ARTHUR NEALE BROWN .....APPELLANT; 1962

*Jan. 23, 24
Mar. 15

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

*Criminal law—Charge of murder—Conviction of manslaughter—Appeal.*

*Courts—Conviction affirmed by Court of Appeal—Dissenting judgment—Whether conflict between majority and minority on questions of law—Jurisdiction of Supreme Court to entertain appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 592(1)(a), (b), (c), 597(1)(a).*

The appellant was charged with the murder of a woman with whom he was sharing a one-room cabin. He testified he had noticed that a rifle in the porch was cocked and that on re-entering the cabin he had asked the woman if it was loaded and she answered it was not. He, nevertheless, proceeded to uncock the rifle and it discharged, the bullet killing the woman instantaneously. The accused's story indicated that when he attempted to uncock the rifle, the rifle barrel was directly in line with the head of the deceased then lying in bed. Thereafter, and on three successive occasions, the appellant admitted responsibility for the shooting, but at the trial his evidence, in substance, was that he had no intention of harming the deceased and the shooting was purely accidental.

The jury were particularly instructed as to murder; manslaughter; provocation, drunkenness and criminal negligence, as incidents reducing murder to manslaughter, and directed that if the shooting was accidental and unaccompanied by criminal negligence, there was no crime. At the close of the trial they brought in a verdict that "we find death by accidental means with elements of criminal negligence, and bring in a verdict of manslaughter". The appellant's conviction was affirmed by a majority of the Court of Appeal. He then appealed to this Court on the grounds, (i) that the trial judge misdirected the jury, and (ii) that the verdict of the jury was ambiguous and the trial judge should not have directed a verdict of guilty of manslaughter to be entered.

*Held* (Taschereau and Fauteux JJ. dissenting): The appeal should be allowed, the conviction quashed and a new trial directed on the charge of manslaughter.

*Per* Locke, Cartwright and Martland JJ.: Assuming that *Rozon v. The King*, [1951] S.C.R. 248, is authority for the proposition that a person who is convicted of an indictable offence whose conviction is affirmed by the Court of Appeal and who asserts a right of appeal to this Court under the provisions of s. 597(1)(*a*) of the *Criminal Code* must show not only (i) that a judge of the Court of Appeal dissented and (ii) that his dissenting judgment was founded on a question of law, but also (iii) that the question of law upon which the dissenting judge founded his judgment was considered by the majority in the Court of

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Appeal and that they disagreed with the view of the dissenting judge upon it, this Court had jurisdiction to entertain the present appeal on both of the grounds put forward.

With respect to the first ground, the Chief Justice of the Court of Appeal found that a passage in the charge to the jury was material and fatally misleading, while Johnson and Kane JJ.A. held that the same passage was irrelevant. This was a disagreement on a point of law.

As to the second ground, there was direct disagreement between the majority and the minority in the Court of Appeal and the question was one of law. In deciding what verdict should be entered by the Court following the rendering of a special verdict by the jury the judge was deciding a question of law.

As to the merits of the appeal, there was, as found by the Chief Justice of the Court of Appeal, misdirection in the charge to the jury. Also as found by the Chief Justice, there was ambiguity or uncertainty in the jury's verdict.

The argument of counsel for the respondent, based on s. 592(1)(*b*)(iii) of the Code, was rejected.

*Per* Taschereau J., *dissenting*: There was no dissent within the meaning of s. 597(1)(*a*) of the *Code*; there was no conflict between the majority judgment and the one delivered by the minority on questions of law. In order to give jurisdiction to this Court there must necessarily exist a difference between the views of the majority and those of the minority. None could be found in the present case. *The King v. Décary*, [1942] S.C.R. 80; *Rozon v. The King, supra; The Queen v. Fitton*, [1956] S.C.R. 958, referred to.

*Per* Fauteux J., *dissenting*: All the members of the Court of Appeal agreed that there was evidence to support a verdict of manslaughter founded on criminal negligence; there was no dissent expressed by the majority on the views taken by the minority on the question of the validity of the instructions in the charge to the jury; the only point of difference was confined to the verdict held to be ambiguous by the minority and unambiguous by the majority. The determination of the question whether the answer or opinion given by the jury on the facts was clear or ambiguous did not involve the determination of any question of law, nor was there any determined by either the members of the majority or those of the minority. The difference in the view they formed in the matter was not a difference on a question of law within the meaning of s. 597(1)(*a*).

