ADELARD LATOUR.....APPELLANT; 1950

AND *Oct. 12, 13
*Oct. 13.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Trial by jury—Misdirection—Pleas of self-defence, provocation and drunkenness—Onus probandi—Reasonable doubt—Evidence—Use of word "establish" in charge is potentially dangerous—Intent in drunkenness—Criminal Code, ss. 263, 1025(1).

Appellant was convicted of murder after a trial by jury. He had pleaded self-defence, provocation and drunkenness. His appeal was unanimously dismissed by the Court of Appeal.

Held: The appeal should be allowed and a new trial ordered.

Held: That, when dealing with the specific pleas of self-defence and provocation, there was a grave departure by the trial judge from the general principles he had laid down in the opening part of his charge with respect to the burden of proof—using the word "establish" in such a way that the jury could reasonably understand it to mean "if it was established by the accused"—and that it was never stated to the jury, either expressly or by clear implication, that, if they were in doubt as to whether the act was provoked, it was their duty to reduce the offence from murder to manslaughter.

Held: A direction to the jury (which could reasonably be, by them, related to the accused) that, if on one point they found the evidence of a witness to be deliberately untrue, they could not believe him in any other particular, was a misdirection of a most serious nature and tantamount to an encroachment upon the right of full answer and defence.

Held: The validity of the defence of drunkenness is dependent upon the proof that the accused was at the time of the commission affected by drunkenness to the point of being unable to form not any intent but the specific intent to commit the crime charged.

Held: As it is the duty of a juror to disagree if unable conscientiously to accept the views of his colleagues, it is wrong in law to tell the jury that they "must agree upon a verdict".

APPEAL from the judgment of the Court of Appeal for Ontario dismissing appellant's appeal from his conviction by a judge and jury on a charge of murder.

C. L. Dubin, M. N. Lacourcière and R. H. Frith for the appellant.

W. B. Common K.C. and *H. D. Wilkins K.C.* for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Estey, Cartwright and Fauteux JJ.

1950

LATOUR
v.
THE KING

Fauteux J.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellant has been convicted, in the city of Sudbury, in the province of Ontario, of the murder of the wife of his first cousin, one Cécile Rainville. His appeal against such conviction was unanimously dismissed by the Court of Appeal, the reasons for judgment reading:

> After listening to the able and elaborate argument addressed to us, we are quite unable to find anything in what has been adduced, which would warrant our interfering with the verdict of the jury. There is nothing to be gained by going over, one by one, the items so ably put before us but the facts in this case are overwhelming and, in view of the findings of the jury and the interpretation they put upon them, there is nothing to be said. The appeal will be dismissed.

Pursuant to section 1025(1), 1948 ch. 39 s. 42 of the *Criminal Code,* leave to appeal was granted on the following points of law: (*a*) Misdirection of the trial judge as to the *onus probandi.* (*b*) Lack of adequate direction with respect to the benefit of reasonable doubt on every issue raised in the defence (*Latour* v. *The King*) (1). (*c*) Misdirection in the following instructions to the jury:—

> Should you come to the conclusion that any witness came here and told something that he knew was not true, that would be tantamount to perjury, and anybody who gives evidence that was not true in any one instance, could not be believed in any other particular.

and (*d*) Failure of the trial judge to relate to the specific crime charged, the rule as to intent applicable in the defence of drunkenness.

At the close of the argument, the Court indicating that reasons for judgment would be delivered later, allowed the appeal, quashed the conviction and ordered a new trial. In view of this order, only such circumstances as are necessary for the determination of the questions raised will be referred to.

On the morning of September 12, 1949, the appellant, both hands badly bleeding, was seen by the landlady and another tenant of the building, leaving the apartment occupied by his cousin Peter Rainville, the deceased Cécile Rainville, and her brother Alexander Verdon. After a short visit to the home of some friends, to wash his hands, he immediately proceeded to the police department where he reported that he had been in a fight and, from there, was escorted to the hospital where he received

(1) 97 C.C.C. 385.

