CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

FRITZ EBERTS ..... APPELLANT; 1912

AND *Oct. 2.
*Oct. 7.

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF ALBERTA.

Criminal law—Indictment for murder—Trial—Evidence—Criminal intent—Provocation—"Heat of passion"—Charge to jury—Misdirection—Reducing charge to manslaughter—New trial—"Substantial wrong"—Criminal Code, ss. 261, 1019—Appeal—Questions to be reviewed.

On a trial for the murder of a police officer there was evidence that E. and J. had set out from their home, during the night when the deceased was killed, with the intention of committing theft; J. and his wife testified that, on returning home, E. had told them that a man, whom he supposed to be a secret-police constable, had pointed a pistol at him and told him to "go to hell" and that he had shot him. The defence was rested entirely upon *alibi* and the accused testified on his own behalf stating that he had been at home during the whole of the night in question, but making no mention of any facts concerning the shooting. In his charge the trial judge reviewed the evidence, in a general way, and told the jury that, upon the evidence adduced, they

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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must either convict or acquit of the crime of murder, that they could not return a verdict of manslaughter, that if they believed J.'s account of what happened to be substantially true they should convict of murder; and he did not instruct the jury as to what, in law, constituted manslaughter nor as to circumstances on which the verdict might be reduced to manslaughter. E. was convicted of murder.

Held, Duff J. dissenting, that, on the evidence, the charge of the trial judge was right, and that the omission to instruct the jury in respect to manslaughter did not occasion any substantial wrong or miscarriage which could justify the setting aside of the conviction nor a direction for a new trial.

Per Fitzpatrick C.J. and Idington J.—In a criminal appeal, it is doubtful whether any question except that upon which there was a dissent in the court below could be reviewed on an appeal to the Supreme Court of Canada.

Per Duff J., dissenting.—In the circumstances of the case, the effect of the charge was to withdraw from the jury some evidence which ought to have been considered by them and which, if considered by them, might have influenced them favourably towards the accused in arriving at their verdict; consequently, some substantial wrong was thereby occasioned on the trial and the conviction should not be permitted to stand.

APPEAL from the judgment of the Supreme Court for the Province of Alberta(1), which affirmed the conviction of the appellant of the crime of murder, Beck J. dissenting.

At the trial, in April, 1912, before Mr. Justice Simmons and a jury, the appellant was convicted of the murder of a Royal North-West Mounted police constable, at Frank, in Alberta, on the night of the 12th of April, 1908, and was sentenced to death. An application for a reserved case was refused by the trial judge. Upon application to the court *in banco*, an appeal was heard, the notice of appeal raising the following questions:—

"(1) As to whether the said learned judge erred in directing the jury that there were only two possible conclusions they could come to, a verdict of guilty

(1) 2 West. W.R. 542.

of murder or a verdict of not guilty and that they could not consider the question of manslaughter at all.

"(2) As to whether the said learned judge erred in refusing to instruct the jury that if they found that the crime was committed by the accused without malice, they were entitled to bring in a verdict of manslaughter.

"(3) As to whether the said learned judge erred in not instructing the jury as to what elements constituted the crime of murder and what that of manslaughter and the difference between said two offences.

"(4) As to whether the said learned judge erred in not instructing the jury that they might, and under what circumstances they might, on a charge of murder bring in a verdict of manslaughter.

"(5) As to whether the said learned judge erred in instructing the jury that the evidence of witnesses as to seeing a flash and hearing a noise at a certain hour was corroborative of the evidence of the witness Jasbec.

"(6) As to whether the said learned judge erred in instructing the jury that the evidence of the wife of the witness Jasbec was corroborative of the evidence of said Jasbec.

"(7) As to whether the said learned judge erred in not instructing the jury that if they believed the evidence of the witness Jasbec they must believe it wholly."

The Supreme Court for Alberta having dismissed this appeal, Mr. Justice Beck dissenting, on the ground that there had been misdirection at the trial which occasioned substantial wrong or miscarriage

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and that there should be a new trial, the appellant appealed to the Supreme Court of Canada.

The charge to the jury, by Mr. Justice Simmons, was as follows:—

"Gentlemen of the jury:—It is my duty to explain to you the law concerning the offence which is charged against the defendant here, and to explain to you the application of the law governing this offence in relation to the offence which is before you in so far as it may affect the guilt or innocence of the defendant Fritz Eberts. It is not necessary for me to define to you what murder is. You know pretty well what that means. But there are some specific definitions given which may possibly widen the meaning of the term murder from its common interpretation, and they are to this effect, that when a person goes out to commit some indictable offence, such as burglary or robbery, and if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence, such as burglary or robbery, or to facilitate the flight of an offender upon the commission or attempted commission thereof, and death ensues from such injury, that would be murder. So that you see a person might be guilty of murder in that sense, although he may not have a murderous intention in the common ordinary conception of that term. He may have started out to commit a common indictable offence and may have armed himself for that purpose, in order to assist in committing the offence or to assist in his escape.

"Now, in the present case the evidence on one branch of this is quite clear — that is, as to the death of the unfortunate young man. That is well localized as to the place and the time. There is the

evidence of Kroning, the brakeman, as to seeing the flash and hearing the report of a gun, and the evidence of two other witnesses who heard the noise sometime during the night — at least after twelve or one o'clock, and Pietro Amicarello being another; all identifying the time as being after twelve or one o'clock, and in the vicinity, according to Pietro Amicarello and Kroning, of between two o'clock and half past two. Kroning says it must have been about that time. The train was due to leave at 2.25 and it took a little time to pull up the slack, they just got under way when he heard the report and saw the flash, and the Italian says it was about twenty minutes after two when he looked at the time in the station. So that part of it seems to be pretty well localized as to the actual time, and that seems to be very important, and I may call your attention to it later on.

"Now, the next circumstances coming to light were the finding of the body by the Chinaman, and by Mr. Steeves and Mr. Haslett, and there was the examination of the body by the sergeant and by Dr. McKenzie and by Mr. Addison. I would like to call your attention particularly to the evidence of Mr. Addison, the undertaker. He described to you very minutely the condition of the body in relation to the wounds that had been received, all corroborative of the evidence of the other witnesses that they were fired at close range, burning the face and around the neck and shoulders and tearing the vital parts around the lungs and heart. Then Mr. Addison also gave evidence that there were bruises — a bruise on the shoulder and one on the fore-arm. Then he took out most of the shot, and one of the witnesses * * * took out the collar button. It is important for you to remember the condition

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of that collar button in regard to the suggestion that this was not ordinary shot. You may, if you wish, look at that collar button again, and that shot, and you may draw any inference therefrom as to the impact of the shot against any solid substance, having in view what happened to that collar button.