However, contrary to these views, assuming the appellant did bring his appeal within the section and that it was open to this Court to consider the grounds of appeal, the appeal should, nevertheless, be dismissed. Once the appellant's account of the occurrence was accepted, as it was by the jury, a verdict of manslaughter based on criminal negligence was, in the circumstances of the case, the only verdict which a reasonable jury acting judicially could return. With respect to the alleged misdirections, the jury having accepted appellant's testimony, it became irrelevant to the appeal to consider the validity of these instructions, and, in any event, no miscarriage of justice or substantial wrong resulted therefrom. As to the verdict, when considered with the evidence and the judge's charge, it meant no more than that

the jury were indicating to the judge that of the three types of manslaughter which it was open for them to find—that is, due to criminal negligence, provocation or because of drunkenness—they were finding him guilty of manslaughter because of criminal negligence.

APPEAL from a judgment of the Court of Appeal of the Northwest Territories[1], affirming by a majority the appellant's conviction of manslaughter. Appeal allowed, Taschereau and Fauteux JJ. dissenting.

*A. W. Miller, Q.C.*, for the appellant.

*T. D. MacDonald, Q.C.*, for the respondent.

TASCHEREAU J. (*dissenting*):—I had the advantage of reading the reasons delivered by my brothers Cartwright and Fauteux, and I agree with my brother Fauteux that this appeal should be quashed. I only wish to add a few personal observations.

The jurisdiction of this Court is determined by s. 597(1) of the *Criminal Code* which is as follows:

597. (1) A person who is convicted of an indictable offence other than an offence punishable by death and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada. 1960-1961, c. 42, s. 27(1).

(*a*) on any question of law on which a judge of the court of appeal dissents, or

(*b*) .....

I think that in the present case, there has been no dissent within the meaning of this section. I can find no conflict between the majority judgment and the one delivered by the minority, on questions of law.

In *The King v. Décary*[2], it was held that the Court had no jurisdiction to entertain the appeal because neither of the judgments of the two dissenting judges of the appellate court disclosed a dissent on a question of law within the meaning of (former) s. 1023 of the *Criminal Code*.

In his reasons, speaking for the full Court, Sir Lyman Duff said:

It is quite plain that the judgment does not rest upon any view of the majority upon a question which is a question of law alone.

And further, at p. 84, he says:

Mr. Justice Walsh, in the reasons delivered by him for his conclusion that there should be a new trial, does not say, either expressly or by implication, that this conclusion is based *upon an opinion that the majority proceeds upon any error in point of law alone.*

[1](1961), 131 C.C.C. 287, 36 C.R. 405. [2][1942] S.C.R. 80, 2 D.L.R. 401.

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In *Rozon v. The King*[1], it was held that,

the appeal should be dismissed as the dissent in the Court of Appeal was not on any ground of law dealt with by the majority, and upon which there was a disagreement in the Court of Appeal.

Speaking for the majority of the Court, Mr. Justice Fauteux said:

> Being of opinion that the judgment of the majority in this case does not rest upon a question of law alone and that the judgment of the minority rests upon a question of law upon which there was no expressed or implied dissent from the majority, I must conclude that it is not within the jurisdiction of this Court to review the answer given by the Court of Appeal, etc. . . .

The same jurisprudence has been followed in *The Queen v. Fitton*[2]. In that case, at p. 978, Mr. Justice Cartwright says:

> In my opinion the motion should be granted. After reading all the evidence and everything that was said by counsel and by the learned trial judge during the hearing and disposition of the issue raised as to the admissibility in evidence of the oral and written statements above referred to and everything said on the point in the reasons for judgment delivered in the Court of Appeal I am unable to discern any dissent on, *or indeed any difference of opinion as to any point of law.*

These judgments clearly hold that in order to give jurisdiction to this Court, there must necessarily exist a difference between the views of the majority and those of the minority. I can find none in the present case. The case of *Brooks v. The King*[3] is not an authority to support the contention that this difference of view is not a necessary element to confer jurisdiction to this Court. In that case the matter has not even been considered.

I would quash the appeal.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—I have had the advantage of reading the judgments to be delivered in this matter by my brothers Cartwright and Fauteux.

I agree with my brother Cartwright that there is, in this case, a dissent—as that expression in s. 597(1)(*a*) of the Code is interpreted in *Rozon v. The King*[1]—upon the two questions of law to which he has referred. Accordingly, there is jurisdiction in this Court to entertain this appeal.

[1] [1951] S.C.R. 248, 2 D.L.R. 594. [2] [1956] S.C.R. 958, 116 C.C.C. 1.
[3] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.

For the reasons assigned by the learned Chief Justice of Alberta and by my brother Cartwright, I would quash the conviction and direct that there be a new trial on a charge of manslaughter.

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal of the Northwest Territories[1] affirming, by a majority, the appellant's conviction of manslaughter before Sissons J. and a jury. S. Bruce Smith C.J. and Hugh John Macdonald J.A. dissenting, would have allowed the appeal, quashed the conviction and directed a new trial on the charge of manslaughter.

The appellant was tried on an indictment charging "that he at Yellowknife in the Northwest Territories on the 17th day of December, A.D., 1960, did murder Madelaine Marlowe contrary to section 206 of the *Criminal Code*".