surgical attendance on his injuries on both hands. Meanwhile, the police, alerted by the landlady of the apartment, proceeded thereto and found the body of the deceased bearing some thirty-two wounds; they also found a knife admittedly identified as belonging to the appellant and a coat the latter had borrowed from Verdon. As to what took place in the apartment, there is no evidence but the incomplete account—hereinafter referred to—given by the appellant himself; the evidence of the landlady and of the other witness on the point throws little or no light. The theory submitted to the jury by the Crown was that the appellant, well aware of the absence of both his cousin and the brother of the victim, Verdon, visited the apartment that morning for the purpose of having carnal knowledge with the victim and that, when she refused, he stabbed her with his knife. It was conceded that there is no evidence in point of an assault prompted by such motives nor of any prior guilty passion by the accused towards the deceased. The evidence reveals that the appellant, a bushman, was, on the day of the fatal occurrence, terminating, in the city of Sudbury, a two-weeks vacation during which, being on good terms with the Rainvilles, he freely visited their home. The appellant testified that the return of the coat of Verdon was the purpose of his visit to the apartment on the morning of the 12th. He relates the following facts: Having delivered the coat, he was departing from the apartment when the deceased invited him to stay, sit and talk and, eventually, proposed to have sexual relations with him. He says that he then scolded her and told her he knew much of how she was carrying on. It may be pointed out here that independent evidence shows that the day before, the appellant having, in the presence of Peter Rainville and Verdon, made unfavourable remarks as to the moral conduct of the deceased, Verdon became angry and left the company in protest. There is no evidence, however, that these remarks of the appellant were subsequently conveyed to the victim either by her husband or by Verdon. The appellant testified that the victim became incensed and told him he knew too much of her past and that she then drew a knife from behind her back and went to stab him. He protected

1950

LATOUR v. THE KING

Fauteux J.

himself with his hands but being then stabbed and by reason of the combined effect of the stabbing, of pain in his hands and of two weeks of persistent drinking, he said he lost his head and does not recall what happened from that moment, up to time he was washing his hands at the home of their common friends. He further denied having brought the knife with him suggesting the deceased must have taken it from his room, which she visited with him two days before, for the purpose of looking over some old family pictures. The occurrence of this visit is corroborated by an independent witness. On the basis of these facts, pleas of self-defence, provocation and drunkenness were advanced on behalf of the appellant, and with respect to each of these pleas, the jurors received from the trial judge instructions which must now be considered conjunctively with the above grounds of appeal.

Dealing with grounds (*a*) and (*b*). The principles of the criminal law as to the *onus probandi* and the benefit of the doubt being substantially correlated in their application, the merits of the first two grounds of appeal may, in this case, conveniently be dealt with together.

In the early part of his charge the trial judge, before entering upon the discussion of the facts of the case and before any reference whatever to the pleas of self-defence, provocation and drunkenness, and to the different verdicts resulting respectively therefrom, properly charged the jury as to the burden of the proof and the benefit of the doubt, making his own the following words of Viscount Sankey, Lord Chancellor, in *Woolmington* v. *Director of Public Prosecutions,* (1), particularly at page 94:—

> . . . it is not until 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. It must be kept in mind that while the prosecution must prove the guilt of the prisoner, there is no such burden laid upon the prisoner, to prove his innocence and it is sufficient for him to raise a doubt as to his guilt. He is not called upon to satisfy the jury of his innocence.

And he further instructed the jury with respect to circumstantial evidence, giving them the rule formulated

(1) 25 C.A.R. 72.

by Baron Alderson in the *Hodge* (1) case. No complaint is made as to the way in which these matters were explained as general principles in criminal law. It is complained, however, that, when he later dealt with the pleas of self-defence and of provocation, there was a grave departure by the learned trial judge from the general principles he had laid down with respect to the doubt, he entirely failed throughout the charge to direct the attention of the jurors, in their consideration of the plea of provocation, to their duty, to give the appellant the benefit of the doubt, if any, in favour of the lesser charge of manslaughter. The following excerpts from the charge, fairly representing the substance of the directions with which the jury was left in the matter, are impeached by the appellant as casting the burden of proof upon him and, therefore, as being in violation of the principles laid down particularly in the Woolmington case. As to the plea of self-defence, the trial judge said, at page 407 of the record:

> It is for the jury to say whether or not the necessary facts have been established to warrant a plea of self-defence.

and as to the plea of provocation, he said, at page 413:

> The doctrine is that an unlawful killing resulting from a deliberate act of violence is *prima facie* murder but that, if it is established that the accused acted under a certain set of conditions which were such as to deprive an ordinary person of the power of self-control, that presumption is rebutted and the killing is only manslaughter.

