Estey, Cartwright, Fauteux and Abbott JJ.: The circumstances were sufficient to call for the trial judge to charge the jury with respect to manslaughter. If the jury concluded upon the evidence that the homicide was culpable, it was necessary for them to decide as a fact, with what intent the respondent had inflicted the fatal wound. If they had a reasonable doubt that he possessed the intent required by s. 259 (*a*) or (*b*) of the *Criminal Code*, the prisoner must be given the benefit of that doubt, and the jury should then consider the offence of manslaughter.

Per Locke J. (dissenting): There was no material before the jury to justify a direction that they should consider a possible verdict of manslaughter.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), quashing, O'Connor C.J.A. and Cairns J.A. dissenting, the respondent's conviction on a charge of murder and ordering a new trial.

H. J. Wilson, Q.C. and *J. J. Frawley, Q.C.* for the appellant.

M. E. Moscovich, Q.C. for the respondent.

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

(1) 110 C.C.C. 338.

The judgment of Kerwin C.J. and Taschereau, Rand, Kellock, Estey, Cartwright, Fauteux and Abbott JJ. was delivered by:—

THE CHIEF JUSTICE: The Attorney General of Alberta appeals from a judgment of the Appellate Division of the Supreme Court (1) directing a new trial where the accused was charged with and convicted of the murder of a woman. The substantial point is whether there was evidence sufficient to call for an instruction to the jury that they might find manslaughter.

The deceased and the accused were alone in a house when the occurrence took place. The defence was accident or self-defence in a struggle over a knife said by the accused to have been in the hand of the victim. Apart from his evidence, there is nothing to show the particulars of what took place. Two witnesses, the occupant of the house and his wife, then a short distance away from the house, heard a scream and saw the woman come staggering out. To the wife she cried "get me to a hosp . . ." and then she collapsed.

There was evidence that the accused and the deceased had agreed upon marriage and that there had been prior dissension between them over the mode of life being led by the deceased. That morning, shortly before the fatal act, they were heard quarrelling. At some stage a knife came into play which pierced the woman's neck to cut the jugular vein and she died in a few minutes from loss of blood.

These, and other circumstances unnecessary to mention, were sufficient to call for the learned trial judge to charge the jury with respect to manslaughter. In *Mancini's* case (2), Viscount Simon, after referring to the rule laid down in *Woolmington's* case (3), that the prosecution must prove the charge it makes beyond reasonable doubt, and consequently that if on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it, pointed out that this is a rule of general application in all charges under criminal law. His Lordship continued at p. 279:

> Thus, when a prisoner is charged with murder and felonious homicide is proved against him, if the jury, when considering the evidence as a whole at the conclusion of the case, are left in reasonable doubt as to whether the homicide proved is not manslaughter, they should return a verdict of manslaughter.

(1) 110 C.C.C. 338.
(2) [1941] 3 A.E. 272.
(3) [1935] A.C. 462.

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Kerwin C.J.

If the jury concluded upon the evidence that the homicide was culpable, it was necessary for them to decide as a fact, with what intent the accused had inflicted the fatal wound. If they had a reasonable doubt that he possessed the intent requisite under 259(*a*) or (*b*) of the *Code* the prisoner must be given the benefit of that doubt, and the jury should then consider the offence of manslaughter.

The appeal should be dismissed.

LOCKE J. (dissenting):—My consideration of the proceedings in this matter leads me to the same conclusion as that expressed at the trial by the learned Chief Justice of the Trial Division and in the Appellate Division by the learned Chief Justice of Alberta (1).

As there is to be a new trial, I make no further reference to the evidence other than to say that, in my opinion, there was no material before the jury which would justify a direction that they should consider a possible verdict of manslaughter.

I would allow this appeal.

Appeal dismissed.

Solicitor for the appellant: *H. J. Wilson.*

Solicitors for the respondent: *Moscovich, Moscovich & Spanos.*