The facts are summarized in the reasons of my brother Fauteux, which I have had the advantage of reading. I shall refrain from repeating them but will make reference hereafter to one or two matters appearing in the transcript which appear to me to require special mention.

Before turning to the merits of the appeal it is necessary to consider the question of our jurisdiction.

While the notice of appeal contains a number of paragraphs, counsel for the appellant put forward only two grounds of appeal, (i) that the learned trial judge misdirected the jury, and (ii) that the verdict of the jury was ambiguous and the learned trial judge should not have directed a verdict of guilty of manslaughter to be entered.

Counsel for the Crown submits that as to the second of the above grounds there is no dissent on a question of law by a Judge of the Court of Appeal which would give a right of appeal to this Court under s. 597(1)(*a*) of the *Criminal Code*. In his factum he puts this submission as follows:

> There was no difference of opinion in the Court of Appeal upon the question of what constitutes criminal negligence or manslaughter; the only difference of opinion was as to what the jury intended to say.

Counsel for the Crown does not in his factum make a similar submission as to the first ground of appeal, based on misdirection, and I did not understand him to do so in his oral argument; but, of course, neither failure to object nor indeed express consent can confer jurisdiction on the

[1] (1961), 131 C.C.C. 287, 36 C.R. 405.

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Court if the right of appeal is not given by the statute. My brother Fauteux has reached the conclusion that we are without jurisdiction to entertain either ground of appeal and both must be examined.

For the purpose of this branch of the matter I will assume that the case of *Rozon v. The King*[1] is authority for the proposition that a person who is convicted of an indictable offence whose conviction is affirmed by the Court of Appeal and who asserts a right of appeal to this Court under the provision of clause (*a*) of subs. 1 of s. 597 of the *Criminal Code* must show not only (i) that a Judge of the Court of Appeal dissented and (ii) that his dissenting judgment was founded on a question of law, but also (iii) that the question of law upon which the dissenting judge founded his judgment was considered by the majority in the Court of Appeal and that they disagreed with the view of the dissenting judge upon it. I use this form of expression because, with the greatest respect, if the judgment of the majority in the *Rozon* case does enunciate the proposition stated, it is my opinion that, giving full effect to the rule of *stare decisis,* it is still open to this Court to reconsider it on the ground that it is at variance with other judgments of this Court equally binding upon us and which were not referred to in the reasons in *Rozon;* an example being *Brooks v. The King*[2]. The fact that *Rozon* was followed in *Pearson v. The Queen*[3], does not preclude this reconsideration; for the reasons in *Pearson* simply follow *Rozon* and make no mention of the other judgments of this Court referred to above which were not dealt with in *Rozon.* It would not, I think, be proper to endeavour to enter upon such a reconsideration in the case at bar, because proceeding on the assumption that *Rozon* is authority for the proposition stated above I have reached the conclusion that we have jurisdiction to entertain this appeal on both of the grounds argued before us by counsel for the appellant.

[1] [1951] S.C.R. 248, 2 D.L.R. 594.
[2] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.
[3] [1959] S.C.R. 369, 123 C.C.C. 271.

As to the first ground, that of misdirection of the jury in a material matter, the learned Chief Justice found that the misdirection occurred when the learned trial judge gave the jury additional directions, from which he quoted the following passage:

I think the most serious objection taken by counsel for the defence was when I stated to you if you did not believe the evidence of the accused as to this being an accident that it did not automatically follow that the verdict would be murder, and that the accused would still be presumed to be innocent until proved guilty, and that it was necessary for you to find beyond a reasonable doubt that he had the intent to murder Madelaine Marlowe. I think perhaps I should have gone a little further than I did, and made my remarks clearer than I probably did. All you have got, the situation you have then if you disbelieve that story, you have the evidence that the accused shot Madelaine Marlowe, but there is no evidence as to intent, or what intent he had in his mind when he shot her, and it doesn't rule out even an accidental death.

It is conceivable he might have shot at her, he might have shot at her with the intent of scaring her, or he may not even have pointed the rifle at her at all, but if he did point the rifle at her, it might have been a case of trying to scare her—it might have been in itself an unlawful act, the unlawful act of point (sic) a rifle—but in any of those things, any of those things would make it manslaughter, instead of murder.

Now I don't know whether I can make myself any clearer, and in fact, I doubt very much if I have met the wishes of counsel for the defence, and I am afraid all I have done is to make this situation more confusing, but that is the best I can do.

Dealing with this passage later in his reasons the learned Chief Justice said:

Before concluding I wish to add, with every respect to the learned trial judge, that in my opinion he misdirected the jury, (a) in instructing them after they were brought back that any of the "things" set out in the second last paragraph of his additional directions and quoted by me at page 6, "would make it manslaughter", (b) in directing the jury that if the accused shot the deceased when he "may not even have pointed the rifle at her at all", "that would make it manslaughter".