"Then the Royal North-West Mounted Police began an investigation around Frank with regard to guns, and apparently made a very full investigation of all the houses and the foreigners there, and visited the house of the accused and found the accused and his wife there and Jasbec and his wife there, and, in response to their request, the two guns are produced — a single barrelled gun produced by the defendant, which Sergeant Piper says was broken, and a Mauser rifle produced by Jasbec — the one which he says he brought up from Taber. Nothing referring particularly to this case seems to happen for some time after that, further than the inquest and the inquiries that may have been made in an attempt to ascertain who the parties were and who were responsible for it. Those seem to be the chief features of the case as regards the happenings with which the defendant here was not closely related.

"And, as you will have to determine upon the truthfulness or untruthfulness of the story told by the Jasbecs, to some extent in the way of corroboration, it is important to observe to what extent the story he tells may correspond with the facts as they have been related by these witnesses, especially in regard to the time of the injury or murder, and as to the manner in which it was inflicted.

"Then we have the evidence of Superintendent Primrose as to the size of the wads, associating them

with the 12-bore gun — and remember, in regard to that, it does not seem that the witness Jasbec had any particular opportunity of knowing that these particular facts would come to light — namely, that Kroning would see a flash at that particular time, or that a 12-bore wad would be found, or that the evidence in regard to the nature of the wound would be given in detail as it has been given by those who examined the bodies, that is, Mr. Addison, Mr. Primrose and the doctor.

"Now, then, the story told by Jasbec has to be examined very closely by you because it implicates himself in the doings of that night, and the Crown have charged him with this crime, and, therefore, I propose, for the purpose of this trial, to treat him as an accomplice. The result of that is, that you will apply a rule of evidence which I have mentioned before and will expect to have this evidence corroborated in material parts, for the very prudent safeguard that he may have an object in view, namely, self-interest, in telling a story that might be very beneficial to himself. The same might very well be applied to his wife's story. Although she is not a party to the unlawful acts of that evening she is Jasbec's wife, and the affection between husband and wife might make, or lead her to make, her evidence as favourable as possible to her husband, and, with that safeguard I have just mentioned, you will apply the rule as ordinarily applied, that there should be corroboration with regard to the death of the man and to the circumstances of the death. You have already had your attention called by me as to corroboration as to the time, which fairly well fits in with the time, if Jasbec's story is true. It was getting on to that time in the

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morning — somewhere around two o'clock. One witness described fairly well where the moon was when he came home about midnight, and the large mountain lies, according to the evidence, to the south and west of Frank, which must necessarily cause the moon to set earlier than it would do on the prairie, for instance.

"Now, another reason for scrutinizing the evidence of Jasbec carefully is that he admits he has been a criminal, and that he has helped to kill cattle, and he admits he was associated with people in Frank who were committing theft. He has told a story here, and has consistently adhered to it, which, if true, would put upon the defendant the onus of at least satisfying you that the story told by Jasbec was not a reliable one. He has been corroborated by his wife, and you may use that evidence for what it is worth, using the rule I have given you. His story is corroborated by Sergeant Piper as to the circumstances under which Piper visited the shacks on the Monday morning. Both families left Frank some time after that, and it would appear that certain things happened in the meantime which caused them some uneasiness, and they have been related to you, and you can draw whatever inference you think proper in that regard.

"I might call your attention to one fact that was referred to by Detective Egan as to the finding of a spot of blood on the window close to the place where the dead man was lying, and a pool of blood, all of which seems to lead to the inference that he must have died almost in his tracks.

"Now, you have those facts, and I propose now to examine them more particularly in relation to the story told by the defendant himself. It has been

pointed out to you in the address by counsel for the Crown, and quite properly, that while there is always under our administration of justice a presumption that a man is innocent until he is proved guilty, that is modified by another rule of evidence:—that there may come a time when the inculpatory facts may be so numerous and so strong in their bearing that the onus shifts on to him, then. That was really the form which this trial took. You had the evidence of a confessed accomplice in the burglary, and who was with him at the time of the shooting, if true, and you have a complete history given of their proceedings that night at the time they left the shack, and the defendant has recognized that, and he has gone into the witness-box and has told a story, and I must caution you, as to that, that you will apply the rule to his evidence, that it must be carefully scrutinized because of the self-interest he has — he is upon trial for his life — and he has recognized that he should give an explanation of what took place, and he has done so. He has said that, on the night in question, he was drunk; he does not remember when he went to bed. He corroborates Jasbec in the fact that he, Jasbec, and his wife were at his house that night. He does not say that he slept with Jasbec in the kitchen, but he says that in the morning he was in his bedroom with his wife; and his wife says the same thing, but she does not seem to be very clear as to how many nights she and Mrs. Jasbec slept in the bedroom. She said they did sleep there sometimes, and that Jasbec and her husband slept in the kitchen sometimes. So there seems to be very little clashing in their evidence, except as to the place of sleeping, up to the time that Jasbec says they set out. Jasbec and his wife do not deny that

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there was some drinking going on on Saturday, but they do not give any details about it, and they do not pretend to remember anything about it. Now, then, the story told by the defendant would require close scrutiny in regard to his actions in the meantime, in so far as the evidence divulges what they are. The evidence shews that when he was at Trail Creek, Montana, he became quite disturbed because his partner came and brought him news that a man resembling Jasbec had come there, and then he told him of the murder of the policeman — he told Kane — and also that he was afraid that this man purporting to be Jasbec might talk too much; that is Kane's version of it. Eberts gives as a reason for being worried about the big man, purporting to be Jasbec, that he would have a fight with him. You should examine that very closely. You may draw what inference you think fit as to whether he would be worried about Jasbec — the big man coming to Trail Creek — if the story that Eberts has told in the witness box is the true one; namely, that he was at home and asleep and had no knowledge of the murder other than what he might have heard afterwards. Then there is his statement when the policeman Collins and the policeman Gorman went to arrest him. He denies that *in toto*, and also the statement of Sergeant Piper as to what he said to him after Piper cautioned him. So you see that the defendant has put himself into this position — that he has placed his word against that of Constable Collins, and he has placed his word against that of Sergeant Piper, and he has given an explanation as to his uneasiness about Jasbec coming to Trail Creek, which you may draw an inference from such as you think proper. You have heard the whole of the evi-

dence, and if you come to the conclusion he did go out, as Jasbec says, that night and that that 12-bore double-barrelled shot gun of Jasbec's was taken with them, and that that was the instrument which caused the death of the policeman, Willmett, then you will consider that in relation to the explanation I have given you as to the law which applies to people who go out to commit an indictable offence and take firearms with them, and kill a man either in effecting the purpose of committing that offence, or in trying to escape.

