1947

*June 2, 3, 4.
*June 18.

JOSEPH TAYLOR.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial—Evidence—Charge of murder—Alleged misdirection in trial judge's charge to jury—Provocation (Cr. Code, R.S.C. 1927, c. 36, s. 261; reduction of murder to manslaughter)—"Insult"—Drunkenness of accused as matter for consideration with regard to his acting on the "wrongful act or insult"—Onus of proof as to defences of drunkenness, provocation.

Conviction of appellant of the murder of his wife was affirmed by the Court of Appeal for Ontario, [1947] O.R. 332, Roach J. A. dissenting (holding there should be a new trial) on grounds, (1) that there was misdirection and non-direction in the trial judge's charge to the jury with reference to the defence of provocation, as a result of which the full theory of the defence with respect to provocation was not stated by him to the jury; (2) that he erred in his charge by telling the jury several times that the burden of proof lay upon the accused to satisfy them with respect to his defences of drunkenness and of provocation by a preponderance of evidence, and, though at other times in the charge he gave a correct statement of the law as to the onus of proof, yet it could not be concluded with certainty that the jury must have had a proper understanding of it. Appellant brought an appeal to this Court, based on those dissents, and also, by leave granted under s. 1025, *Cr. Code,* on the ground that the decision appealed from conflicted with that of the Court of Appeal for Saskatchewan in *Rex* v. *Harms,* 66 Can. Crim. Cas. 134 on the following point: assuming the facts permitted the jury to find that they were "sufficient to deprive an ordinary person of the power of self-control" under s. 261 (2), *Cr. Code,* may the jury, in deciding whether or not the provocation did in fact produce a passion that led to the fatal act, take into account the actual condition of the accused in respect to drunkenness.

At the trial appellant gave evidence, which included evidence of words spoken between himself and his wife and, after a certain answer by his wife, a slap by her on his head, and that he did not remember what happened after that until he was trying to pick her up from the floor.

Held: The conviction should be set aside and a new trial held.

Per The Chief Justice and Kerwin J.: Both grounds of said dissent were rightly taken.

As to the first ground: Under s. 261 (3), *Cr. Code,* it was for the jury to say "whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received". The jury were entitled to believe the whole, or part, or

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

none, of appellant's testimony; if they accepted the whole, they were at least entitled to consider the wife's answer in connection with the slap; if they accepted only the evidence as to the conversation between appellant and his wife, they were entitled, in view of the word "insult" in s. 261, to consider whether that was sufficient to deprive an ordinary person of the power of self-control; and these matters were not put to the jury.

As to the second ground: Reading in its entirety what the trial judge said to the jury, it is impossible to say that there was no error; the jury did not have such a clear and correct direction as the accused was entitled to; and under all the circumstances it could not be said that there was no substantial wrong or miscarriage of justice.

The third ground of appeal should not have effect. Should a jury find that what was complained of was sufficient to deprive an ordinary person of the power of self-control, then, in deciding whether the accused was actually so deprived, they are not entitled to take into consideration any alleged drunkenness on the part of the accused. *Rex.* v. *Harms* (*supra*) disapproved on this point.

Per Taschereau and Kellock JJ.: Appellant should succeed on the first ground of said dissent and also on the third ground of appeal. If the jury believed appellant's evidence, his wife's act of slapping him, which was wrongful in itself, was also, against its verbal background (in a meaning which it was open to the jury to give to the words spoken), an "insult", within the meaning of that word in s. 261 (2). It was (under s. 261 (3)) for the jury to find (1) as to the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and (2) whether appellant was thereby actually deprived of his self-control. In finding on the latter question the jury should consider the effect on appellant's mind of the intoxication to which he was subject at the time, if they should find he was intoxicated to any degree. *Rex* v. *Harms* (*supra*) approved.

As to the erroneous direction several times to the jury as to onus with respect to drunkenness and provocation, and the effect of this upon the jury in view of correct statements of the matter to the jury at other times: As there is to be a new trial, it is sufficient to refer to *Woolmington* v. *Director of Public Prosecutions,* [1935] A.C. 462, at 481 and 482, where the trial judge's duty on such matter is clearly defined.

Per Estey J.: As to the first ground of said dissent: The conversation and the slap (of appellant's evidence thereon was believed by the jury) would, under all the circumstances, constitute evidence of a "wrongful act or insult" within the meaning of s. 261. An insult may be effected by either words or acts or a combination of both. Appellant's wife's words and her act were so closely associated that their meaning and effect could only be determined by considering them together and in relation to all the surrounding circumstances. It was a misdirection to charge the jury in such a way that their consideration was directed to the slap alone.

