HIS MAJESTY THE KING.....APPELLANT;

AND

ROBERT BARBOUR .....RESPONDENT.

1938

* Oct. 17.
* Nov. 15.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Evidence—Trial for murder—Evidence of previous quarrels between accused and deceased with accompanying assaults by accused —Admissibility.

The accused (respondent) was convicted at trial of the murder of H., a girl living near his home and with whom he had been "keeping company" for some time. On March 30, 1938, accused and H. were seen together and later on that day H. was found suffering from injuries from which she died. Evidence was given of statements by accused, after the alleged attack, that he had killed H. with a hammer, that he was "awful jealous of her," that he took her home the night previous and "afterwards she ran out with another fellow." Evidence was given, against objection, of previous quarrels between accused and H. and accompanying assaults upon H. by accused, one such incident occurring shortly before Christmas, 1937, one in January, 1938, and one about a week before said March 30, 1938. The Appeal Division of the Supreme Court of New Brunswick (Harrison J. dissenting) directed a new trial, on the ground that evidence of previous assaults by accused upon H. was improperly admitted (13 M.P.R. 203). The Crown appealed.

Held (Kerwin and Hudson JJ. dissenting): The appeal should be dismissed.

Per Duff C.J., Rinfret and Davis JJ.: The Crown's case was that accused had killed H. in a fit of jealous passion aroused by her conduct with another man. The evidence definitely negatived any connection between this other man and the earlier incidents now in question; and wholly failed to present any facts from which the jury could properly infer that there was any connection of such earlier incidents with accused's objection to H.'s associating with other men; or that such incidents were the result of enmity or ill-will on accused's part; they were transient ebullitions of annoyance and anger which immediately passed away and led to nothing; in their physical characteristics they had no real similarity to the attack of March 30. Where there are acts seriously tending, when reasonably viewed, to establish motive for a crime, evidence of such acts is admissible, not merely to prove intent, but to prove the fact as well; but it is important that courts should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged, merely because it discloses some incident in the history of the relations of the parties. The incidents in question did not appear to be such that they could reasonably be regarded as evidencing feelings of enmity or ill-will which could have been the motive actuating the homicide charged. A quarrel might, in its incidents or circumstances or in its relation to other facts in evidence, have such a character as

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1938

THE KING
v.
BARBOUR.

to entitle the jury to infer motive and intention and state of mind, even in the absence of verbal declaration; while, on the other hand, such an occurrence or series of occurrences might be so insignificant as to leave nothing for the jury to interpret and to afford no reasonable basis for a relevant inference adverse to the accused. The facts in each case must be looked at, and if, reasonably viewed, they have no probative tendency favourable to the Crown or adverse to the accused in respect of the issue joined between them, the evidence should be excluded.

Rex v. *Bond,* [1906] 2 K.B. 389, at 397, 401, *Rex* v. *Ball,* [1911] A.C. 47, at 68, and other cases, referred to. *Theal* v. *The Queen,* 7 Can. S.C.R. 397, on its facts has no resemblance to the present case.

Per Kerwin J. (dissenting): The intent of accused was directly in issue (*Cr. Code,* s. 259 (*b*) referred to), and it was for the Crown to adduce evidence thereon. There was a definite connection between the accused's acts accompanying said quarrels and the issue as to accused's intent in inflicting the injuries on March 30; the evidence of those acts was relevant to that issue as indicating a jealous disposition on accused's part and as evidence of his motive. The jury was entitled to take those matters into consideration in conjunction with the other evidence, and the probative value was not so slight that the evidence as to any of the quarrels was inadmissible.

Rex v. *Bond,* [1906] 2 K.B. 389, at 397, 400, 401, *Rex* v. *Ball,* [1911] A.C. 47, at 68, *Rex* v. *Shellaker,* [1914] 1 K.B. 414, *Rex* v. *Chomatsu Yabu,* 5 West. Australian L.R. 35, and other cases, referred to.