"I am bound to say to you, and instruct you, that there seem to be only two conclusions you can come to, that is, a verdict of guilty of murder or a verdict of not guilty. I cannot see where you could consider the question of manslaughter at all, in view of the statement of Eberts himself. There is this to say also, that Jasbec after his arrest, at least very soon after, made up his mind to tell his story, which is practically the one which he has told to you. In regard to Eberts's wife, there does not seem to be very much in her evidence that contradicts the story of Jasbec and the story of Jasbec's wife, other than the question of where they slept and the question as to whether Eberts spoke to Mrs. Jasbec on the Sunday or not. In other respects, what she has said would largely coincide with the happenings that occurred around the house of Eberts, and around the shack of Jasbec on the Saturday and Sunday in question. It will be your duty, then, having regard to the explanation I have given of the law and the way in which you will proceed to treat the evidence, to come to a conclusion as to whether Jasbec's story of the happenings of that night, from the time they left the shack until the time they got back is substantially the true story, because,

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if it is, there is then no explanation from the defendant that would enable me to give you any other instructions than what I have given you; namely, to find a verdict of guilty against him, that is, if Jasbec's story — that they started out and went to the Canadian Pacific Railway freight sheds first, and then went around by P. Burns's store, and then around behind the Imperial Hotel, and that they had a gun with them, and that the accused asked for the gun and got it at the time they saw the shadow, or what they thought was the shadow, of a man and Jasbec heard the shot, and the other evidence given by these other people, that they heard a shot then — leaves it in the position that, if Jasbec's story is substantially true in regard to these important features of the happenings that night, then there is no alternative for you but to bring in a verdict of guilty.

"If there is a reasonable doubt in your mind — and the meaning to be attributed to that term 'reasonable doubt' was very well explained by counsel for the Crown, and the reference he gave of a very learned judge — I do not think I can improve on that — if you have a reasonable doubt you are entitled to give Fritz Eberts the benefit of that doubt.

"If there is anything you wish instructions on during your consideration of the matter you are to let me know and you will obtain it. You will also have access to the exhibits, if you wish them, during your consideration. You will now retire to consider your verdict."

MR. MACLEOD:—"Before the jury retires I wish you to instruct them on two or three matters. I wish your Lordship to instruct the jury that if they believe the

story of Jasbec or any part of it they must believe it wholly."

THE COURT:—"No."

MR. MACLEOD:—"I wish to read to your Lordship from Wills on Evidence (1) (reading): 'It is essential to justice that a confessional statement, if it be consistent, probable and uncontradicted should be taken together, and not distorted, or but partially adopted.' 'It is a rule of law,' said Lord Ellenborough, 'that when evidence is given of what a party has said or sworn, all of it is evidence (subject to the consideration of the jury, however, as to its truth), coming, as it does, in one entire form before them; but you may still judge as to what parts of the whole you can give credit; and also whether that part which appears to confirm and fix the charge does not outweight that which contains the exculpation. On the trial of a man for murder committed 24 years before, the principal inculpatory evidence consisted of his confession, which stated in substance that he was present at the murder, but went to the spot without any previous knowledge that a murder was intended and took no part in it. It was urged that the prisoner's concurrence must be presumed from his presence at the murder, but Mr. Justice Littledale held that the statement must be taken as a whole; and that so qualified it did not in fairness amount to an admission of the guilt of murder; and where the prisoner's declaration in which she asserted her innocence, was given in evidence, and there was evidence of other statements confessing guilt, the judge left the whole of the conflicting statements to the jury for their consideration.'"

(1) 6 ed., pp. 116, 117.

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"The point is this, if they believe the statement of Jasbec they must accept his whole statement."

THE COURT:—"With the qualifications, which I have warned them about which applies always to an accomplice, and that is the reason of the rule of evidence requiring corroboration of the evidence of an accomplice, because of the probability of the accomplice making the story favourable to himself."

MR. MACLEOD:—"Your Lordship has the whole statement of Jasbec before you, and I would ask you to address the jury that if they believe the whole statement of Jasbec then they must bring in a verdict of manslaughter."

THE COURT:—"If you wish to argue that after the jury retire you may do so. I have instructed the jury as to the rule of evidence applying as to an accomplice."

MR. NOLAN:—"And in the meantime I wish the jury to retire."

MR. MACLEOD:—"Your Lordship will not instruct the jury on that point?"

THE COURT:—"No."

MR. MACLEOD:—"I will ask you to instruct them, with regard to April 11th, 1908, that the jury must conclusively find that there were four persons in the Eberts house on that afternoon."

THE COURT:—"I have referred to that in my address to them."

MR. MACLEOD:—"Notwithstanding the evidence of Jasbec and the wife they must conclusively find under the evidence that there were four persons there in the afternoon."

THE COURT:—"And what bearing has that upon the case?"

MR. MACLEOD:—"It affects the credibility of the evidence."

THE COURT:—"That is a question within the competence of the jury."

MR. MACLEOD:—"There is a rule of law."

THE COURT:—"It is a question of fact."

MR. MACLEOD:—"But where two persons swear to a negative and two persons swear to a positive the positive must prevail."

MR. NOLAN:—"But I would ask that the jury retire now."

THE COURT:—"Any other application?"

MR. MACLEOD:—"I would like you to direct the jury that the rule may also be considered that, to justify conviction in a criminal case, the evidence of guilt must not only be a balance of probability, but it must also satisfy the jury that the accused is guilty. They cannot balance probabilities. I would ask you to instruct the jury that the evidence must be such as to exclude the hypothesis of innocence; the evidence to convict must be such as to exclude the presumption of innocence or hypothesis of innocence."

THE COURT:—"The rule was well known, and has been explained by me to the jury, that if they believe beyond a reasonable doubt, as reasonable men, using the common sense and intellect that reasonable men use in the affairs of life, especially in relation to serious matters — using that common sense — if they as reasonable men believe that the story told by Jasbec is the true one, there is no alternative for them but to bring in the verdict I have indicated — the verdict of guilty; if they have a reasonable doubt as to the truth of that story, so far as it implicates Eberts, they will give Eberts the benefit of that reasonable doubt."

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J. W. McDonald and *Colin MacLeod,* for the appellant. It should have been left to the jury to decide as between manslaughter and murder; these should have been distinguished. *Reg.* v. *Brennan*(1); *Rex* v. *Wong On*(2); *Rex* v. *Scherf*(3); *Rex* v. *Daley*(4). In *Gilbert* v. *The King*(5), there was no evidence whatever to support a verdict of manslaughter; the evidence was that the shooting was an accident. In the present case there is evidence upon which the jury might reasonably have found manslaughter; the circumstances which might have justified a verdict of manslaughter and which are detailed in the judgment of Mr. Justice Beck(6). The trial judge, in his charge, passes over these points, and dismisses the question of manslaughter. It was the right and privilege of the jury to be instructed and directed by the learned trial judge, and it was their duty to follow the explicit instructions which he gave. These instructions made it impossible for them to find a verdict of manslaughter.