As to the third ground of appeal: If the jury found the "insult" of such a nature as to be "sufficient to deprive an ordinary person of the power of self-control", then, in considering whether the accused "acted upon it on the sudden and before there had been time for his

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passion to cool", the jury might consider any facts in evidence that might have influenced the accused to act or not to act upon it, including his consumption of liquor and its effect upon him. (The view taken on this point in *Rex v. Harms, supra,* approved)

Whether the effect of the trial judge's repeated misdirection to the jury as to onus of proof was corrected in their minds by his correct statements of the law at other times in his charge, it was not necessary to determine, as a new trial must be had on other grounds above. (The law as to burden of proof in criminal trials stated, with explanatory discussion thereon, and reference to the *Woolmington* case, *supra,* at p. 481).

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) dismissing (Roach J. A. dissenting) his appeal from his conviction, at trial before Chevrier J. and a jury, on a charge of murder. The appeal was on grounds of the dissent taken by Roach J. A. (who held there should be a new trial), and also on a ground raised by leave granted under s. 1025 of the *Criminal Code* (R.S.C. 1927, c. 36). The said grounds are stated in the reasons for judgment in this Court now reported and are indicated in the above headnote.

G. A. Martin K.C. and *W. A. Donohue* for the appellant.

W. B. Common K.C. and *W. M. Martin K.C.* for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The appellant was convicted of the murder of his wife and that conviction was affirmed by the Court of Appeal for Ontario with Mr. Justice Roach dissenting on the ground that there was misdirection and non-direction in the charge of the trial judge with reference to the defence of provocation as a result of which the full theory of the defence with respect to provocation was not put by him to the jury. This is the only ground of dissent stated in the formal judgment, but in his reasons, Mr. Justice Roach also dissented on the ground that the trial judge erred in his charge by telling the jury several times that the burden of proof lay upon the accused to satisfy them with respect to his defence of drunkenness and of provocation by a preponderance of evidence. Although this second ground does

(1) [1947] O.R. 332; 88 C.C.C. 281.

not appear in the formal judgment, this Court is entitled to look at the reasons of the dissenting judge: *Reinblatt* v. *The King* (1).

The appellant appeals from the Order of the Court of Appeal based on these two dissents. By leave of Mr. Justice Rand, granted under section 1025 of the *Criminal Code,* the appellant also appeals on the ground that the decision *a quo* conflicts with the decision of the Court of Appeal for Saskatchewan in *Rex* v. *Harms* (2) on the point whether, assuming the facts permitted the jury to find that they were sufficient to deprive an ordinary person of the power of self-control under section 261 (2) of the *Criminal Code,* the jury, in deciding whether or not the provocation did in fact produce a passion that led to the fatal act, might take into account the actual condition of the accused in drunkenness. Mr. Justice Rand treated what was said in this respect by the Chief Justice of Ontario for the majority of the Court of Appeal, not as a mere dictum but as laying down a proposition by which that Court would be subsequently bound. It is open to the Court to come to a contrary conclusion but, upon consideration of the reasons of the Chief Justice, it would appear that he meant his remarks upon the subject to be treated as laying down a binding rule.

As there should be a new trial, I mention only such circumstances as are necessary for a determination of the three questions thus raised. At the trial, the appellant testified that, some days before the night his wife received the injuries from which she died, he warned her never to be alone with one Holmes because of something the appellant had witnessed between Holmes and Mrs. Morgan. There was evidence that throughout that night and evening the appellant had been drinking at several places before returning with his wife and Holmes to his own home. At some stage, the appellant's wife went out of the house. The appellant testified: that, being alone in his house, he heard the sound of a motor car which he stated he recognized as being Holmes' motor car; that his wife shortly thereafter came in the house and when he asked her "Where have you been?", she did not answer; that he said, "You have been out with Harry Holmes", to

(1) [1933] S.C.R. 694. (2) (1936) 66 C.C.C. 134.

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which she replied "So what? Harry Holmes is all right",—which, he testified, meant to him that she thought Holmes a better man than he, and when asked in what respect, he answered, "Well, that would depend on how a woman judged a man"; he further testified that when he said to her "You have been out with Harry Holmes", he meant that as an accusation of misconduct; upon being asked at the trial what happened after his wife answered "So what? Harry Holmes is all right", he replied, "She walked over to me and slapped me a good one on the side of the head", he said that he did not remember what happened after that until he was trying to pick his wife up from the floor.

As to both drunkenness and provocation, the trial judge several times charged the jury correctly as to the onus remaining throughout upon the Crown to prove a charge of murder beyond a reasonable doubt, but on several occasions he put it as if there were an onus on the accused to make out such a case of drunkenness or provocation as would reduce the crime charged from murder to manslaughter. This was misdirection: *Woolmington* v. *Director of Public Prosecutions* (1), and the first general proposition stated by Viscount Simon in *Mancini* v. *Director of Public Prosecutions* (2).

Woolmington's case (1) is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it.

Finally, after the jury had been out for three hours, they came in and the foreman addressed the judge:—

In your address to the jury, you spoke in regards to provocation as regards to the sobriety item, and you spoke of drunkenness as a second item, and it is the end of your remarks. In other words, summarizing your address, you pointed out that we should take all the facts into consideration. Well, we need some guidance in regard to combined provocation and drunkenness.