On behalf of the respondent, it was pointed out that the trial judge did not say "established by the accused" but simply "established" and then argued that no burden was consequently cast upon the appellant to prove the ingredients necessary to a plea of self-defence or to a plea of provocation as had been explained to the jury. In the circumstances of this case, the jury, in my view, could only, or to say the least, could reasonably understand the directions as if it had, in effect, been said: "if it was established by the accused" for, in this case, it is virtually only from the account given by the appellant of what took place in the apartment between himself and the victim, that the proof of the ingredients necessary to each defence could, if at all, be found. It is on that view that the legality

(1) 2 Lewin 227.

1950

LATOUR
v.
THE KING

Fauteux J.

of the instructions must be considered for, in *Bigaouette* v. *The King* (1), Duff J., as he then was, delivering the judgment for the Court, stated at page 114:

> The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex* v. *Gallagher*, in these words:
>
> > . . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.

It is suggested, on behalf of the appellant, that according to the dictionary, the word "establish" means "place beyond dispute." (Shorter Oxford English Dictionary, 3rd edition, page 684). On that basis, it would then appear sufficient to substitute these words to the word "establish" to conclude that, had it been said:

> It is for the jury to say whether or not the necessary facts have been placed beyond dispute by the accused to warrant a plea of self-defence.

or had it been said with respect to the plea of provocation:

> . . . if it is placed beyond dispute by the accused that he acted under a certain set of conditions . . .

the two directions, standing alone, would have been palpably wrong, for the law only requires that the evidence in the record,—introduced by the Crown or the defence, it does not matter—be sufficient to raise in the minds of the jury a reasonable doubt as to whether the accused acted in self-defence or under provocation.

In judicial proceedings, the word "establish" is correlated to the burden of the proof but to the burden of the proof not in the sense of the necessity there may be for an accused in the course of the enquête to introduce evidence in order to explain away the case being made by the Crown, but in the sense of the permanent and paramount obligation there is for the Crown, at the end and on the whole of the case, to have proved the guilt beyond all reasonable doubt.

In Phipson on Evidence, 8th edition, it is stated at page 27:

> As applied to judicial proceedings, the phrase "burden of proof" has two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading—the burden, as it has been called, of

(1) [1927] S.C.R. 112.

establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) The burden of proof in the sense of *introducing evidence* . . . So in criminal cases, even where the second, or the minor burden of introducing evidence is cast upon or shifted to the accused, yet the major one of satisfying the jury of his guilt beyond a reasonable doubt is always upon the prosecution and never changes; and if, on the whole case, they have such a doubt, the accused is entitled to the benefit of it and must be acquitted.

(*Mancini* v. *D.P.P.* (1); *Woolmington* v. *D.P.P.* (2)).

It is clearly in relation to the "major burden," it may be pointed out, that the word "establish" is used by the House of Lords in the above excerpt from the Woolmington case. In giving directions to the jury, the use of the word "establish" in relation to the "minor burden" of introducing evidence, is inadequate, confusing and potentially dangerous as it may, depending upon the context or upon the whole charge and the nature and circumstances of the case, lead the jury into error as to the plain nature of their duty with respect to the most important feature of our criminal law, the paramount and permanent burden of the Crown to establish ultimately its case beyond all reasonable doubt. Not that it is suggested that the word "establish" is necessarily improper in all cases. Used with proper qualifications, it has been approved—it was pointed out on behalf of the respondent—in cases where a defence of insanity is raised. This, however, affords no argument in favour of the latter's views, for a defence of insanity is a matter altogether different. In point of fact, the legislature affirms a legal but rebuttable presumption against insanity. Section 18 of the *Criminal Code* reads:

Everyone shall be presumed to be sane at the time of doing or omitting to do any act *until the contrary is proved.*

So, there is, in such case, an obligation to prove or to establish the defence of insanity even if it needs not be established beyond reasonable doubt but only to the reasonable satisfaction of the jury. (*Smythe* v. *The King* (3). No similar presumption exists, however, with respect to the issue of self-defence or of provocation. Even the presumption that everyone intends the natural consequences of his act needs, in order to be rebutted, no more than evidence sufficient to raise a doubt as to the intent.

(1) [1941] 3 All E.R. 272.
(2) [1935] A.C. 462.
(3) [1941] S.C.R. 17.

1950

LATOUR
v.
THE KING

Fauteux J.