The learned judge directs the jury that the possibility of a verdict of manslaughter is wholly excluded by the statement of Eberts himself that he was not present at the killing of Willmett, but in fact that he was at his home on the night in question. He does not say that there is not evidence upon which they could reasonably find Eberts guilty of the reduced crime if they should find him guilty at all, but merely that his own story excluded such finding. The effect of the direction is that though there may be, in the evidence given by other persons, reason to believe the ex-

(1) 4 Can. Cr. Cas. 41.
(2) 8 Can. Cr. Cas. 423.
(3) 13 Can. Cr. Cas. 382.
(4) 39 N.B. Rep. 411.
(5) 38 Can. S.C.R. 284.
(6) 2 West. W.R. 542, at pp. 545 *et seq.*

istence of circumstances justifying a verdict of manslaughter, yet as Eberts said he was at his home that night, these circumstances could not exist. In other words, in this respect he said that the evidence of Eberts must prevail against all other evidence, and for the purpose of excluding the possibility of manslaughter they must give full credence to the story of Eberts in his attempt to prove an *alibi*. The learned Chief Justice, who delivered the judgment of the court *en banc*, apparently does not agree with this view. Whether Eberts swore falsely or not is immaterial on the point of manslaughter. If he were guilty of perjury, he was not, therefore, necessarily, guilty of murder. *Rex* v. *Carr*(1). By modern authority all questions as to motive, intent, heat of blood, etc., must be left to the jury and should not be dealt with as propositions of law. *The Queen* v. *McDowell*(2), at page 115. All such questions were excluded entirely from the consideration of the jury. *Reg.* v. *Brennan*(3), at page 674; *Reg.* v. *Kirkham*(4); *Reg.* v. *Sherwood* (5); *Reg.* v. *Smith*(6).

The learned trial judge directed the jury: "When a person goes out to commit some indictable offence such as burglary or robbery and if he mean to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence such as burglary or robbery or to facilitate the flight of an offender upon the commission or attempted commission thereof, and death ensues from such injury, that would be murder." This is doubtless a correct statement of law as laid down in section 260 of the Criminal Code,

(1) 2 Cohen Cr. App. 317.
(2) 25 U.C.Q.B. 108.
(3) 27 O.R. 659.
(4) 8 C. & P. 115.
(5) 1 C. & K. 556.
(6) 4 F. & F. 1066.

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but it could not but have misled the jury. The learned judge evidently meant the jury to believe that the accused had been attempting to commit burglary, whereas the only evidence is that the accused and Jasbec attempted to gain an entrance to the Canadian Pacific Railway freight shed and the meatshop of P. Burns. This is shop breaking and not burglary, and the accused cannot be brought under section 260, though the judge so directed the jury, and that that section applied. Even if the section did apply, the judge should have asked the jury to find whether or not the shot was fired with a view to facilitate flight.

There were other circumstances which might have reduced the crime to manslaughter that were not referred to by the judge and which the jury were not asked to pass upon. If the accused had abandoned his criminal intent and was on the way home, and Willmett, who was not in uniform, attempted to arrest him, the arrest was unlawful and accused would not be guilty of murder. *Rex* v. *Addis*(1); *Reg.* v. *Carey*(2); *Reg.* v. *Chapman*(3).

The judge was in error in instructing the jury as to corroboration: in instructing them that Jasbec was corroborated by his wife: *Rex* v. *Neal*(4); and in instructing them that the evidence of Kroning and Amicarello was corroborative: Taylor on Evidence (10 ed.), secs. 969-970. It is immaterial that there may have been other evidence of corroboration. It is impossible to say what effect such a direction may have had in bringing the jury to their conclusion: *Rex* v. *Everest*(5); *Allen* v. *The King*(6).

(1) 6 C. & P. 388.
(2) 14 Cox C.C. 214.
(3) 12 Cox C.C. 4.
(4) 7 C. & P. 168.
(5) 2 Cohen Cr. App. 130.
(6) 44 Can. S.C.R. 331.

We also refer to *Rex* v. *Blythe*(1); *Rex* v. *Ellson* (2); *Rex* v. *Stoddart*(3).

E. F. B. Johnston K.C. and *W. M. Campbell* for the respondent, argued that the objections now urged had not been taken in the courts below; that the only questions open on an appeal to the Supreme Court of Canada were such as related to the dissent in the provincial court of appeal, and that, on a defence rested entirely on *alibi* at the trial, the appellant could not assume the position that there ought to have been a conviction for manslaughter only.

The following authorities were cited on behalf of the respondent: Criminal Code, secs. 53, 261, 1019; *Rex* v. *Philpot*(4); *Rex* v. *Barrett*(5); *Reg.* v. *Fitzgibbon*(6); *Gilbert* v. *The King*(7); *Rex* v. *Scholey* (8).

THE CHIEF JUSTICE.—I concur in the opinion stated by Mr. Justice Idington.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of Alberta, sitting *en banc,* refusing, Mr. Justice Beck dissenting, to grant a new trial to the prisoner who had been tried and convicted of murder.

The application for a new trial was based upon the contention that the trial judge should have instructed the jury that if they believed Jasbec's account of the

(1) 19 Ont. L.R. 386, at p. 391.
(2) 28 Times L.R. 1.
(3) 2 Cohen Cr. App. 217.
(4) 7 Cohen Cr. App. 140.
(5) 14 Can. Cr. Cas. 465.
(6) 7 Cohen Cr. Cas. 264.
(7) 38 Can. S.C.R. 284.
(8) 3 Cohen Cr. App. 183.

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shooting as detailed to him by the prisoner immediately after it took place, it was open to them to find the prisoner guilty of manslaughter only, and that the trial judge had charged the jury they were bound either to acquit the prisoner altogether or find him guilty of murder.

Section 261 of the Code reads as follows:—

> Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

The question argued before us and which we are asked by the prisoner's counsel to decide in the affirmative, is whether or not, under the evidence given by Jasbec of the conversation he had with the prisoner immediately after the latter shot the deceased, it was open to the jury to reduce the crime with which the prisoner was charged from murder to manslaughter.

No such contention was made with respect to the conversation given in evidence by Jasbec's wife. From her version one of two conclusions would have to be drawn, either that in shooting the deceased as and when he did the prisoner was guilty of murder, or that he shot deceased in self-defence and should be acquitted. It would not be possible for counsel successfully to contend, under Mrs. Jasbec's version of the prisoner's statement of the shooting, that a verdict of manslaughter could be rendered.