The trial judge replied in part as follows:—

Well, gentlemen, if you are satisfied beyond a reasonable doubt the accused is the one who killed Rita Taylor, then you have provocation and drunkenness to look after. If he was provoked to the point that I have indicated, and you are satisfied beyond a reasonable doubt that there was then provocation, that provocation would reduce that to manslaughter.

(1) [1935] A.C. 462. (2) [1942] A.C. 1, at 11.

It is true that he proceeded to state the matter in terms that could not be objected to, but in view of the conflicting directions in his charge before the jury retired and of the error in the first part of his answer upon their return,

> If he was provoked to the point that I have indicated, and you are satisfied beyond a reasonable doubt that there was then provocation, that provocation would reduce that to manslaughter.

I am forced to the conclusion that the jury did not have such a clear and correct direction as the accused was entitled to. Reading the charge in its entirety and particularly the whole of the trial judge's answer to the foreman's question, I find it impossible to say that there was no error. Mr. Justice Roach was, therefore, right in his second ground of dissent, and under all the circumstances I cannot say that there was no substantial wrong or miscarriage of justice.

I now turn to Mr. Justice Roach's first ground of dissent. The criminal law for Canada on the subject of provocation is set out in section 261 of the *Criminal Code*.

> 261. 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.
>
> 2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
>
> 3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.
>
> 4. The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation.

Except for a few immaterial variations, this is the same as section 176 of the Draft Code prepared by the Criminal Code Commission of 1878-79 in England, which section is set out in the third volume of Stephen's History of the Criminal Law in England at page 81. A Bill was prepared for enactment to carry out the provisions of the Draft Code and that part of the Commission's report relating to

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the provisions of the Draft Code and of the Bill dealing with provocation is set out in Taschereau's Criminal Code at page 156:—

> There is no substantial difference between the provisions of the Draft Code and the Bill dealing with provocation, though the language and arrangement differ. Each introduces an alteration of considerable importance into the common law. By the existing law, the infliction of a blow, or the sight by the husband of adultery committed with his wife, may amount to provocation which would reduce murder to manslaughter. It is possible that some other insufferable outrages might be held to have the same effect. There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty. We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury.

The Bill was never enacted into law and in England, therefore, the matter is still dealt with at common law. It is in the light of these circumstances that the decisions of the House of Lords in *Mancini's* case (1) and in *Holmes* v. *Director of Public Prosecutions* (2) must be read.

In the enunciation of the second general proposition in the *Mancini* case (1) it is said:—

> If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with.

That may be taken as generally true in Canada in the sense that in order to raise a question of manslaughter there must be some foundation for it at the trial. That is true also in so far as provocation is concerned, subject to the express terms of section 261 of the *Code*. Earlier in the *Mancini* case (1) (at p. 10), Viscount Simon had stated:—

> In that view [i.e., that Mancini's story was rejected] the only knife used in the struggle was the appellant's dagger, and this followed Distleman's coming at him and aiming a blow with his hand or fist. Such action by Distleman would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was, therefore, on the assumption that the appellant's evidence was rejected, no adequate material to raise the issue of provocation.

The position at common law is again set forth in *Holmes'* case (2), at page 597:—

> If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable

(1) [1942] A.C. 1. (2) [1946] A.C. 588.

jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter.

Thus at common law the House of Lords has declared that it is the province of the judge to decide whether there is any evidence of provocation proper to be dealt with by the jury, but for Canada subsection 3 of section 261 of our *Code* provides:—

> Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.

This is not to say that in a proper case the trial judge should not draw the jury's attention to the nature of the provocation and the mode of resentment and ask them to consider whether the latter bears a reasonable relation to the provocation, but the subsection clearly enacts that it is not the province of the judge to decide such matters.

The Chief Justice of Ontario considered that the wife of the appellant repudiated the latter's implied accusation, and continues:—

> In the circumstances I am strongly of the opinion that her words and conduct in so doing did not constitute provocation within section 261. They were the answer to be expected from a woman of any spirit to an unfounded charge of infidelity made by a husband who himself had been so occupied with his drink that he did not know even where she was. In my opinion there was no evidence to go to the jury in this case that would support the plea of provocation set up by the appellant.

The issue, however, was raised, so that it cannot be said that there was no foundation for it, and the meaning to be ascribed to the wife's equivocal answer to the appellant's query, taken in conjunction with the slap, was for the jury. As is pointed out in the extract from the report of the English Criminal Code Commission set out above:—

> The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury.

And the matter is thus put by Sir Lyman Duff, speaking for this Court in *The King* v. *Manchuk* (1):—

> We think it was a question for the jury whether (*a*) the acts relied upon as constituting provocation were calculated to deprive an ordinary

(1) [1938] S.C.R. 18, at 21.

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man of self-control to such an extent as to cause an attack upon Mrs. Seabright of such a character as that delivered by the accused.