It seems clear to me that in respect to the matters referred to in (a) the jury should have been left to find whether their verdict was manslaughter or not guilty as was suggested at the trial by counsel for the Crown. The jury were in my view directed to find manslaughter in any of the circumstances set out in the paragraph referred to.

I am satisfied that the jury should not have been told that it "would make it manslaughter" if the accused had not pointed the rifle at the deceased at all, at all events unless there was coupled with this direction the qualification that in order to so convict they must find the accused was negligent in the degree required in manslaughter cases, or a reference to this requirement as explained earlier in the charge.

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Turning to the reasons of the majority it will be found that Parker J.A. did not disagree with the learned Chief Justice on this first ground; indeed he pointed out further errors in the charge. After quoting the second paragraph from the additional directions which had been quoted by the learned Chief Justice, Parker J.A. said:

> This portion of the charge is not, with respect, completely sound.

The learned Justice of Appeal went on to hold that the appeal should be dismissed for the reason which he stated as follows:

> Although there are, with respect, certain deficiencies in the charge of the jury, no substantial wrong or miscarriage of justice has occurred and, accordingly, I would dismiss the appeal against conviction having regard to the provisions of Section 592(1)(*b*)(iii) of the *Criminal Code*.

Johnson J.A., with whom (except on the question of sentence) Kane J.A. agreed, says early in his reasons:

> The two grounds of appeal which require consideration are, (1) that there was no evidence upon which to found a verdict of manslaughter, and (2) that the jury's verdict was in fact a verdict of acquittal, or alternatively, that the verdict indicated a doubt as to there being criminal negligence within the meaning of the *Criminal Code*.

It will be observed that this sentence makes no mention of the question of misdirection; however, later in his reasons the learned Justice of Appeal in the course of his discussion of the question whether the words used by the jury when they returned to render a verdict were unambiguous refers to several portions of the charge and says:

> At the end of the charge, defence counsel objected that this latter part of the charge was bad because it stated that the story of the accused must be accepted before the jury could find that death was caused by accident. The jury was recalled and further instructed. The instructions on this point were preceded by the words "if you disbelieve that (appellant's) story", and what followed is not very clearly expressed. Much was made at the hearing of this appeal of these additional instructions but I think it is quite clear from their verdict that the jury accepted the appellant's account of what happened, for it is only on this evidence that a verdict of criminal negligence would be founded. That being so, these additional instructions to the jury became irrelevant as far as this appeal is concerned.

With the greatest respect to those who entertain a different view, it appears to me that when one judge holds that a passage in the charge to the jury is material and fatally misleading and another judge holds that the same passage is irrelevant they are in disagreement on a point of law.

Turning now to the question whether we have jurisdiction to consider the second ground of appeal it is at once apparent that as to this ground there was direct disagreement between the majority and the minority in the Court of Appeal and all that has to be considered is whether the question is one of law. It is desirable to state precisely what occurred when the jury returned to the court-room for the purpose of giving their verdict. The transcript reads as follows:

The Clerk: Gentlemen of the Jury, have you arrived at your verdict? if so, say so by your foreman.

Foreman of the Jury: (Mr. H. McCaskill): We have.

The Clerk: What is your verdict?

Foreman of the Jury: We find death by accidental means, with elements of criminal negligence, and bring in a verdict of manslaughter.

The Clerk: Gentlemen of the Jury, do you all agree? (Each name was called, and each juror answered "Yes").

The Clerk: Harken to your verdict as rendered by your foreman, you find death by accidental means, with elements of criminal negligence.

Mr. Miller: In the light of the finding of the Jury, I am asking that Your Lordship direct that the accused be acquitted. The finding is that death was accidental, with elements of criminal negligence, which indicates a doubt that it was caused by criminal negligence, and therefore the accused is entitled to an acquittal.

Mr. De Weerdt: I have nothing to say, except that I would disagree.

The Court: No, I am accepting the verdict of the jury as the verdict of manslaughter.

It will be observed that when the clerk directed the jury to harken to their verdict and proceeded to state it he omitted the final words which had been used by the foreman: "and bring in a verdict of manslaughter".

It will also be observed that the clerk did not use the form of question which is usual: "Harken to your verdict as recorded . . . so say you all?" The reason for this would seem to be that the clerk rightly regarded the findings of the jury as reported by the foreman to be a special verdict upon which it would be for the judge to direct whether a verdict of guilty or not guilty should be recorded. While the argument that followed as to what verdict should be entered by the Court is extremely brief and the decision of the learned trial judge even more so, it would appear that the learned judge and counsel also regarded the verdict as a special one.