But counsel did contend that, on Jasbec's version of prisoner's statement, the jury might have found him guilty of manslaughter only. I do not think so. I do not think, in the first place, that it was open to the jury, on the evidence, to find that the prisoner had abandoned the criminal intent to steal with which he started out that night. It might be possible for some

such finding to be made with regard to Jasbec himself. Both during the unsuccessful attempt to break into Burns's store, and afterwards while they were standing in the street in the rear of the bank, Jasbec suggested to the prisoner the abandonment of the criminal enterprise which they had jointly entered upon and a return home. He further said that when the prisoner took the gun from him and went away with it, with the object of meeting the man whose shadow they had seen, he, Jasbec, had made up his mind to return home. But there was no evidence justifying any such finding as regards the prisoner.

Then as to the fact of the deceased who was shot being a secret-police officer, and believed by the prisoner to have been such when he shot him, I cannot see where there can be any doubt. The prisoner said to Jasbec just after the shooting, and while they were returning to their shack, that he guessed the man he shot was one of the secret-police, but was not sure of it. Probably not; absolute certain knowledge he hardly could have had; but he *believed* the man was a secret-police officer.

The only "provocation" suggested was that stated by the prisoner to Jasbec that the man who, he guessed, was one of the secret-police, having found him at the time of night and in the place he did, pointed a pistol towards him told him to "go to hell." Nothing at all is said about the prisoner being aroused to a "heat of passion" by the action of the police officer. Not a word from which any such state of mind could be inferred. On the contrary, the prisoner told Jasbec that he raised the gun he carried and shot the man dead. Looking at all the circumstances and facts surrounding the unfortunate shooting of the

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officer, as detailed in the evidence, I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while "in the heat of passion caused by sudden provocation."

I think, reading the charge of the trial judge as a whole and in the light of all the facts given in evidence, it cannot be said that his direction to the jury that they must either acquit the prisoner or find him guilty of murder, occasioned such a substantial wrong or miscarriage on the trial as would give us jurisdiction to set aside the conviction or direct a new trial.

I think the judgment of the court below was right and that the appeal should be dismissed.

IDINGTON J.—The appellant and one Jasbec being engaged about one or two o'clock a.m., in a joint expedition for purposes of stealing in Frank, in Alberta, at a time when the miners there were on strike, carried with them a gun, and having tried several places unsuccessfully, saw a man, or shadow of one, at some distance. The appellant got the gun from Jasbec and started with it to find out who the man was, suggesting it was possibly an acquaintance come to scare them. He went one route or direction and Jasbec another, as agreed between them. Jasbec tells this story and proceeds to say he concluded to go home and had gone some short distance when he heard a shot fired, and in a few minutes heard running behind him the appellant with the gun. Then both ran till near appellant's shack.

The following evidence of Jasbec contains the story as there and then recited by appellant:—

Q. Did you have any talk with him ?

A. And then I asked him: "What is the matter ?" And he said: "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and he pointed a revolver at me and said, 'What are you doing here, go to hell,' and I thought he drawed his gun and fired at him."

Q. Who did ?

A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it ? What was next said by either of you after that ? What was next said ? Did you ask him anything then ? He said he drew his gun and fired at him ? He said he drew his gun up and fired at the man ?

A. And I said: "What became of him ?" and he said he shot him — he shot the fellow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time ?

A. Yes.

Q. What did he say ?

A. He said: "I guess it is one of the secret-police, but I am not sure about it." That is what he said.

The appellant gave evidence on his own behalf and denied this whole story of Jasbec and declared he had never been out of his house on the night in question.

The story of Jasbec so fitted into the surrounding facts and circumstances as to corroborate it and was so supported by evidence of others that there could be no doubt of appellant having shot one of the secret-police found dead next morning with a pistol near his dead hand.

The contention set up is that it might have been the result of a quarrel or such other facts and circumstances as would in law have reduced the culpable homicide from murder to manslaughter.

The learned trial judge refused to countenance this claim when counsel for the accused asked him to direct the jury that under such facts as in evidence the offence *must,* if committed, be taken to be manslaughter. He directed the jury that there did not

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seem to be any ground for a verdict of manslaughter and it seemed as if there must be a verdict of guilty of murder, or not guilty.

The court of appeal dismissed an application made to it on this and other grounds. Mr. Justice Beck dissented, holding that the jury ought to have been directed as to what would constitute manslaughter, and to consider whether or not, if the accused were guilty of anything, a verdict of manslaughter might not be the proper verdict.

It seems to me the learned trial judge and the majority of the court were right in the view taken by them.

To reduce culpable homicide to manslaughter requires, in the class of manslaughter cases suggested herein, evidence of roused passions.

The man, whose passions we are asked to find might have been so aroused, has by his own oath denied the fact and left in his unsworn story nothing to rest such a finding upon. Moreover, his remarkable career as told by himself seemed to demonstrate that he was hardly the sort of man to be roused to passion by the sight of a revolver or the sound of rough language. Indeed, the language he used in relating this incident now in question to Mrs. Jasbec slightly varies from above and indicates he felt bound to shoot or was proud of having shot first.

There is nothing but mere surmise or conjecture on which to rest such a finding as is claimed to have been legally possible.

The discarding or overlooking such a defence to a charge of killing a man he knew or believed to be a policeman, properly armed to deal with midnight prowlers carrying guns, is hardly a case where we

can, in the language of section 1019, of the Criminal Code, find that "substantial wrong or miscarriage of justice" entitling us to interfere.

A verdict of that kind in such a case would have been a travesty of justice and made of the administration of the law a farce.

No jury could properly return such a verdict. It would, therefore, have been idle or worse for the learned trial judge to have entered upon an exposition of the law bearing on manslaughter and thus needlessly perplexed the jury.

It might have been argued in such a case, but it was not in this, that a man faced with a revolver was put in fear of his life, and, therefore, shooting first, was entitled to an acquittal. But where a case of manslaughter, which is supposed to fall within what section 261 of the Criminal Code defines, can find place under the very peculiar circumstances of this case, I am at a loss to understand.

If the learned trial judge had been asked to direct an acquittal on the ground that the man, having reasonable apprehension of death or grievous bodily harm, had taken the life of another, he should have explained the law bearing on the subject and left that to the jury.

True, the circumstances would not have seemed a very promising foundation to dwell upon such an issue, but it was the only possible issue that could have been raised on such facts as put in evidence.

The appeal should be dismissed.

As a matter of courtesy due to a man on an appeal for his life we heard argument about want of corroboration, which, I submit, needs no further observation than this: The gun found with the pri-

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soner, the wad fitted for it found in and with the body of the deceased and a mass of evidence that connected appellant therewith (quite independent of Jasbec and his story), if well marshalled and fitted together and carefully considered might have spared us that argument.

But I may add that it is doubtful if anything except the only point upon which a judicial dissent in the court below appeared in judgment can be brought here.

DUFF J. (dissenting).—I think there should be a new trial. It appears to me that the effect of the learned trial judge's charge was to withdraw from the jury evidence which ought to have been considered by them and which if considered by them might not improperly have given rise to real doubts as to whether the prisoner was guilty of the offence of which he was convicted in arriving at their verdict.