Nor is it suggested that the use of the word "establish" will always be fatal in all of the cases, for each case must be judged upon its merits but confusion in words naturally, if not always, leads to confusion in ideas and, in the matter, to confusion as to what the duty is. Again and in the case at bar, all what was said as to the burden of proof and the benefit of reasonable doubt, has been indicated above and was further stated as general principles in the earlier part of a charge, necessarily lengthy, and long before any reference was made to the special issues raised in the case, to the necessary ingredients thereof and to the different verdicts resulting therefrom. But the principle that, if the jurors were in doubt as to whether the act was provoked, it was their duty to reduce the offence from murder to manslaughter, was never stated to them, either expressly or by clear implication. In the case of *Prince* (1), the accused, charged with murder, pleaded provocation. This was the only issue. A verdict of murder was set aside for the following reasons stated by the Lord Chancellor at page 64:

> We think that the summing up was insufficient. Having regard to the absence of any direction that, if upon the review of all the evidence, the jury were left in reasonable doubt whether, even if the appellant's explanation were not accepted, the act was provoked, the appellant was entitled to be acquitted of the charge of murder.

In the case of *Manchuk* v. *The King* (2), the jury, while considering the case, returned to Court to request the assistance of the learned trial judge upon a difficulty which they explained in the following question:

> In order to reduce a murder charge to a manslaughter charge, is it necessary to establish the fact that the person killed committed the act of provocation?

At page 349, Sir Lyman Duff, the then Chief Justice of Canada, said:

> The terms in which the question is expressed manifest plainly that (notwithstanding some observations in the earlier part of the charge as to the burden resting upon the Crown up to the end of the case of establishing guilt beyond a reasonable doubt) they had fallen into the very natural error of thinking that, in proving the killing, the Crown had disposed of the presumption of the prisoner's innocence and that they must find the prisoner guilty of murder unless he affirmatively established to their satisfaction provocation in the pertinent sense. The interrogatory of the jury ought to have been answered in such a manner as to remove this error from their minds. It ought to have been made clear to them

(1) 28 C.A.R. 60.

(2) [1938] S.C.R. 341.

that in the last resort the prisoner could not properly be convicted of murder if, as the result of the evidence as a whole, they were in reasonable doubt whether or not he was guilty of that crime.

On behalf of the respondent, it was suggested that the general instructions given at the beginning of the charge of the trial judge as to the burden of proof and the doubt, were sufficient and that, as stated at page 280 in the *Mancini* case (*supra*):

> There is no reason to repeat to the jury the warning as to the reasonable doubt again and again, provided that the direction is plainly given.

It is not difficult to agree with this sentence from the *Mancini* case but it is impossible to accept that in the charge made in the present case, the pertinent direction was "plainly given."

In *Albert Edward Lewis* (1), Avory J., as he then was, stated, at page 34:

> The importance of telling the jury that the burden has not shifted is probably greater in a case in which the defendant goes into the witness-box (as the appellant did) than in one in which he does not. The jury not unnaturally are apt to think that when a defendant goes into the witness-box the burden is on him to satisfy them of his innocence.

While one may regard the direction given with respect to the plea of self-defence as being less questionable because of the general instructions given in the earlier part of the charge, the impeached direction with respect to the plea of provocation, coupled with the complete lack of direction as to the duty of the jury to give the benefit of the doubt, if any, on the issue raised and bring a verdict of manslaughter instead of a verdict of murder, leaves no doubt, I must say with deference, that the jury was not instructed according to law. For, once properly instructed as to what the law recognizes as ingredients of self-defence or of provocation, the accurate question for the jury is not whether *the accused has established* such ingredients but whether *the evidence indicates them.* And they, then, must be directed that, should they find affirmatively or be left in doubt on the question put to them, the accused is entitled, in the case of self-defence to a complete acquittal, or in the case of provocation to an acquittal of the major offence of murder.

(1) 14 C.A.R. 33.

1950

LATOUR v. THE KING

Fauteux J.

To dispose of the third ground of appeal, it could be sufficient to say that, with natural fairness, it was conceded by Mr. Common, K.C., of counsel for respondent, that it was a misdirection to instruct the jury in the following terms:

> Should you come to the conclusion that any witness came here and told something that he knew was not true, that would be tantamount to perjury and anybody who gives evidence that was not true in any one instance, could not be believed in any other particular.