Per Hudson J. (dissenting): The onus was on the Crown to establish that accused killed H. and that he did it with malice. To satisfy that onus, recourse to circumstantial evidence was necessary. Evidence of the previous relations of the parties, including evidence of their quarrels and how they then behaved towards each other, was relevant on the issue of malice as that issue is explained in *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462, at 482. The evidence being relevant to an issue, it should not be excluded merely on the ground that it disclosed some other crime or offence of a similar nature committed by accused (*Makin* v. *Attorney-General of New South Wales,* [1894] A.C. 57; *Rex* v. *Bond,* [1906] 2 K.B. 389).

APPEAL by the Attorney-General of New Brunswick from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing (Harrison J. dissenting) the accused's appeal against his conviction for murder and ordering a new trial, on the ground that evidence given at the trial of previous assaults by the accused upon the deceased was improperly admitted. The material facts of the case are sufficiently stated in the judgments now reported; the evidence is dealt with in some considerable detail in the judgment of Kerwin J. (dissenting). The appeal to this Court was dismissed, Kerwin and Hudson JJ. dissenting.

(1) (1938) 13 M.P.R. 203.

1938

THE KING v. BARBOUR.

E. B. MacLatchy for the appellant.

P. J. Hughes K.C. for the respondent.

The judgment of the majority of the Court (The Chief Justice and Rinfret and Davis JJ.) was delivered by

THE CHIEF JUSTICE.—This appeal, in my view of it, does not raise any question of general principle. As Lord Dunedin said in *Thompson* v. *The King* (1):—

> the law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner.

It must not be forgotten that the jury are not engaged in a scientific investigation. They are trying an issue of fact between the Crown and the prisoner; and the court must see that the practical rules, the purpose of which is thus explained by Lord Dunedin, are duly observed.

Nobody disputes that it is of the utmost importance to

> a prisoner charged with an offence * * * that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge.

I am quoting from the judgment of Mr. Justice Kennedy in *Rex* v. *Bond* (2).

While, as already observed, I do not consider any question of general principle is really involved in this case, I do not suggest for a moment that assistance in applying well known principles to the facts may not be gained by consulting the authorities.

In *Rex* v. *Ball* (3) two people were indicted upon a charge of incest. At the trial, evidence was admitted of previous acts of intercourse and of the fact that they had been living in relations akin to those of husband and wife. The House of Lords held these acts were admissible as tending to establish the existence of a guilty passion at the very time the acts charged were alleged to have been committed on the ground that

> their passion for each other was as much evidence as was their presence together in bed of the fact that when there they had guilty relations with each other.

(1) [1918] A.C. 221, at 226. (2) [1906] 2 K.B. 389 at 397.
(3) [1911] A.C. 47.

1938

THE KING v. BARBOUR.

Duff C.J.

In this Court, counsel for the Crown, who had conducted the Crown's case at the trial and who presented his argument with conspicuous fairness, sustained the admissibility of the evidence objected to on the strictly narrow ground that it was relevant to the issue of intent and upon that alone. He expressly disclaimed the suggestion that the quarrels of which evidence was given proceeded from hostility or enmity, or tended to show the existence of such feelings. In his factum he contends that evidence of the relations of the parties, friendly or unfriendly, is admissible without qualification; but on the oral argument his contention was explicitly limited as above explained and, it should be noticed, that this limitation is logically inconsistent with any contention that the evidence tended to establish feelings of hostility or malignity; a contention which, as observed, he explicitly refused to adopt. The existence of such feelings would, as we shall see, be relevant not merely in respect of intent, but in respect of the fact as well. The evidence adduced by the Crown was inconsistent with the notion that anything like a feeling of ill-will or malignity actuated these quarrels; and, indeed, as the learned Chief Justice of New Brunswick intimates, they were transient ebullitions of annoyance and anger on the part of the accused which immediately passed away and led to nothing.