Viscount Simon stated in the *Holmes'* case (1) at page 600 that it was not necessary to decide whether there were any conceivable circumstances accompanying the use of words without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder, but continued:—

> It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

The wording of our Code, however, is "any wrongful act or insult", and the word "insult", as generally understood and as defined in standard dictionaries, includes language as distinct from acts: *Rex* v. *Krawchuk* (2). The reason for the recommendation of the English Criminal Code Commission is expressed as follows:—

> We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow.

and our Code follows the Draft Code and Bill.

The jury were entitled to believe the whole, or part, or none, of the accused's testimony. If they accepted it in its entirety, they were at least entitled to consider the wife's answer in connection with the slap, and, if they accepted only the evidence relating to the conversation between the appellant and his wife, they were entitled, in view of the word "insult", to consider whether that was sufficient to deprive an ordinary person of the power of self-control. These matters were not put to the jury, and the first ground of dissent by Roach J. A., is, therefore, well taken.

I pass to the conflict between the decision of the Court of Appeal in this case and that of the Court of Appeal for Saskatchewan in the *Harms* case (3). The argument, that the jury should have been directed that if they came to the

(1) [1946] A.C. 588.
(2) (1941) 75 C.C.C. 219.
(3) (1936) 66 C.C.C. 134.

conclusion that what was complained of was sufficient to deprive an ordinary person of the power of self-control, they then, in deciding whether the appellant was actually so deprived, must consider the alleged drunkenness of the appellant, cannot, in my view, prevail. It is important to refer again to subsection 2 of section 261 of the Code:—

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

The criterion is the effect on an ordinary person. It is true that a trial judge must at some stage ask the jury whether the accused was actually deprived of the power of self-control by the provocation which he received, because there may be cases where, because of evidence of ill-will before the provocation or other circumstances, it would be open to the jury to find that the accused did not so act. However, in coming to a conclusion on that point, the jury is not entitled to take into consideration any alleged drunkenness on the part of the accused. In my opinion, the matter is tersely and correctly put by Roach J. A., when he says that the argument on behalf of the appellant is tantamount to saying

the act or insult on which I rely would have caused an ordinary man to lose his self-control but not me. The only reason I lost my self-control was because I was drunk.

The decision on this point in the *Harms* case (1) cannot be supported.

The appeal should be allowed, the order of the Court of Appeal and the conviction set aside, and a new trial directed.

The judgment of Taschereau and Kellock, JJ., was delivered by

KELLOCK J.—The appellant was convicted on a charge of murdering his wife. His appeal to the Court of Appeal for Ontario was dismissed, Roach J. A. dissenting. This appeal comes to this Court on two questions of law pursuant to section 1023 of the *Criminal Code,* namely, alleged misdirection in regard to provocation and alleged misdirection and non-direction with respect to the burden of proof. There is a further question raised pursuant to

(1) (1936) 66 C.C.C. 134.

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leave granted under section 1025, as to alleged conflict between the judgment in appeal and the decision of the Court of Appeal of Saskatchewan in *Rex* v. *Harms* (1). Mr. Common submits that, notwithstanding the leave, this last point is not open as there is in fact no conflict. It will be convenient to consider this point first.

The way the matter is put is that the basis of the judgment in appeal is that there was no evidence of provocation and therefore anything said in relation to the decision in the *Harms* case (1) was *obiter*. While in the judgment of the majority it is stated, not once but twice, that there is no evidence of provocation, the point arising in the *Harms* case (1) is dealt with as a distinct ground of appeal and is decided adversely to the appellant. I think, therefore, that the point was a ground of decision and that conflict has been shown accordingly.

Provocation is governed by section 261 of the Code. By subs. 1, the provocation with which the section deals is sudden provocation, and the offender also must himself have acted "upon the sudden". By subs. 2 "any" wrongful act or insult *may* be provocation if of such a nature as to be sufficient to deprive an *ordinary person* of the power of self-control but only if *the offender* acts thereon. The question, however, as to whether or not there is any evidence is for the court, but, subject to that, it is provided by subs. 3 that the above two matters are both questions of fact for the jury, namely:

(1) the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and

(2) whether the accused was actually deprived of his self-control by such act or insult.

To appreciate the matters in controversy, it is necessary to state shortly the relevant facts. I quote from the reasons for judgment of Roach J. A. in the Court of Appeal:

> Rita Taylor was the wife of the accused. Together they resided in a residence which was originally intended as a summer cabin, but which, due to a housing shortage, was occupied the year round, at a place called Baxter's Beach on the Canadian shore of the St. Clair River a few miles outside the city of Sarnia. The accused was employed as a labourer at a foundry in or near the city of Sarnia.

(1) (1936) 66 C.C.C., 134.

On Friday, November 29th, he quit work at noon and went to his home. In the afternoon he and his wife went into the city of Sarnia where he, at least, did some shopping and later they went together to the beverage room of a local hotel. There an orgy of drinking commenced which was not concluded until somewhere around midnight out at Baxter's Beach.