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Special verdicts in criminal cases are unusual; the *Criminal Code* makes express provision for them in only two cases, defamatory libel (s. 267), and cases in which evidence is given that the accused was insane at the time the offence was committed (s. 523); but the *Criminal Code* does not forbid the giving of a special verdict in any case and it is open to the jury to do so if they see fit.

The matter is put briefly and accurately in Halsbury's Laws of England, 3rd ed., vol. 10, under the title "Criminal Law and Procedure" as follows:

at page 428:

> The verdict may be either a general verdict of guilty or not guilty on the whole charge, or a verdict of guilty on one part of the charge and not guilty on another part, or a special verdict which finds the facts of the case and reserves the legal inference to be drawn from them for the judgment of the Court.

at page 430:

> Where a special verdict is returned, it is for the Court to act upon it and to direct a verdict of guilty or not guilty to be entered.

and at page 431:

> If the finding of the jury is ambiguous or inconsistent, and a verdict of guilty has been entered on it, the conviction will be quashed.

It is sufficient to refer to one of the cases cited. In *Regina v. Gray*[1], the prisoner was indicted for obtaining food and money by false pretences. After the summing up the jury retired to consider their verdict and upon their return handed to the trial judge a paper which they said contained their verdict. It read as follows: "Guilty of obtaining food and money under false pretences, but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy". The trial judge accepted this verdict and discharged the jury. After hearing argument the trial judge directed a verdict of guilty to be entered but at the request of counsel for the prisoner stated a case for the Court of Crown Cases Reserved. The members of that Court, Lord Coleridge C.J. and Denman, Mathew, Charles and Williams JJ., were unanimous in deciding that the conviction should be quashed. Denman J. said at page 302:

> If the verdict had been guilty merely, no question could have arisen. But when the jury go beyond the mere verdict of guilty or not guilty and add words, they at once give rise to the question whether their verdict is sufficient.

[1] (1891), 17 Cox C.C. 299, 7 T.L.R. 477.

It is scarcely necessary to point out that the jurisdiction of the Court of Crown Cases Reserved was limited to deciding questions of law which arose in criminal trials. The strictness with which that rule was observed is illustrated by the case of *The Queen v. Clark*[1].

That Parliament contemplated the giving of special verdicts in criminal cases appears from the wording of clause (*c*) of subs. (1) of s. 592 of the *Criminal Code* which reads as follows:

> 592. (1) On the hearing of an appeal against a conviction, the Court of Appeal
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> * * *
>
> (*c*) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court;

The opening words of this clause "may refuse to allow the appeal" would indicate that but for the power conferred by this subsection the Court of Appeal should allow the appeal if of opinion that the trial court arrived at a wrong conclusion as to the result of a special verdict.

The Court of Appeal derives its power to allow an appeal against a conviction from subs. (1) of s. 592 and, in my opinion, it is only in clause (*a*)(ii) of that subsection that power is found to allow an appeal because the trial court has arrived at a wrong conclusion as to the effect of a special verdict; in arriving at that wrong conclusion the trial court has made "a wrong decision on a question of law". It will be remembered that s. 592(1)(*a*) reads as follows:

> 592. (1) On the hearing of an appeal against a conviction, the court of appeal
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> (*a*) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice.

In my opinion in deciding what verdict should be entered by the Court following the rendering of a special verdict by the jury the judge is deciding a question of law; the task of

[1] (1866), L.R. 1 C.C.R. 54.

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the jury has been completed and it becomes the function of the judge to interpret their finding and to order the appropriate verdict of guilty or not guilty to be entered; *ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores.*

On the merits of the appeal I find myself as regards both of the grounds argued before us, in substantial agreement with the reasons of the learned Chief Justice who dissented and in whose reasons Macdonald J.A. concurred.

I agree with the view of the learned Chief Justice that the learned trial judge should have asked the jury to reconsider their verdict, but as this was not done we must, of course, deal with the matter on the record as it stands.

I have already quoted the passage from the reasons of the Chief Justice in which he found that there had been misdirection and I agree with it. His reasons on the second ground conclude as follows:

> I find myself unable to conclude what the jury meant by the phrase "with elements of criminal negligence" and where there is ambiguity or uncertainty in a jury's verdict and their intention is not clear, this court cannot speculate or guess what the jury meant. The confusion is added to by the clerk having recorded the verdict as 'you find death by accidental means with elements of criminal negligence' without reference to their words 'and bring in a verdict of manslaughter'. The jury made no comment when the clerk asked them to 'harken to your verdict as rendered by your foreman'. The jury may have accepted the accused's statement as to what occurred and found that he failed to act as a reasonable person, that is that he was negligent and that his negligence caused the deceased's death, but reached the conclusion that his negligence was not of the high degree required to prove manslaughter. There is so much doubt whether the jury intended to convict of manslaughter that in my opinion it would be quite unsafe to accept the jury's verdict as one of guilty of this offence and on this ground I would quash the conviction and direct a new trial. I do not consider that the verdict which the jury rendered is a verdict which can be recorded as a verdict at all.