The Crown's case was in truth that the accused had killed the deceased in a fit of jealous passion aroused by her conduct with another man. There is nothing in the evidence to show that the accused was aware even of the existence of this man before the last of the incidents in question, although he had first become acquainted with the deceased, according to his own evidence, about two weeks before that. The evidence definitely negatives any connection between him and the earlier incidents. It seems reasonable to infer from counsel's opening that he expected to connect all the incidents now in question with the accused's objection to the victim's associating with other men; but the evidence wholly fails to present any facts from which the jury could properly infer that there was any such connection. It is true there is a general statement, elicited in re-examination from one of the witnesses by leading questions, to the effect that the accused objected

to her going with other men and that he was a little "jealous" of her. But there is no evidence which would have entitled the trial judge to instruct the jury that they might ascribe these quarrels to any such feeling. Indeed, as regards the first of the quarrels, the evidence of the witness for the Crown who related the facts is explicit that the quarrel had a totally different origin. There is no suggestion in the record, it should be added, from the beginning to the end of the trial that these incidents were the result of enmity or ill-will on the part of the accused.

If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. But I think, with the greatest possible respect, it is rather important that the courts should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged merely because it discloses some incident in the history of the relations of the parties.

In the course of the argument in *Rex* v. *Ball* (1), Lord Atkinson said:—

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought" * * *

Of course, a much wider latitude is allowed the accused, who may adduce any evidence, of good character for example, tending to show, not only that it was not likely that he committed the crime charged but that he was not the kind of person likely to do so.

In *Rex* v. *Ball* (1), Lord Loreburn quoted the following passage from the judgment of Kennedy J. in *Rex* v. *Bond* (2):—

> The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

It is most important to attend to the qualification "so

(1) [1911] A.C. 47, at 68. (2) [1906] 2 K.B. 389, 401.

1938

THE KING
v.
BARBOUR.

Duff C.J.

far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment." It explains, I think, why Cresswell J. and Williams J. in *Mobbs'* case (1) were not satisfied of the admissibility of evidence of conduct of the accused directed towards the deceased eleven days before the date of the alleged murder in the absence of some accompanying declaration, even as tending to prove malice.

In *Theal* v. *The Queen* (2), counsel for the Crown in opening (p. 399) stated he would prove systematic ill-treatment culminating in the final assault which was the immediate cause of the victim's death. The previous acts of violence were held admissible as tending to establish intent and as in the same category as deliberate menaces or threats tending to prove malice and intent (*per* Ritchie C.J. at p. 406). The judgment must be interpreted in light of the facts and especially of the character of the previous assaults proved and the threats accompanying them. The case has no sort of resemblance to that before us.

By way of summary, it may perhaps be added that, first of all, the incidents in question do not appear to be such that they could reasonably be regarded as evidencing feelings of enmity or ill-will which could have been the motive actuating the homicide charged. I do not doubt that a quarrel might in its incidents or circumstances, or in its relation to other facts in evidence, have such a character as to entitle the jury to infer motive and intention and state of mind, even in the absence of verbal declaration; while, on the other hand, such an occurrence or series of occurrences might be so insignificant as to leave nothing for the jury to interpret and to afford no reasonable basis for a relevant inference adverse to the accused. The facts in each case must be looked at, and if, reasonably viewed, they have no probative tendency favourable to the Crown or adverse to the prisoner in respect of the issue joined between them, it is the duty of the court to exclude the evidence. The responsibility of the judge in such cases is a grave one if there is any risk that the evidence tendered may prejudice the prisoner.

Having regard to the character of the case made at the trial, the course of the trial, and the position taken by

(1) (1853) 6 Cox C.C. 223.

(2) (1882) 7 Can. S.C.R. 397.

counsel for the Crown in this court, it would be unsafe to set aside the order for a new trial pronounced by the Supreme Court of New Brunswick on any such hypothesis as to the origin and nature of these incidents.

For the same reason it would be equally unsafe to proceed upon the proposition that evidence of these incidents was admissible as relevant to the issue of intent as evidence of similar acts calculated to negative accident or mistake or tending directly to prove that the acts of the 30th of March were committed with the intent to kill. In view of the relations of the parties it is questionable if what occurred on any one of the occasions dealt with by Mr. Justice Harrison amounted even technically to an assault; in any event, the Crown, as already observed, refused to impute to the accused ill-will and there is no suggestion that there was any intention to harm; in their physical characteristics there is no real similarity between these quarrels and the murderous attack of March 30th.