In the hotel the accused met a man called Holmes, and he joined the accused and his wife at the latter's table in the beverage room. The accused did not have a motor car; Holmes did. Towards the end of the afternoon Holmes suggested that he would drive the accused and his wife to their home at Baxter's Beach. Before leaving the city, however, and shortly before 6 o'clock, Holmes and the accused went to a local wine shop and purchased between them four bottles of cheap wine. Then Holmes drove the accused and his wife to their home at the beach where all three proceeded to drink the wine. Early in the evening a neighbour called Goodwin from a nearby cabin joined them. While he was present, and about 9 o'clock, the appellant and his wife got into an argument and they went into an adjoining bedroom. There is some evidence of scuffling in the bedroom. The appellant emerged from that room and said that he had given his wife a few "rabbit punches". The accused states that the argument developed as a result of the wife's intoxicated condition, and his insistence that she should go to bed. Whatever were the nature of the "rabbit punches" the wife was not perceptibly hurt. She remained in the bedroom and the three men went to Goodwin's cabin, where the fourth and last bottle of wine was consumed. Some little time later and while the men were still there, the appellant's wife came over to Goodwin's cabin and joined them. The wine having been exhausted, Holmes and the appellant and his wife drove in Holmes' car to a bootlegger's place where they drank beer. Leaving the bootlegger's place they returned to the appellant's cabin, apparently, about 11 o'clock or a little later, bringing with them three bottles of beer. Holmes and the appellant went into the cabin but the wife apparently remained outside in the car. Holmes and the appellant finished the beer and Holmes left about midnight.

The appellant stated in evidence that the next he recalls was when he awoke and found himself on his bed dressed only in a new suit of underwear which he had purchased that afternoon. He had no recollection of having put on that underwear. He states that he was awakened by the cold; he got up and realized that his wife was not there.

When Holmes arrived at his car he found the wife half asleep—in a doze in the back seat. There was some conversation between them which was not admissible in evidence, but as a result of which Holmes and the wife drove around the country-side over a circuitous route and returned to the neighbourhood of the accused's cabin about one o'clock. They stopped on the highway about a quarter of a mile from the Taylor cabin. There the wife got out and walked home.

I should here interject that the appellant swore in evidence that some days earlier he and his wife had some conversation about Holmes, during which conversation he told her never to be alone with Holmes because of an "incident" he had seen take place between Holmes and a Mrs. Morgan who lived in a nearby cabin. Mrs. Morgan was a Crown witness and on cross-examination she said that sometime earlier she had told both Taylor and his wife that Holmes had tried to get "fresh" with her and to have sexual intercourse with her.

As to what happened when the wife arrived at the cabin in the early hour of the morning in question, we have only the appellant's word.

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In the evidence he stated that he heard the noise from Holmes' car. He identified that noise as coming from Holmes' car because of the fact that apparently the car was lacking a muffler and made a terrific noise. Realizing that his wife was not in the cabin, he concluded that she was with Holmes. His evidence of what happened on her return is most important, and is as follows: "Q. What, then, was your reaction on hearing this car, realizing that your wife was away from the cabin? A. I was getting a little mad, sir. Q. Now, what happened after that? A. My wife came in the back door. I went out in the kitchen. I said, 'Where have you been?' I got no answer. I said, 'You have been out with Harry Holmes.' Her answer to that was, 'So what? Harry Holmes is all right.' Q. Now, what did that convey to you, Mr. Taylor? A. She thought him a better man than me. Q. In what respect? A. Well, that would depend on how a woman judged a man. Q. What did you mean by saying to her, 'You have been out with Harry Holmes?' Was it an accusation you were making against her? A. It was. Q. Was it an accusation of misconduct with Holmes? A. It was. Q. And her answer was, 'So what? Harry Holmes is all right.' Is that right? A. That is right, sir. Q. What happened after that? A. She walked over to me and slapped me a good one on the side of the head. Q. Now, Mr. Taylor, do you know what happened from there on? A. I do not, sir. Q. What was the next thing that you remember? A. I was trying to pick my wife up, and I didn't have the strength. Q. Have you any consciousness of the passage of time between that last incident of the slap and the time you tried to pick your wife up? A. I had not, sir."

In the interval during which he swore he had no recollection of what was happening, there can be no doubt that he caused his wife most serious and grievous bodily injuries. He broke a chair over her head or body, and probably struck her head with his fists. The attack can best be described as maniacal.

Sometime about one-thirty o'clock that morning the accused came to one of the nearby cabins and aroused the occupants. They got up and went with the accused to his cabin where they found the wife on the floor with frightful injuries to her head and bleeding profusely. A doctor was called and later an ambulance and the wife was rushed to the hospital. She died the following afternoon as a result of her injuries.