With this passage also I agree.

It remains to consider the argument of counsel for the respondent based on s. 592(1)(*b*)(iii) of the *Criminal Code*:

> 592 (1) On the hearing of an appeal against a conviction, the court of appeal
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> (*b*) may dismiss the appeal where
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> * * *
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> (iii) notwithstanding that the court is of opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

It may be observed, in passing, that it is only in cases of which the court is of opinion that the appeal might be decided in favour of the appellant because the judgment of the trial court should be set aside on the ground of error in law that it can require to consider subpara. (iii) of s. 592(1)(*b*) at all.

On this point also I am in agreement with the reasons of the learned Chief Justice and propose to add only a few words.

The finding of the jury has negatived any intention on the part of the appellant to injure the deceased. There was evidence on which it was open to the jury to find that immediately before the happening of the fatal accident the appellant was engaged in endeavouring to unload the rifle in case it should be loaded. The rifle was cocked and the appellant did not know whether it was loaded or not. He had not loaded it but apparently he was not satisfied of the reliability of the statement of the deceased that she had not done so. The rifle was made an exhibit; we had an opportunity of examining it and it was described by the witness Corporal Kirby of the R.C.M.P., an expert in the matter of fire-arms. It is a .22 calibre rim-fire, bolt-action, single-shot rifle. After a cartridge has been inserted and the breech closed the rifle is cocked by "grasping the bolt by the tail and bringing it to the rear". The rifle is then ready to be fired. It is so constructed that when there is a live round in the breech and the rifle is cocked the breech cannot be opened to permit of the extraction of the live round until the rifle is either discharged or uncocked. Corporal Kirby was asked how the rifle could be uncocked without firing it and explained that this operation "requires both hands, one to grasp the tail of the bolt, and the second to release the trigger and then it is allowed to travel forward slowly". It is obvious that if while this procedure was being carried out the bolt should slip from the fingers of the operator the rifle would be discharged. The concluding question and answer in Corporal Kirby's cross-examination read as follows:

> Q. And if one is not careless, but is careful, one might still accidentally lose contact with the tail of the bolt?
>
> A. Yes sir, and allow it to fire.

It appears to me that it would have been open to the jury to take the view that the appellant, engrossed in the operation of uncocking the rifle, was momentarily inattentive to

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the direction in which it was pointing; and on that view it would be a question of degree for the jury whether his conduct amounted to the "very high degree of negligence required to be proved before the felony is established"—to use the words of Lord Atkin in *Andrews v. Director of Public Prosecutions*[1], quoted in the reasons of Johnson J.A.

The question was eminently one on which the appellant was entitled to have the verdict of a properly instructed jury; I find it impossible to say that had the jury been properly instructed they would necessarily have convicted him.

While I do not found my judgment upon what was said by Crown counsel at the trial after the misdirection referred to above had occurred, it is worthy of note that, with exemplary fairness, Mr. Price submitted to the learned trial judge that it was open to the jury to find a verdict of not guilty and that he should so instruct them.

For the above reasons and those given by the learned Chief Justice in the Court of Appeal, I would allow the appeal, quash the conviction and direct a new trial on the charge of manslaughter.

FAUTEUX J. (*dissenting*):—Tried, last May at Yellowknife in the Northwest Territories, on a charge that he, at Yellowknife on the 17th day of December 1960, did murder one Madelaine Marlowe, contrary to s. 206 C.C., appellant was found guilty of manslaughter. His appeal from this conviction to the Court of Appeal of the Northwest Territories was dismissed by a majority decision[2]; Johnson, Parker and Kane JJ.A., of the majority, affirmed the conviction while Smith C.J.A., and Macdonald J.A., would have ordered a new trial. Appellant now appeals to this Court.

For the purpose of this appeal, the facts adduced in evidence by the prosecution and by the accused, sole witness heard for the defence, need only be shortly stated.