The main facts are stated in the judgments in the court below and I shall refer to them only in so far as is necessary to a clear statement of the ground upon which I think the verdict should not be permitted to stand. The prisoner was convicted of murder. The homicide occurred at Frank, Alberta, on the 12th April, 1908. The trial took place four years afterwards, in April, 1912. The chief witnesses as against the accused were one Jasbec and Jasbec's wife. Jasbec says that, on the night in question, he and Eberts set out from a shack on the outskirts of Frank intending to get food by stealing; and that, abandoning a projected attempt on the Canadian Pacific Railway freight sheds and a partly executed plan of entering Burns's butcher shop, they gave up the expe-

dition and started for home. On the way home noticing the outlines of a man near the Imperial Hotel who seemed to disappear "behind the buildings" Eberts (so Jasbec's story runs) said, "that I bet you is Jan" (meaning a common companion Jabusick with whom they had been abroad before on similar expeditions), "give me the gun and I will go and see who it is;" and they separated, Eberts taking Jasbec's shot-gun and setting out towards the figure they had observed, while Jasbec proceeded on his way homewards. Shortly afterwards Jasbec says he heard a shot fired, the sound appearing to come from the direction in which Eberts had gone. Later Eberts joined him and they reached their shack together. The next day the unfortunate deceased, a constable of the Royal North-West Mounted Police, was found in the vicinity indicated by this evidence obviously killed by a discharge from a shot-gun. These facts and the evidence given by Jasbec and Jasbec's wife of statements made by Eberts constitute the substance of the case made by the Crown against the accused. The accused gave evidence in his own behalf and his defence was an *alibi*. The learned trial judge in effect instructed the jury that if they believed Jasbec's story (in certain features of it which he specified), then they had no alternative but to convict him of murder.

The following passages give the substance of the charge so far as material:—

But there are some specific definitions given which may possibly widen the meaning of the term murder from its common interpretation, and they are to this effect, *that when a person goes out to commit some indictable offences, such as burglary or robbery, and if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence, such as burglary or robbery, or to facilitate the flight of an offender upon the commission or attempted commission thereof and death ensues from such injury, that would be*

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murder. So that you see a person might be guilty of murder in that sense, although he may not have had a murderous intention in the common ordinary conception of that term. He may have started out to commit a common indictable offence and may have armed himself for that purpose, in order to assist in committing the offence or to assist in his escape.

* * * * *

It has been pointed out to you in the address by counsel for the Crown, and quite properly, that while there is always under our administration of justice a presumption that a man is innocent until he is proved guilty, that is modified by another rule of evidence — *that there may come a time when the inculpatory facts, may be so numerous and so strong in their hearing that the onus shifts on to him, then. That was really the form which this trial took.* You had the evidence of a confessed accomplice in the burglary and who was with him at the time of the shooting, if true, and you have a complete history given of their proceedings that night at the time they left the shack, and the defendant has recognized that, and he has gone into the witness box and has told a story.

* * * * *

He has said that on the night in question he was drunk; he does not remember when he went to bed. He corroborates Jasbec in the fact that he, Jasbec, and his wife were at his house that night. He does not say that he slept with Jasbec in the kitchen, but he says that in the morning he was in his bedroom with his wife, and his wife says the same thing.

* * * * *

You have heard the whole of the evidence, and if you come to the conclusion he did go out, as Jasbec says, that night and that that 12-bore double-barrelled shotgun of Jasbec's was taken with them and that that was the instrument which caused the death of the policeman, Willmett, then you will consider that, in relation to the explanation I have given you as to the law which applies to people who go out and commit an indictable offence and take firearms with them and kill a man either in effecting the purpose of committing that offence, or in trying to escape.

I am bound to say to you and instruct you that there seem to be only two conclusions you can come to, that is, a verdict of guilty of murder or a verdict of not guilty. I cannot see where you could consider the question of manslaughter at all in view of the statement of Eberts himself.

* * * * *

It will be your duty then, having regard to the explanation I have given of the law and the way in which you will proceed to treat the evidence, to come to a conclusion as to whether Jasbec's story of the happenings of that night, from the time they left the shack until the time they got back is substantially the true story, because if it is

there is then no explanation from the defendant that would enable me to give you any other instructions than what I have given you, namely, to find a verdict of guilty against him, that is, *if Jasbec's story, that they started out and went to the Canadian Pacific Railway freight sheds first and then went around by P. Burns's store, and then around behind the Imperial Hotel, and that they had a gun with them and that the accused asked for the gun and got it at the time they saw the shadow, or what they thought was the shadow of a man, and Jasbec heard the shot, and the other evidence given by these other people, that they heard a shot* then — leaves it in the position that, if Jasbec's story is substantially true in regard *to these important features of the happenings that night — then there is no alternative for you but to bring in a verdict of guilty.*

* * * * *

THE COURT:—The rule was well known, and has been explained by me to the jury that if they believe beyond a reasonable doubt, as reasonable men using the common sense and intellect that reasonable men use in the affairs of life, especially in relation to serious matters — using that common sense, — if they, *as reasonable men, believe that the story told by Jasbec is the true one, there is no alternative for them but to bring in the verdict I have indicated — the verdict of guilty:* if they have a reasonable doubt *as to the truth of that story, so far as it implicates Eberts, they will give Eberts the benefit of that reasonable doubt.*

It cannot be doubted that, from these passages, the jury would take the view that their sole task was to decide whether they should believe Jasbec's story in respect of the incidents specified by the learned judge himself, and, if they did so, it was their duty to find a verdict of guilty.

I shall presently call attention to the passages in the evidence of Jasbec and his wife which I think the jury ought to have been asked to consider but, in the meantime, it is convenient to observe that the charge of the learned trial judge seems calculated to mislead the jury in the important point of the burden of proof. The onus was on the Crown to establish the guilt of the prisoner, to produce evidence, that is to say, which should satisfy the jury beyond any real doubt that the prisoner was guilty of murder. It is

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quite true that the proof of homicide alone by the prisoner might constitute a *primâ facie* case, and a very strong *primâ facie* case against him. But if, in proving the homicide, evidence of its circumstances and incidents was given of such a character as properly to raise in the minds of the jury a real doubt as to the prisoner's guilt, it would then be their duty to acquit. In criminal cases (it is needless to observe) the degree of certitude at which a jury ought to arrive before finding the issue of guilty or not guilty against the accused is higher than that which is measured by the criterion of the preponderance of evidence or balance of probability applied in civil cases. In *Rex* v. *Stoddart*(1), at pages 243 and 244, the principles governing the incidence of the burden of proof in criminal trials are stated in these words:—

> It seems to the court that the jury ought to have been told that the prosecution having given *primâ facie* evidence from which the guilt of the defendant might be presumed, and which, therefore, called for explanation by the defendant, the jury ought to consider the evidence upon both sides, and if, upon a review of the whole of the evidence, they were satisfied that the prosecution had made out the case that the defendant Stoddart was a party to the conspiracy, they should convict him, but that, if their minds were left in a state of doubt, they ought to acquit him, as the burden of proving the defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing-up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing-up cannot be said to qualify the specific direction to which attention has been called. In the opinion of the court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the court is of opinion that there was a substantial misdirection.