In these circumstances, the first question which arises is, what is the matter in evidence upon which, if believed, the accused was entitled to rely as constituting provocation within the meaning of the statute. The learned trial judge in his charge, upheld by the majority below, directed the jury that they could consider only the slap in the face and not what was said by the deceased wife, taking the view that, as to the words spoken, the point was covered by the decision of the House of Lords in *Holmes* v. *Director of Public Prosecutions* (1). Roach J. A. was of opinion that the *Holmes* case (1) had no application and that:

In my opinion it was grave error to instruct the jury in that fashion and the result was that the whole theory of the defence was not put to

(1) [1946] A.C. 588.

the jury. The theory of the defence was not that the accused was provoked within the meaning of s. 261 by the mere slap; the theory was that he was thus provoked by the slapping coupled with the words spoken almost contemporaneously therewith and all the surrounding circumstances.

As to the *Holmes* case (1), it is first to be observed that it is not a decision under a statute but upon the common law. The actual decision that the words spoken in that case, namely, the confession of the wife that she had been unfaithful, standing by themselves did not amount to provocation, does not apply, in my opinion, to the case at bar. The words spoken by the deceased were not the same as the words in question in the *Holmes* case (1), and, moreover, they do not stand by themselves. Further, the statement of Viscount Simon that

> in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime,

i.e. from murder to manslaughter, requires to be placed against the language of the statute "any insult", and, so viewed, cannot in my opinion, be a correct statement under the Code. They were not intended to be.

In the present case, the husband said to the wife "You have been out with Harry Holmes". At the least that amounted to a statement that she had disregarded his injunction given previously, but it was also open to the jury to interpret it as an accusation of misconduct with Holmes. On the answer of the wife "So what? Harry Holmes is all right", in my opinion, it was open to the jury to believe that "So what?" meant either "Even if that be so" or "It is so, what are you going to do about it?" or "There's nothing you can do about it". "Insult" is defined in "The Oxford English Dictionary" *inter alia,* as

> an act, or the action, of attacking or assailing; an open and sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.

In my opinion the act of slapping, which was wrongful in itself, was also, against its verbal background, an insult. I therefore agree with Roach J. A. on this branch of the case.

Coming to the second question, the learned trial judge refused to direct the jury that the fact that the accused

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was intoxicated to such degree, if any, as they might find, was a matter which they might consider in determining whether or not *the accused*

was actually deprived of the power of self-control by the provocation which he received.

All the members of the Court of Appeal considered that there was no error in this respect, the view of the majority being that any such direction would be in conflict with the decision of the House of Lords in *Director of Public Prosecutions* v. *Beard* (1). This view was not accepted by the Court of Appeal for Saskatchewan in the *Harms* case (2). That Court regarded the *Beard* case (1) as approving the direction of Baron Parke in *Rex* v. *Thomas* (3), which was applied in the *Harms* case (2). That direction was as follows:

> But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober.

In support of the judgment in appeal Mr. Common submits that the third proposition laid down by Lord Birkenhead in *Beard's* case (1) is in conflict with the direction of Parke B. That proposition, to be found at p. 502, is as follows:

> 3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

For my part I am unable to see anything in the language which is in conflict with the law as laid down in *Rex* v. *Thomas* (3). The third proposition in *Beard's* case (1) draws the line between drunkenness of such a nature that capacity to form the necessary intent is absent, and drunkenness of a lesser degree. A person doing an act resulting in death while drunk to the greater extent, is guilty of manslaughter only, whether provoked or not. If drunk to the lesser degree, the same act may be reduced from murder to manslaughter if committed under provocation as defined in section 261. Intent in the last mentioned

(1) [1920] A.C. 479.
(2) (1936) 66 C.C.C. 134.
(3) (1837) 7 C. & P. 817, at 818-820.

case is present at the time, because there is no lack of capacity, and it cannot be said that a person free from alcohol who acts in passion due to provocation lacked intent *at the time* although then deprived of his self-control due to the passion which has been provoked. In *Woolmington's* case (1), Viscount Sankey, L.C., said at 482:

> 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.

Lack of intention, then, is not an element in the application of section 261, and therefore the third proposition in *Beard's* case (2) does not apply to it. In truth the proposition deals and deals only with drunkenness as a *defence* and not with the aspect under consideration in *Rex* v. *Thomas* (3). I am unable to find anything in Lord Birkenhead's reference to *Rex* v. *Thomas* (3) which throws doubt upon the soundness of that decision, and I find it still cited as an authority in the Hailsham Edition of Halsbury, Vol. 9, p. 439, as well as in Russell on Crime, the 9th Edition, p. 39. In Stephen's Digest of the Criminal Law, p. 231, Art. 317, the following is stated:

> Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received; and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to *all other circumstances* tending to show the *state of his mind.*

If intoxication to any degree is a circumstance which may tend to affect the mind of a person, and it is generally agreed it is, then, if Stephen J. be right, the jury must consider the effect on the mind of the offender of the intoxication to which he was subject at the time if they find he was intoxicated to any degree. That the proposition as stated by Stephen J. correctly states the common law is established by the fact that it was cited with approval by the House of Lords in *Mancini* v. *Director of Public Prosecutions* (4). The statement in the judgment of Viscount

(1) [1935] A.C. 462.
(2) [1920] A.C. 479.
(3) (1837) 7 C. & P. 817, at 818-820.
(4) [1941] 3 All E.R. 271, at 277.