Appellant and the deceased were sharing a small one-room cabin on Joliffe Island in Yellowknife. The accused testified that, on the night of December 16, both left the cabin at 6 p.m. and, from that time to 11 p.m., consumed four bottles of wine with two other persons. Upon their return home at 11 p.m., appellant went to bed while Marlowe, already inebriated, left the cabin to obtain more

[1] [1937] A.C. 576 at p. 583. [2] (1961), 131 C.C.C. 287, 36 C.R. 405.

liquor. Appellant said he became concerned with her condition and went looking for her at a neighbour's place where admittance was refused to him. Early in the morning of the 17th, he went out again and found her at a neighbour's place "just about as drunk as I have ever seen her". He brought her home and both went to bed. He got up in the forenoon when some visitors came. As he followed the last visitor leaving the cabin, he said that he glanced at the .22 calibre bolt-action, single-shot rifle which was behind the door in the porch, noticed that it was cocked and realized that it was dangerous because a little boy used to run around the premises. Having re-entered the cabin, he asked Marlowe, who was still lying in bed, whether the rifle was loaded and she answered it was not. He testified that he, none the less, proceeded to uncock the rifle and said: "I don't know what happened, whether the bolt slipped or I touched the trigger or what but it went off." The bullet struck Marlowe's head in the left temporal region penetrating the brain in a straight horizontal direction. This fact, if appellant's story is to be believed, indicates that when he attempted to uncock the rifle, the rifle barrel was directly in line with the head of the deceased then lying in bed. Marlowe died instantaneously. Thereafter, and on three successive occasions, appellant admitted responsibility for the shooting. To McKechnie, the last visitor to leave the cabin prior to the event, he handed the rifle, saying: "Here, Trapper, I did it. I shot her. You go to Scratchet's and phone the police." To Larsen, a neighbour, he said: "I shot Madelaine Marlowe." And to the police, he declared: "I shot her" or "I shot a woman" and when asked why, he answered: "She lied to me." After the usual warning, he said: "I shot her. I don't care. I told Trapper I shot her and I asked him to phone the police." He then inquired whether she was dead and being informed that she was, said: "Thank God for that. I won't write anything, and I won't say anything." At trial, he explained that when he said "She lied to me", he was referring to her statement that the gun was unloaded and that by saying "Thank God for that", he was expressing thankfulness for the fact that being dead she was not going to suffer. In substance, his evidence was that he had no intention of harming the deceased and the shooting was purely accidental.

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The jury were particularly instructed as to murder; manslaughter; provocation, drunkenness and criminal negligence, as incidents reducing murder to manslaughter, and directed that if the shooting was accidental and unaccompanied by criminal negligence, there was no crime. At the close of the trial, they brought in the following verdict:

> We find death by accidental means with elements of criminal negligence, and bring in a verdict of manslaughter.

Requested to say whether they all agreed to this verdict, each juryman answered affirmatively.

Appellant then appealed his conviction to the Court of Appeal with the result already indicated.

His appeal to this Court purports to be lodged pursuant to s. 597 (1)(*a*) C.C., reading:

> 597. (1) A person who is convicted of an indictable offence other than an offence punishable by death and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada. 1960-1961, c. 42, s. 27(1).
>
> (*a*) on any question of law on which a judge of the court of appeal dissents, or
>
> (*b*) .....

It behooves the appellant to show that the record discloses material enabling him to bring his appeal within the conditions prescribed by this section. While, in certain respects having here no relevancy, the text of this section differs from that of its predecessors, the section still, as did the latter, conditions the right of appeal given thereby to the presence, in the reasons for judgment delivered in the Court of Appeal, of points of difference between the views of the majority and those of the minority, on pure questions of law. *Rozon v. The King*[1] and the decisions therein referred to and applied; *The Queen v. Fitton*[2]; *Pearson v. The Queen*[3]. It is therefore expedient to compare the two sets of reasons, as was done by this Court in *The King v. Décary*[4], to ascertain whether this statutory condition is here present.

[1] [1951] S.C.R. 248, 2 D.L.R. 594. [2] [1956] S.C.R. 958, 116 C.C.C. 1.
[3] [1959] S.C.R. 369, 123 C.C.C. 271. [4] [1942] S.C.R. 80, 2 D.L.R. 401.

For the minority, Smith C.J.A., with the concurrence of Macdonald J.A., found (i) that there was doubt as to what the jury meant by their verdict; (ii) that there were misdirections in the following excerpt from the charge:

> It is conceivable he might have shot at her, he might have shot at her with the intent of scaring her, or he may not even have pointed the rifle at her at all, but if he did point the rifle at her, it might have been a case of trying to scare her—it might have been in itself an unlawful act, the unlawful act of point (sic) a rifle—but in any of those things, any of those things would make it manslaughter, instead of murder.

Being unable to say that no substantial wrong or miscarriage of justice had occurred as a result of these instructions, he concluded that the conviction should be quashed and a new trial ordered.

For the majority, Johnson J.A., with the concurrence of Kane J.A., said that there were two grounds of appeal requiring consideration, namely (i) that there was no evidence upon which to found a verdict of manslaughter and (ii) that the jury's verdict was in fact a verdict of acquittal or, alternatively, that the verdict indicated a doubt as to there being criminal negligence within the meaning of the *Criminal Code*. He rejected the first ground as being unfounded, adopting, in this respect, a view similar to that of the Judges of the minority who would have ordered a new trial. As to the second ground, *i.e.*, the meaning of the verdict, he also rejected it. While considering this ground, the learned Judge did refer to the criticism made in relation to the instructions above quoted and found to be misdirections by the minority. However, he expressed no view in the matter. He considered these instructions irrelevant as far as the appeal was concerned, in view of the fact that it was quite clear from the verdict that the jury had accepted the appellant's account of what had happened.