(1) 2 Cohen Cr. App. 217.

The learned trial judge seems, (as appears from the extracts quoted from his charge,) to have thought that if the jury were once convinced that the prisoner was the author of the homicide that was the end of the case, because evidence of facts justifying his act or reducing his crime to manslaughter must come from the prisoner alone. That, of course, was equivalent to withdrawing from the jury all the circumstances disclosed by the evidence of Jasbec or Jasbec's wife bearing upon the degree of culpability which ought to be attached to the prisoner's act, assuming the homicide to have been his act.

Before going into that evidence, (of Jasbec and his wife,) there are two material observations.

1st. The prisoner's statements to these two witnesses having been put in evidence by the Crown they became evidence in his favour as well as against him. In *Rex* v. *Higgins*(1), Parke J. said:—

> Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it.

It was for the jury to say how much of the prisoner's statement they accepted as true, but the Crown having offered the statement and got it before the jury it was the duty of the jury to consider the statement as a whole, and the consideration of it as a whole could not properly be withdrawn from them; 2ndly. It was for the jury to say how much they were to believe of the accounts which Jasbec and his wife gave of the prisoner's statements to them. They

(1) 3 C. & P. 603.

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might believe parts of those accounts, reject other parts.

The jurors are not bound to believe the evidence of any witness; they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him. *Per* Lord Blackburn, in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1), at page 1201.

The point I have to discuss is whether, on any reasonable view of the evidence of Jasbec and his wife, (bearing in mind these principles,) the minds of the jury might, under proper instruction from the court, have been brought into a real state of doubt as to the guilt of the prisoner. Mrs. Jasbec's account of Eberts's statement is as follows:—

Fritz Eberts said he was out with my husband that night, but he got bad luck; *when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say, "Go to hell," but he came before and he shoot.*

Q. Who shoot ?

A. Fritz Eberts shoot.

Q. Shoot who ?

A. Shoot the policeman.

Q. Do you remember anything else ?

A. He says, "Good I kill him right away — it is good that I kill him." He said that, too.

Q. Is there anything else you remember ? I know it is a long time ago. Did you have any other conversation with Eberts and his wife, when they were together, or was that the only time ?

A. That was the only time.

Q. That was the only time Eberts spoke to you about the policeman ?

A. Yes.

Q. That was on *the Sunday that you heard of it ?*

A. *Yes.*

Q. And had you *already heard that the policeman was killed at that time or not ?*

A. *Yes; I heard it all right.*

(1) 3 App. Cas. 1155.

Jasbec's account is this:—

Q. Did you have any talk with him ?

A. And then I asked him what is the matter. And he said: "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and *he pointed a revolver at me and said: What are you doing here, go to hell,' and I thought he drawed his gun up and fired at him.*"

Q. Who did ?

A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it ? What was next said by either of you after that ? What was next said ? Did you ask him anything then ? He said he drew his gun and fired at him ? He said he drew his gun up and fired at the man ?

A. And I said: "What became of him ?" and he said he shot him — he shot the follow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time ?

A. Yes.

Q. What did he say ?

A. He said: "I guess it is one of the secret-police, but I am not sure about it." That is what he said.

I shall assume for the moment that this evidence was evidence which the jury ought to have considered. On that assumption the trial judge would, of course, have instructed the jury that the first question to which they ought to apply their minds was how much of these two conversations really occurred; how far are the statements attributed to Eberts to be ascribed to him ? Both witnesses were speaking of conversations which had occurred four years before. Jasbec himself had been under arrest for five months and having regard to the suspicions attaching to him, (it was his gun, it will be remembered, from which the shot was alleged to have been fired,) a jury would be acting wisely in examining his testimony with critical care, even with suspicion, and no lawyer would, of course, dispute that the question of what Eberts did really say in the course of these conversations was a

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question exclusively within the province of the jury. Did Eberts, for example, say to Jasbec, "I guess it is one of the secret-police ?" Did he, in talking to Mrs. Jasbec, express satisfaction in having killed a police officer ? At the preliminary hearing Mrs. Jasbec had not recalled this part of the conversation. It is quite within the bounds of reasonable possibility that the jury might have rejected this part of the story altogether; or may have felt it to be of too doubtful credit to be acted on with safety. Assuming them to have reached that conclusion, let us examine the effect of these statements, in the light of the other evidence placed before the jury by the Crown, to see if there is any substantial foundation in them for the suggestion that the prisoner acted under such provocation or such reasonable fear of harm as to make it proper that the jury's attention should be directed to them.

There was, I may repeat, abundance of evidence from which the jury might have reached the conclusion that, when they saw the figure of the man who was shot, they had abandoned their criminal project and were on their way home. However little such a conclusion may commend itself to one's own judgment, Jasbec's own evidence is perfectly clear upon the point; and Jasbec had been put forward by the Crown as a credible witness. In his cross-examination, he says:—

Q. When you told Eberts that you had better go home Eberts agreed to go ?
A. Yes.
Q. And he put the screw back in the door ?
A. Yes.
Q. And you started for home ?
A. Yes.
Q. And he agreed to do that ?
A. Yes.

This is entirely consistent with the testimony given by him on his examination in chief. Again, his evidence is precise to the effect that Eberts thought the man they had seen was their friend Jan. If the jury accepted this part of Jasbec's testimony the situation they would have to consider was this — Eberts in these circumstances setting out to accost his friend Jan. suddenly meeting a stranger who, to use the language of the wife, "takes a revolver and put it right in his face," and Eberts shooting. These are the bald facts presented by this story. But there is another, and a most important piece of evidence, touching the state of Eberts's mind, furnished by Eberts's statement to Mrs. Jasbec, as repeated by her. Her report of Eberts's words is this:—

> Fritz Eberts said he was out with my husband that night, but he got bad luck; when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say, *"Go to hell," but he come before and he shoot.*

There can be no possible doubt that if the jury believed these words to have been used by Eberts they were entitled to regard them as indicating that Eberts acted in response to and in defence against a sudden assault with a pistol. A good deal was made on the argument of the exclamation, "Go to hell." But the effect of such an exclamation upon a man in Eberts's position would depend wholly upon the attitude of the person uttering it, and it is to be observed, moreover, that Jasbec admitted upon cross-examination that it was not until after he had told his story to the police that he recalled the use of this expression. The jury might, in the circumstances, consider this part of the evidence to be negli-

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gible. The fact, it may be added, that there were lawless, not to say desperate, men about is a circumstance which weighs as much at least in favour of the suggestions made on behalf of the prisoner as against him.