Nor is there any evidence from which the jury could reasonably ascribe the conduct of the accused on these isolated occasions to the motive alleged to have prompted the acts of March 30th—resentment against the association of the deceased with other men.

The appeal should be dismissed.

KERWIN J. (dissenting)—Robert Barbour was convicted of having murdered Margaret Harris on March 30th, 1938. The Appeal Division of the Supreme Court of New Brunswick (1) directed a new trial on the ground that evidence given that the accused had previously assaulted the deceased was improperly admitted. Mr. Justice Harrison dissented and the Attorney-General now appeals to this Court upon the question of law upon which such dissent was based.

Upon an examination of the residuum of the evidence there would appear to be no dispute as to the following facts. The accused and Margaret Harris had been "keeping company" for some time. (I refer immediately to what transpired on the evening of March 29th, 1938, because while there was a suggestion that the evidence on the point is of a "previous assault," it was not so urged

(1) 13 M.P.R. 203.

1938

THE KING v. BARBOUR.

Kerwin J.

before us by counsel for the accused and in fact I do not understand how that proposition could be seriously advanced). On the evening, then, of March 29th the accused brought Margaret to her home and shoved her through the doorway, saying to her mother, "keep her home, she is running around too much." On March 30th, the accused and Margaret were seen together,—the latter sitting on the former's knee and the accused crying. Shortly thereafter the girl was discovered in the same house bleeding and suffering from injuries inflicted by a hammer. The same day the accused went to the shire gaol and gave himself into custody. Upon arrival at the buildings he met Napoleon Leger and said to him: "My name is Robert Barbour, son of John Barbour. * * * I have just killed my lady friend." After being incarcerated, he made a certain statement in the presence of two prisoners. One of them, Wilmot, gives the statement as follows: "I just committed murder about ten minutes ago. * * * Yes, that is right—I just killed my girl with a hammer." Upon Wilmot remarking: "How in the name of God did that happen?" the accused continued, according to Wilmot: "I was awful jealous of her— I took her out last night— I took her home— Afterwards she ran out with another fellow— She came over to the house to-day and I killed her." The other prisoner, Darbison, testified: "He (meaning the accused) said he had killed a girl—had hit her on the head with a hammer. * * * He said he took her home the night previous and he was terribly jealous of her." As a result of the injuries sustained on March 30th, Margaret died on April 15th.

The issues to be determined by the jury were whether the accused had inflicted the injuries from which the girl died, and under clause (*b*) of section 259 of the *Code*, whether he had meant to cause her any bodily injury which was known to him to be likely to cause death and was careless whether death ensued or not. That is, the intent of the accused was directly in issue and the responsibility devolved upon the Crown to adduce evidence on that point. Evidence as to any motive the accused might have had in inflicting the injuries spoken of in the *Code* was directly relevant to that issue of intent. While the Crown is not obliged to adduce evidence of motive, the presence

or absence of motive may be of very considerable importance. If the evidence before the jury disclosed merely that the girl had received injuries and that the accused had caused those injuries, the case would have been left in a very unsatisfactory position, and hence it was that evidence of what the accused said to Leger and to the two prisoners was tendered, not merely to indicate that the accused had inflicted the injuries but as to his motive in so doing.

How, then, does the matter stand with reference to the evidence of previous assaults which the Court of Appeal has determined was improperly admitted? In his opening address to the jury, after stating that the accused had been keeping company with Margaret Harris and after referring to one Robert MacPherson, who "comes into the scene on March 29th," and after referring to the evidence to be adduced that on the evening of that day the accused had pushed Margaret through the doorway saying something to this effect: "Keep her home. She is running around too much," Crown counsel continued, according to the transcript on page 40 of the Appeal Case, as follows:—

> Now there is evidence also to be submitted here that the accused and his girl friend, sweetheart if you like, have not been getting along very well lately. Evidence to show that there had been some quarrelling. Now what the reasons for the quarrels are you will have to have some evidence before you what was bring that about. What was the trouble. What he was crying about that day. Why his mysterious movements on the day before and why his mysterious actions in the house that afternoon of the fatal day, March 30th.