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Simon on the same page as to the relationship between the mode of resentment and the provocation reserved is not, under the Code, a matter of law, but a matter to be considered by the jury when determining whether or not the accused acted as he did by reason of the provocation. As put by Stephen J. in the passage already quoted,

> regard must be had to the nature of the act by which the offender causes death.

In my opinion, therefore, the *Harms* case (1) was rightly decided. It is admitted, this being so, that the charge cannot be supported on this branch of the case.

If the jury be directed to disregard any degree of intoxication to which they may believe the accused was subject at the time, the result will be that the question which they will be considering is whether the accused, if he had not been intoxicated, would have acted on the provocation, instead of the question directed by the statute, namely, whether the accused in his then actual state of mind so acted.

There remains the question as to the admittedly erroneous direction of the learned trial judge to the jury, repeated on several occasions, as to the matter of onus with respect to both drunkenness and provocation. There was considerable argument as to the effect of this upon the jury in view of the fact that upon other occasions the learned trial judge stated the matter correctly. In view of the fact that there is to be a new trial, it will perhaps be sufficient to say that the duty of a judge presiding at a criminal trial with respect to this matter is clearly defined in *Woolmington's* case (2) at pages 481 and 482. If the law as there laid down is followed at the new trial, as no doubt it will be, there should be no further difficulty on this point.

I would allow the appeal and direct a new trial.

ESTEY J.—The accused, convicted for the murder of his wife, appealed to the Court of Appeal for Ontario. At his trial, apart from contending that he had not committed the offence, he pleaded drunkenness and provocation as separate grounds for reducing the offence to manslaughter. The majority of the Court of Appeal affirmed the con-

(1) (1936) 66 C.C.C. 134. (2) [1935] A.C. 462.

viction, but Mr. Justice Roach dissented on the basis that the learned trial judge had misdirected the jury as to what constituted evidence of provocation and as to the burden of proof both with respect to drunkenness and provocation.

This appeal is taken under section 1023 of the *Criminal Code* upon those points raised in the dissenting judgment and on a further point as a consequence of leave granted under section 1025 of the *Criminal Code* on the basis of possible conflict between the decision of the majority of the Court of Appeal in this case and that of the Saskatchewan Court of Appeal in *Rex* v. *Harms* (1).

The evidence disclosed that the accused, his wife and Harry Holmes had been drinking downtown in the afternoon of November 29, 1946, that in the late afternoon they had all gone to the home of the accused in Harry Holmes' car. Harry Holmes remained there and all three continued drinking. During the evening they visited two homes and returned to the home of the accused around 11 o'clock. Sometime thereafter the accused fell asleep on his bed. When he later awoke, he was alone in the house.

In a few minutes he heard a car upon the road and from its noise concluded it was the car of Harry Holmes. As he had warned his wife not to be alone with Harry Holmes, this made him a "little mad". In a few minutes his wife came in the back door, and to his inquiry as to where she had been she made no reply. He then, as he deposed, accused her of improper conduct in these words: "You have been out with Harry Holmes". Her reply was: "So what? Harry Holmes is all right" and with that he says "she walked over to me and slapped me a good one on the side of the head." He deposed that as to what followed he had no recollection. Harry Holmes deposed that after the accused went to sleep, he went out to his car and found Mrs. Taylor there, that she refused to get out of the car and that as a result they drove around for some time and then she went home and he continued to his home.

At about 1.30 a.m. the accused called at his neighbour, Morgan's, for assistance. Mr. and Mrs. Morgan went at once to his home where they found Mrs. Taylor unconscious and bleeding as a result of a brutal attack, as a consequence of which she died later the same day.

(1) (1936) 66 C.C.C. 134.

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With deference to the learned judges who hold a contrary opinion, it would appear that the conversation and the slap here deposed to, if believed, would under all the circumstances constitute evidence of a "wrongful act or insult" from which the jury might find provocation within the meaning of section 261 of the *Criminal Code*.

His Lordship charged the jury that the slap in the face alone could be considered as evidence of provocation and that the foregoing words and their implication of immorality did not constitute evidence of provocation and must be disregarded in the consideration of that issue. This direction is based on statements similar in effect in the decisions at common law, more recently discussed in *Holmes* v. *Director of Public Prosecutions* (1), where it would appear that even at common law there is some qualification to the general statement that mere words cannot constitute evidence of provocation.

We need not here, however, discuss the precise statement of the common law. Parliament, in enacting section 261 of the Criminal Code, has declared the law with respect to provocation in Canada:

261. (Provocation) 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.

2. (What is provocation) Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. (Question of fact) Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. (Illegal arrest) The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation.