And it could be added that this Court, in *Deacon* v. *The King* (1), approved, at page 536, what had been said by Riddell J. in *Rex* v. *Kadeshewitz* (2), when the latter refused to accept, as being the law in Canada, the following summarized statement, the substance of which is attributed to Lord C.J. Hewart in the case of *Harris* (3):

> If a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence.

But to examine in a proper light the ultimate suggestion made on behalf of the respondent that no substantial wrong or miscarriage of justice resulted from such misdirection, it is further convenient to consider two questions: To which of the witnesses heard in this case such warning could reasonably be related by the jury, and, then, what effect, if any, it could have in the result.

The facts, proof of which was material to the case of the Crown—the death of Cécile Rainville, the violent cause of her death, and the author of her death,—were not virtually disputed by the appellant who, by his very testimony, assumed the task of explaining them away in relating what, according to him, took place between him and the victim in the apartment, for the advancement of his pleas of self-defence and of provocation. At the end of the case, the veracity and the credibility of the accused really turned to be the crucial point for the decision of the case. Naturally, any direction in this respect would particularly and at first be applied to the accused by the jury. Furthermore, the manner and the measure in which the appellant was cross-examined by the Crown Attorney and the trial judge as well, could only add to the natural disposition of

(1) [1947] S.C.R. 531.
(2) 61 C.C.C. 193.
(3) 20 C.A.R. 144.

the jury to relate the misdirection to him. Throughout the address to the jury, the instructions with respect to the special pleas advanced, were either prefaced or followed by the *caveat*: "If you accept the testimony of the accused." To be virtually directed that, if on one point, they found his evidence deliberately untrue, they could not believe him in any other particular, was a misdirection of a most serious nature as, if the condition on which rested the direction was found to exist, the jury was then instructed to entirely disregard the whole defence. To say that, in the circumstances of this case, this misdirection could be tantamount to an encroachment upon the right of full answer and defence, would not be an extravagant statement.

Dealing now with the last ground of appeal. It was formulated orally in the course of the argument, leave to do so being then granted upon the consent of the Crown, and in view of the importance of the case. The grievance is that the trial judge failed to direct the jury that the validity of the defence of drunkenness is dependent upon the proof that the accused was, at the time of the commission, affected by drunkenness to the point of being unable to form not any intent but the specific intent to commit the crime charged in this case, the crime of murder, or the lesser crime of manslaughter. As it turned out, this ground was not pressed in the argument and, for this reason, its merits will not be discussed. As there will be a new trial, it may be pertinent to say a word on this and another matter. The rules of law for determining the validity of the defence of drunkenness have been stated, in the two following propositions, by Lord Birkenhead, in the *Beard* case (1):

> That evidence of drunkenness which renders the accused incapable of forming the *specific intent* essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had *this intent*.
>
> 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.

Reference may equally be had to the judgment of this Court in *MacAskill* v. *The King* (2).

(1) [1920] A.C. 479 at 501 and 502. (2) [1931] S.C.R. 330.

1950

LATOUR v. THE KING

Fauteux J.

The other matter in which comments may be added, although the point was not raised by the appellant, is related to the following direction given to the jury:

> This is an important case and you must agree upon a verdict. This means that you must be unanimous.

This is all that was said on the subject. If one of the jurors could have reasonably understood from this direction—and it may be open to such construction—that there was an obligation to agree upon a verdict, the direction would be bad in law. For it is not only the right but the duty of a juror to disagree if, after full and sincere consideration of the facts of the case, in the light of the directions received on the law, he is unable conscientiously to accept, after honest discussion with his colleagues, the views of the latter. To render a verdict, the jurors must be unanimous but this does not mean that they are obliged to agree, but that only a unanimity of views shall constitute a verdict bringing the case to an end. The obligation is not to agree but to co-operate honestly in the study of the facts of a case for its proper determination according to law.

In the presence of the misdirections above discussed, their gravity and their combined effect, I am unable to say that the respondent has affirmatively shown that there was, in the result, no substantial wrong and that justice was done according to law. And, as above indicated, the judgment rendered by the Court is that the appeal is allowed, the verdict of murder is quashed and a new trial is ordered.

Appeal allowed and new trial directed.

Solicitor for the appellant: *J. E. Lacourcière.*

Solicitor for the respondent: *W. B. Common.*