During the course of the trial this evidence as to quarrelling was adduced:—

(1) The evidence of Frances Barbour, a sister of the accused. After the objection of counsel for the accused had been over-ruled, the questions and answers proceeded:

> Q. I would ask you the question, prior to March 30th shortly prior to March 30th, did you ever see Robert Barbour, your brother, and Margaret Harris quarrelling?
> A. Yes.
> Q. About how long before March 30th?
> A. About a week.
> Q. Where was this quarrel you saw? Where did it take place?
> A. In the Barbour house.
> Q. In your own house?
> A. Yes.
> Q. In what room in your own house?
> A. In the living room.

1938

THE KING v. BARBOUR.

Kerwin J.

Q. Tell us what you saw on that occasion?
A. Margaret and Robert were sitting down, they were quarrelling. They were talking about something. I didn't hear. Robert jumped up and started hitting Margaret.
Court: He jumped up?
A. Yes.
Court: And did what?
A. Hit Margaret.
Court: He hit Margaret?
A. Yes, Margaret went into the bed room and Robert went out.
Q. Margaret went into the bed room?
A. Yes.
Q. And Robert went out doors?
A. Yes.
Q. How many times did he hit her and how did he hit her?
A. He hit her with his hand.
Q. Do you know whether it was his clenched hand or open hand?
A. I didn't take notice.
Q. What stopped the quarrel?
A. My sister-in-law stopped it.
Q. Your sister-in-law?
A. Yes.
Q. That is Mrs. Richard Barbour?
A. Yes.
Q. How did she stop them?
A. Came and parted them.
Q. What did you do yourself in that case?
A. I called for Mrs. Galley.
Q. Where is Mrs. Galley?
A. In the same building we are in.
Q. In the rear part of your house, is that right?
A. Yes.

In cross-examination the witness was asked and answered as follows:—

Q. You say your brother Robert, the accused, and Margaret Harris went out together a great deal?
A. Yes.
Q. As a matter of fact, he was very fond of her?
A. Yes.

* * *

Q. Isn't it true that Margaret Harris was inclined to tease Robert?
A. Yes.
Q. You said yes?
A. Yes.
Q. Do you know whether or not she was teasing him on the occasion you spoke of, that you were telling Mr. McLatchey of?
A. No, she was not.

(2) The evidence of Mrs. Richard Barbour, a sister of Margaret Harris, which on this point appears at pages 160 to 165 of the Case. After an objection had been overruled, this witness testified that she had seen the accused and Margaret quarreling on three occasions. The first was shortly prior to the preceding Christmas; the accused want-

ed Margaret to go to her own home and kicked her; the witness stopped this quarrel. The next occasion was about January of 1938 and while the witness could not state the reason for the quarrel, she saw the accused strike Margaret once or twice over the shoulder with his open hand; the parties to the quarrel stopped of their own accord. The third occasion was a week before March 30th and is the same one already spoken of by Frances Barbour. On cross-examination the witness admitted that the accused and Margaret had been keeping company for a long time; that they seemed to be fond of each other; that Margaret was inclined to tease the accused from time to time "for fun," and that they would have "spats"; that when they were quarrelling on the two latter occasions spoken of by this witness "it would be one of those spats"; that they would generally "make up right after and go on as they had before"; and that on the first occasion spoken of by the witness, the accused wanted Margaret to go to her own home so that he might go to bed to be rested for his work in the morning. On re-examination the following occurred, as reported on page 184 of the Case:—

Q. Was Robert jealous about Margaret?
A. He appeared to be a little.
Q. Did he object to her going around with other men?
Mr. HUGHES: Just a moment—I object.
Question allowed.
A. Yes, he did.

CROSS-EXAMINATION on these questions—Mr. HUGHES.