Under this section, when there is evidence of "any wrongful act or insult" it is for the jury to determine whether it is

of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

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If, therefore, there is any evidence of any wrongful act or insult, this must be submitted to the jury in such a fair and complete manner that the jury will appreciate the law and the evidence in relation to that issue.

Under this section 261 an insult may constitute provocation, and an insult may be effected by either words or acts or a combination of both. In the case at bar, the words of Mrs. Taylor and her act were so closely associated that their meaning and effect can only be determined by considering them together and in relation to all the surrounding circumstances. This evidence adduced by the accused himself may or may not be true, but that is entirely a question for the jury. The only concern of the appellate court is the right of the accused to have his defence, so far as it is supported in the evidence, fairly and fully placed before the jury. It was, with respect, a misdirection to segregate the slap from the words and direct the jury that the slap alone should be considered in determining whether there was sufficient provocation within the meaning of section 261.

If the jury found that this insult was

> of such a nature as to be sufficient to deprive an ordinary person of the power of self-control,

then that insult was in this case provocation. If and when the jury found such provocation, it was then their duty under section 261 to consider whether the accused acted "upon it on the sudden" and before there had been time for his passion to cool, or, as stated by Chief Justice Duff in *The King* v. *Manchuk* (1):

> We think it was a question for the jury * * * whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack * * * was acting upon such provocation on a sudden and before his passion had time to cool * * *

In determining this question whether the accused acted on the sudden upon this provocation, the jury must consider the conduct of the accused himself as distinguished from the conduct of the ordinary man. Upon this question or issue the jury may consider any facts in evidence that may have influenced the accused to act or not to act upon that provocation already found by them. His consumption of liquor and its effect upon him may be taken into con-

(1) [1938] S.C.R. 18, at 21.

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sideration upon the second question where his own conduct is under consideration, but not upon the first question where the standard is that the wrongful act or insult must be such as to deprive an ordinary person of the power of self-control in order to constitute provocation.

That was the view expressed in *Rex* v. *Harms* (1). It was submitted at the hearing that *Director of Public Prosecutions* v. *Beard* (2) was contrary to *Rex* v. *Harms* (1). In the *Beard* case (2), the House of Lords was considering the defence of drunkenness as evidence of inability to form the intent essential in the crime of murder. Drunkenness in relation to its effect upon the action of one who had suffered provocation within the meaning of the law was not an issue nor was it discussed further than a mere reference thereto. *Rex* v. *Thomas* (3), cited in support of the reasons in *Rex* v. *Harms* (1), is mentioned along with certain other authorities in the *Beard* case (2) where the Lord Chancellor, in referring particularly to these cases, states at p. 497:

> The judgments however in these cases diverged into topics not specifically helpful in the matter now under debate.

With geat respect, I do not find the suggested conflict between the *Beard* (2) and the *Harms* (1) cases.

The charge of the learned trial judge relative to drunkenness sufficient to render the accused unable to form the intent essential in the crime of murder was not questioned before this Court further than with respect to the burden of proof both as to the defence of drunkenness and provocation. It was contended, as Mr. Justice Roach held, the learned trial judge had instructed the jury that the burden of proof rested upon the accused to prove either of these defences by a preponderance of evidence. The learned judge pointed out that this burden upon the accused was not so great as to require that he prove his drunken condition beyond a reasonable doubt, but he repeated at different times in the course of his charge that the accused must prove either of these defences by preponderance of evidence. With respect, this constituted a misdirection.

(1) (1936) 66 C.C.C. 134.
(2) [1920] A.C. 479.
(3) (1837) 7 C. & P. 817.

However, about as often as this direction was given, it was offset by a correct statement that throughout the entire trial the burden rested upon the Crown to prove the accused guilty beyond a reasonable doubt. Whether, therefore, the effect of the misdirection upon this point was corrected in the minds of the jury we need not here determine, as a new trial must be had upon the basis already discussed with respect to provocation. It is sufficient to emphasize that, apart from the defence of insanity and a statutory provision with respect to the burden of proof, the burden of proof rests always and throughout the entire case upon the Crown to prove the guilt of the accused beyond a reasonable doubt. The evidence favourable to the accused, either as found in the evidence adduced by the Crown or adduced on his own behalf, may be sufficient to raise a reasonable doubt in the minds of the jury. The position is that if after all the evidence, both for the Crown and the defence, has been seriously considered, the jury is unable to conclude that the evidence establishes the guilt of the accused beyond a reasonable doubt, then he is entitled to a verdict of not guilty.

In *Woolmington* v. *The Director of Public Prosecutions* (1), Lord Sankey at p. 481 states:

* * * it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

See also *Mancini* v. *Director of Public Prosecutions* (2).

In the result, a new trial must be held. The appeal is allowed.

Appeal allowed; conviction set aside, and new trial directed.

Solicitors for the appellant: *Donohue & Maher.*

(1) [1935] A.C. 462. (2) [1942] A.C. 1.