Weighing all the relevant considerations I am unable to convince myself that a jury properly instructed might not reasonably have taken a view of this evidence which would afford a foundation for real doubt as to the propriety of convicting the prisoner of the capital offence. I take it to be indisputable that, where a homicide follows instantaneously upon acts which may be a sufficient provocation to take the act of the accused out of the category of murder, it is a question of fact for the jury whether in the particular case there was such provocation. Criminal Code, sec. 261. It is said that there is no evidence here of passion; but, where provocation is proved, is it to be said that a jury is bound to convict of murder, as a matter of law, in the absence of express evidence of passion outside of the act of homicide itself? That is an impossible proposition. If the circumstances are such as legitimately to raise in the minds of the jury a real doubt as to the presence of malice, in the legal sense, then it is the duty of the jury not to convict of murder. Is it to be laid down as a proposition of law that the presenting of a pistol, in such circumstances as those we are considering, cannot properly afford a foundation for such a doubt? The case is perhaps stronger in support of the suggestion that the appellant acted in reasonable fear of bodily harm. A court of appeal would, however, be assuming a very grave responsibility, if, finding in the record, evidence of circum-

stances which ought to have been considered by the jury as bearing upon the question whether the accused had acted in self-defence in response to a sudden assault, it should say, as a matter of law, that these circumstances could afford no basis for a defence on the ground of provocation. To draw the line between the effect of acts and words such as those attributed to the unfortunate victim in producing such a state of passion as would constitute provocation within the meaning of the law and their effect in producing a reasonable fear of bodily harm such as would afford a ground for justification would be a feat of some difficulty, and one which a court of appeal could rarely attempt with safety.

I suppose, indeed, that no one would argue that these circumstances ought not to have been considered by the jury had it not been for the fact that Eberts himself went into the witness box and denied all knowledge of the facts alleged against him. That he did so is undoubtedly a circumstance which would tell powerfully with any tribunal, and properly so, of course, against the defence now suggested. But I am quite unable to bring my mind to the conclusion that the weight to be attributed to that circumstance was not altogether a matter for the consideration of the jury.

Two points remain. As to the suggestion that Eberts's statements point to action in self-defence and not to action as a result of provocation and that, since the learned judge was asked to reserve a case only on the latter point, it is not open to us to afford any relief, even assuming the prisoner to have been deprived of the benefit of a defence fairly open on the evidence — it will be unnecessary to repeat what I

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have said as to the bearing of the circumstances in question upon the defence of manslaughter. But there is a further observation to be made. The learned judge, as we have seen, ruled in the most unmistakeable way that if the jury found the prisoner was the author of the homicide then it was their duty to convict of murder; and the necessary effect of that ruling was to withdraw from the jury all considerations arising upon the prisoner's statements to Jasbec and his wife. He did not tell the jury that on the whole case they must convict of murder or acquit. He told them in effect that if they found the prisoner had killed the deceased it was their duty to convict of murder. The statement of a case then, with regard to manslaughter, in effect would raise the substantial question I have been discussing, namely, whether assuming the prisoner to be the author of the homicide there was any ground upon which a jury might reasonably entertain a doubt as to whether he was guilty of murder.

The remaining question is whether it appears, in the language of section 1019 of the Criminal Code, that there was any "substantial wrong or miscarriage of justice." It is contended by Mr. Johnson that the prisoner having deliberately elected to stand upon an *alibi* cannot avail himself of a defence which is open upon the evidence adduced by the Crown, but which assumes his complicity in the homicide. In civil cases it is a rule generally acted upon that, in order to prevent litigation going on forever, a party who deliberately elects at the trial to fight his case out upon one issue and gets beaten upon it cannot raise on appeal a new and totally different issue, (which he did not put before the jury,) although it should be open upon both the pleadings and the evidence;

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Browne v. *Dunn*(1). I should desire to consider the question long and carefully before committing myself to such a proposition as applied to prosecutions for criminal and especially for capital offences. It is not easy to reconcile this contention with the rule laid down in *Reg.* v. *Gibson*(2), *per* Mathew J., at p. 543:—

> We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not,

In any case it has no application here. It was stated in the argument by counsel for the prisoner and not disputed that the issue of manslaughter was fully placed before the jury by counsel, and, indeed, the suggestion that it was not would be incredible. Then it is said that the evidence, as a whole, as it appears upon the record is convincing of the prisoner's guilt, and that, since we can see that he was rightly convicted, we are bound to hold that there had been no "substantial wrong or miscarriage." I cannot agree. The construction of these words was authoritatively settled eighteen years ago by the Privy Council in *Makin* v. *Attorney-General for New South Wales*(3). Apart altogether from the binding force of the decision as an authority, the reasoning of Lord Herschell at pages 69 and 70 is complete and conclusive. This is the passage:—

> The point of law involved is, whether where the judge who tries a case reserves for the opinion of the court the question whether evidence was improperly admitted, and the court comes to the conclusion that it was not legally admissible, the court can, nevertheless, affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.
>
> It was admitted that it would not be competent for the court

(1) 6 R. 67.

(2) 18 Q.B.D. 537.

(3) [1894] A.C. 57.

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to take this course at common law, but it was contended that section 423 of the "Criminal Law (Amendment) Act, 1883," (46 Vict. No. 17) empowered, if even it did not compel the court to do so. That section is in these terms:—

"The judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the judges of the Supreme Court, who shall determine the questions and may affirm, amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that the person convicted ought not to have been convicted or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

Reliance was, of course, placed upon the language of the proviso. It was said that if, without the inadmissible evidence, there were evidence sufficient to sustain the verdict, and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence — that is to say, what the law regards as evidence — established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. The judges are, in truth, substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much-cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the court might, under such circumstances, be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend, in their Lordship's opinion, to shew that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there

has been no substantial wrong or miscarriage of justice where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

In their Lordships' opinion, substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

His Lordship is here dealing, of course, only with the case in which inadmissible evidence has been admitted and has gone before the jury. His observations, however, seem to apply with equal force to the case of a misdirection in consequence of which relevant evidence has been withdrawn from the consideration of the jury which might, under a proper instruction and not unreasonably, bring their minds into a state of doubt as to the propriety of the verdict at which they ultimately arrived. Such a misdirection is error that, (since it deprives the accused of his constitutional right to have submitted to the decision of a jury all the defences open to him on any reasonable view of the evidence,) can only be corrected by setting aside the verdict.

ANGLIN and BRODEUR JJ. concurred in the opinion stated by Mr. Justice Davies.

Appeal dismissed.

Solicitors for the appellant: *Macleod & Gray.*

Solicitor for the respondent: *W. M. Campbell.*