Q. Mrs. Barbour, you said Robert appeared to be a little jealous of Margaret?
A. Yes.
Q. He seemed, as you have already said, to be very fond of her?
A. Yes.
Q. And you thought he wanted to marry her, I take it?
Mr. MCLATCHEY: She didn't say that.
Q. That would be correct, would it not?
A. Well, I don't know.
Q. Well, that was the impression you gathered from their relationship, was it not?
A. Yes.
Q. And that if he thought he was likely to lose her he appeared to be jealous, that is what you thought?
A. Yes, sir.
Q. Did he not appear to be trying to protect her?
A. I don't know.
Q. Have you not seen indications of that?
A. No, I have not.

1938

THE KING v. BARBOUR.

Kerwin J.

Q. Did he not try to keep her from going to places that he thought she should not go to?

A. Well, I don't know anything about that.

(3) The evidence of John Harris, Margaret's father, who testified that in January of 1938 he had had a conversation with the accused and had told the accused " Margaret had two black eyes and I asked him what was the meaning of it and he did not give me any answer." The witness testified further that on March 29th " he (the accused) told me, he said 'I will never lay hands on Margaret again' and he made a promise and I took him up on it and we shook hands on it." On cross-examination the witness testified that the accused had not admitted that he (the accused) was responsible for the blackening of Margaret's eyes.

The only reference in the judge's charge to the jury as to the accused having struck or kicked Margaret is at page 450 of the Case, and it was introduced in connection with the judge's instructions on the question of the accused's insanity, which had also been raised. The learned judge had discussed this question at some length and then said:—

> Let us see what turns here:
>
> We have been told that the accused and this girl were very friendly. I do not know whether they were lovers or not, but they had been going around together for three or four years. There is evidence also that he had kicked her. There is evidence that he hit her. There is evidence that on the 29th of March he had, that before Margaret Harris was found wounded or injured in the Barbour house, that he had told Margaret's father that he wouldn't ever lay a hand on her again. So that you compare that with the situation I have given you, of a father coming in and telling you that he had killed his child.

The judge immediately continued with his instruction upon the question of insanity. At page 444 he is reported to have spoken " of the reference to the fact that Margaret was teasing the accused " and to have pointed out that it appeared to him that it was introduced for no reason except to suggest provocation, as to which the judge intimated there was no evidence.

I have mentioned in detail the only evidence of previous assaults and have shown how that evidence was introduced and led at the trial. The manner in which it was dealt with by the trial judge and Crown counsel cannot, of course, cure the defect, if in truth it was not proper to place it before the jury, as the objection is to its admissibility and not to the weight to be attached to

it. However, it is apparent that it was never suggested that such evidence was submitted for the purpose of showing the accused had committed another offence, or that he was a person who was likely to mean to cause to the deceased an injury known to the accused to be likely to cause death, or as evidence of similar acts; but on the ground that it was some evidence of a motive,—particularly when considered in conjunction with the evidence as to what transpired on the evening of March 29th and the evidence as to the statements made by the accused on March 30th to Leger and the two prisoners.

On the argument the case of *Rex* v. *Bond* (1) was relied upon by counsel for the respondent and we were particularly pressed with the applicability of the judgment of Lord Justice Kennedy. In *Rex* v. *Ball* (2), counsel for the accused, during the course of his argument before the House of Lords, referred to that part of the judgment of Lord Justice Kennedy at page 397 in the *Bond* case (1), but later the Lord Chancellor quoted another part of the same judgment at page 401:—

> The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

Upon counsel remarking:—

> That is because, in murder, you have the act, and then the question of what was in the mind of the assailant.

Lord Atkinson then interposed:—

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought," inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.

It is true that the circumstances in the *Ball* case (3) were peculiar but in *The King* v. *Shellaker* (4) Sir Rufus Isaacs, Lord Chief Justice of England, in delivering the judgment of the Court of Criminal Appeal, which included Channell,

(1) [1906] 2 K.B. 389.
(2) [1911] A.C. 47.
(3) [1911] A.C. 47.
(4) [1914] 1 K.B. 414.