Parker J.A., said that there were only two grounds of appeal to which need was to refer, namely, (i) that the trial Judge misdirected the jury and (ii) that the jury in stating the basis upon which they found the accused guilty of manslaughter used language raising a doubt whether they had proceeded upon the right principle. Considering at first the latter ground, he rejected it. As to the instructions to the jury, he said that while there were certain deficiencies in the charge, no substantial wrong or miscarriage of justice had occurred.

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In short, all the members of the Court agreed that there was evidence to support a verdict of manslaughter founded on criminal negligence; there was no dissent expressed by the majority on the views taken by the minority on the question of the validity of the instructions quoted above; the only point of difference is confined to the verdict held to be ambiguous by the minority and unambiguous by the majority. Hence the question is whether this disagreement is on a pure question of law.

It is certain that if the verdict is ambiguous, it cannot be accepted in that form. On that proposition, there is not the slightest disagreement in the Court below.

By definition, a verdict is "The answer of a jury on a question of fact in a civil or criminal proceeding" Osborn, A Concise Law Dictionary, or "The opinion of a jury on a question of fact in a civil or criminal proceeding" Earl Jowitt, Dictionary of English Law. In this particular case, the determination of the question whether the answer or opinion given by the jury on the facts is clear or ambiguous does not involve the determination of any question of law, nor was there any determined by either the members of the majority or those of the minority. The difference in the view they formed in the matter is not a difference on a question of law within the meaning of s. 597(1)(*a*).

Under these circumstances, I would say that the record does not disclose material enabling appellant to bring his appeal within the section and that the appeal should be quashed.

I will assume, however, that contrary to these views, appellant did bring his appeal within the section and that it is open to this Court to consider grounds of appeal raised on behalf of appellant, namely, lack of evidence to support a verdict of manslaughter founded on criminal negligence, misdirections, and ambiguity of the verdict.

None of the members of the Court below found any merits in the first ground. A former soldier, appellant was familiar with the danger of loaded firearms. It was indeed that very danger which, on his own story, prompted him to uncock the trigger of the rifle. He did not rely on Marlowe's answer that it was not loaded. In performing this operation, he had a duty to take these ordinary precautions in the absence of

which human life would necessarily be endangered. The elementary if not the only one called for was to make sure that during the operation the rifle would point in a direction opposite to that of the woman. The special hazards allegedly attending the uncocking of this particular rifle, whether known or unknown to appellant, did not minimize but rendered more imperative the duty to do so. Proceeding as he did while the rifle was directly in line with the deceased's head, appellant did show wanton or reckless disregard for the life and safety of the victim. In my view, once appellant's account of the occurrence is accepted, as it was by the jury, a verdict of manslaughter based on criminal negligence was, in the circumstances of this case, the only verdict which a reasonable jury acting judicially could return.

With respect to the alleged misdirections, I agree with Johnson and Kane JJ.A., that the jury having accepted appellant's testimony, it became irrelevant to the appeal to consider the validity of these instructions, and, in any event, as found by Parker J.A., no miscarriage of justice or substantial wrong resulted therefrom.

As to the verdict, Johnson J.A., with the concurrence of Kane J.A., had this to say:

> I have said that the verdict must be considered in the light of the judge's charge. It must also be considered with the facts of this case. I have said it was apparent that the jury accepted the appellant's account of the events preceding the shooting. It was the acts of the appellant as related by himself, which, taken together with and in the circumstances related by him, that were criminally negligent. That evidence was not capable of being broken down into separate "elements" which could be believed or not without destroying the whole fabric of the explanation. The only exception to this was the conversation between the accused and the deceased about whether the rifle was loaded. That could be believed or not without affecting the narrative of events.
>
> The language of a jury of laymen should not be subjected to minute scrutiny or to fine shading of dictionary meanings. When the verdict is considered with the evidence and the judge's charge, it means no more than this: they, the jury, were indicating to the judge that of the three types of manslaughter which it was open for them to find—that is, due to criminal negligence, provocation or because of drunkenness—they were finding him guilty of manslaughter because of criminal negligence.

With these views, I am in substantial agreement.

I would, therefore, quash the appeal.

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*Appeal allowed, the conviction quashed and a new trial directed on the charge of manslaughter,* TASCHEREAU *and* FAUTEUX JJ. *dissenting.*

*Solicitors for the appellant: Miller, Miller and Witten, Edmonton.*

*Solicitor for the respondent: The Attorney General of Canada.*