1938
THE KING
v.
BARBOUR.
Kerwin J.

Bray, Avory and Lush, JJ., pointed out that the *Ball* case (1) followed a long line of authorities of which *Reg.* v. *Ollis* (2) was one. The rule propounded by Channell J. in the latter was adopted wherein he stated that in such cases evidence of other transactions is admitted not for the purpose of showing that the prisoner committed other offences but for the purpose of showing that the transaction in question was done with the intent to defraud or with guilty knowledge, as the case may be. The *Ollis* case (3) is again referred to, as well as the *Shellaker* case (4), in *Rex* v. *Lovegrove* (5), another judgment of the Court of Criminal Appeal (the Earl of Reading, L.C.J., Salter and Acton JJ.) delivered by the Lord Chief Justice.

These decisions show, if any authority be needed, that the *Bond* case (6), and particularly the judgment relied upon, cannot be taken as setting forth the only circumstances under which prior offences of an accused may be disclosed on his trial. In fact, Lord Justice Kennedy enunciated several general rules, i.e., (1) "evidence must be confined to the point in issue" and (2) "the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge" (page 397). As to these rules, it will be noticed that the Lord Justice refers to the "point in issue" and to "conduct of the prisoner unconnected with such charge," and later at page 400 points out that it is not easy to say whether a particular case falls within the (second) rule or within the apparent exceptions.

In *Reg.* v. *Mobbs* (7), it is reported in (1853) 6 Cox C.C. 223 and in 17 J.P. 713, that Baron Cresswell and Williams J., in a case where evidence was offered of a prior assault, felt so uncertain about the matter that they decided not to admit the evidence. These reports are very meagre but in 38 Central Criminal Court Reports, 651, which purports to give the proceedings as they occurred, no reference is made to a ruling by the judges. From this report it appears that upon counsel for the accused objecting to the question, "What did you then see the prisoner do to his wife?" and stating that such evidence did not ex-

(1) [1911] A.C. 47.
(2) [1900] 2 Q.B. 758, at 781.
(3) [1900] 2 Q.B. 758, 781.
(4) [1914] 1 K.B. 414.
(5) [1920] 3 K.B. 643.
(6) [1906] 2 K.B. 389.
(7) (1853) 6 Cox C.C. 223, 17 J.P. 713, 38 Central Cr. C.R. 651.

plain the difference between murder and manslaughter, which was the only argument open to him, Mr. Bodkin for the Crown indicated "that he did not purpose to prove any expressions accompanying the acts but only the acts themselves; that it was not consistent with his duty to omit all mention of the matter, but having done so, he would now withdraw the question."

Whichever report of *Reg.* v. *Mobbs* (1) is correct, it is apparent that the case cannot be considered a precedent to apply to other cases where, either a prior act of the accused is accompanied by a statement of his, or where there are other acts of his that a jury might consider in conjunction with such prior act. And this view was taken in *Rex* v. *Chomatsu Yabu* (2). It was there held, on an appeal from a conviction of a man for having murdered a Japanese woman, that evidence was rightly admitted that at a date some time earlier than the date of the alleged offence the accused was in a yard behind the house of the woman and in answer to her accusation admitted that he had broken up her furniture. McMillan J. stated:—

> I think if facts can be found from which the jury can properly infer what the motive and intention and state of mind of prisoner was, that those facts are as properly brought before them as any declaration on the part of the prisoner would have been.

At the famous trial of William Palmer, 1856 (3), one question was as to whether the accused administered the poison. After referring to the practice in some countries of allowing a probability to be raised that an accused has committed an offence by showing that he has committed other offences, Lord Campbell instructed the jury that by the law of England every man is presumed to be innocent and that it allowed his guilt to be established only by evidence directly connected with the charge. He then referred to circumstantial evidence leading to the conclusion of guilt, stating that with respect to the alleged motive "it is of great importance to see whether there was a motive for committing such a crime" and concluded that the adequacy of the motive was of little importance.

(1) (1853) 6 Cox C.C. 223, 17 J.P. 713, 38 Central Cr. C.R. 651.

(2) (1903) 5 West. Australian L.R. 35.

(3) Reporter's note.—See in series of "Notable British Trials," the "Trial of William Palmer" (Knott and Watson) at pp. 297, 299.

1938

THE KING v. BARBOUR.

Kerwin J.

In the case at bar, it is doubtful, in my opinion, in view of the relations between the accused and Margaret Harris, if the striking and kicking may be termed offences in any sense of the word. In any event, for the reasons already indicated, I believe there was a definite connection between those acts, accompanying, as they did, the quarrels mentioned, and the issue as to the accused's intent in inflicting the injuries on Margaret Harris on March 30th, 1938. The evidence of these acts was relevant to that issue as indicating a jealous disposition on the part of the accused and as evidence of the accused's motive.

In connection with the four episodes, it is well to bear in mind the relationship between the Harris and Barbour families and just who the witnesses were who testified. Mrs. Richard Barbour was not only the sister of Margaret Harris but was also married to a brother of the accused. Frances Barbour was a sister of the accused; and John Harris, besides being the father of Margaret Harris, was, of course, the father-in-law of his other daughter's husband. As to the first occasion, Mrs. Richard Barbour did testify on cross-examination, as has been noted, that the accused wanted Margaret to go to her home so that he might go to bed to be rested for his work. In view of the fact that this testimony was given by answering "Yes" to a series of suggestions by counsel for the accused (put by him with perfect propriety), the jury would be entitled to weigh such answers and give such effect to them, if any, as they saw fit. The jury was entitled to take all these matters into consideration in conjunction with the other evidence and I cannot agree that the probative value is so slight that the evidence as to any of the quarrels was inadmissible. The trial judge admitted the evidence and, in my opinion, should not have ruled otherwise.

Notwithstanding that the appellant is restricted upon his appeal to the question of law upon which there has been dissent in the court below, it was submitted on behalf of the accused that the latter is not to be deprived of the new trial granted him unless this Court is satisfied, in making such order "as the justice of the case requires" (section 1024, subsection 1), that no error exists in connection with any of the other grounds taken by the accused before the Court of Appeal. We accordingly heard argu-

1938

THE KING v. BARBOUR.

Kerwin J.

ment on all questions that counsel for the accused desired to raise. It is unnecessary for me to express an opinion on any of these questions or on the point of jurisdiction, since the majority of the Court have come to the conclusion that the appeal of the Attorney-General fails.

HUDSON J. (dissenting)—The only point on which there was dissent in the court below is that "there was error in admitting the evidence of previous assaults by the accused upon Margaret Harris."

The prisoner was charged with murder and pleaded not guilty. The duty of the Crown in such a case is stated by the Lord Chancellor, Lord Sankey, in the case of *Woolmington* v. *The Director of Public Prosecutions* (1), as follows:—

> When dealing with a murder case the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked.

The onus then was on the Crown to establish that the prisoner killed the deceased and that he did it with malice. To satisfy this onus, recourse to circumstantial evidence was necessary. The questions immediately arose: What were the previous relations between the parties? Were they friends or otherwise? If friends, how friendly? How did they normally behave towards each other? What were their normal acts and ordinary doings?

I am of opinion that evidence in this case of the previous relations of the parties, including evidence of their quarrels and how they then behaved towards each other, was relevant on the issue of malice as above defined by the House of Lords.

If the evidence was relevant to any issue, then I can find no authority to justify the exclusion of such evidence merely on the ground that it disclosed some other crime or offence of a similar nature committed by the accused. The decision of the Privy Council in *Makin* v. *Attorney-General for New South Wales* (2), and of the Court of *Appeal in The King* v. *Bond* (3), sufficiently establish this.

(1) [1935] A.C. 462, at 482. (2) [1894] A.C. 57.
(3) [1906] 2 K.B. 389.

1938

THE KING v. BARBOUR.

Hudson J.

For these reasons, I agree on this point with the conclusion of Mr. Justice Harrison who dissented in the court below.

As the majority of this Court has come to the conclusion that the appeal should be dismissed, it is unnecessary for me to express an opinion on the question of jurisdiction or on the other points raised on behalf of the prisoner.

Appeal dismissed.

Solicitor for the appellant: *E. B. MacLatchy.*

Solicitor for the respondent: *G. W. MacDonald.*