WALTER GRANT.....APPELLANT; 1949

AND *Mar. 23
*Apr. 12

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal Law—Accused charged with manslaughter arising out of operation of motor vehicle—Trial judge directed jury to return verdict of not guilty of manslaughter and to consider if reckless driving proven—Whether jury satisfied itself that accused was not guilty of manslaughter, and since this a condition precedent, whether it had jurisdiction to consider offence of reckless driving—Criminal Code, ss. 285 (6), 951 (3).

Section 951 (3) of the *Criminal Code* provides that, upon a charge of manslaughter arising out of the operation of a motor vehicle, the jury if satisfied that the accused is not guilty of manslaughter but is guilty of an offence under s. 285 (6), may find him guilty of that offence.

The appellant was charged with manslaughter arising out of the operation of a motor vehicle. The trial judge in charging the jury told them there was no evidence to support the manslaughter charge and directed that they bring in a verdict of not guilty on that count but left with them to determine whether or not the appellant was guilty of reckless driving.

Held: that the jury in returning a verdict of not guilty of manslaughter, followed the judge's direction on a question of law as it was their duty to do; therefore the terms of the statute were met and their verdict meant that, although acting in conformity with the judge's direction and their duty, the jury was satisfied that the accused was not guilty of manslaughter.

APPEAL by the accused from the judgment of the Supreme Court of New Brunswick, Appeal Division (1) which dismissed his appeal, (Richards C.J. dissenting), from a conviction and sentence for reckless driving.

R. V. Limerick for the appellant.

H. W. Hickman for the respondent.

THE CHIEF JUSTICE:—I have had the privilege of reading the reasons of my brother Kerwin, and I fully agree with them.

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

(1) (1948) 92 Can. C.C. 366.

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Rinfret, C.J.

The appellant contends that the words "if they are satisfied that the accused is not guilty of manslaughter", as applied to the jury in subsection (3) of section 951 of the *Criminal Code,* should be construed as introducing into the *Code* an entirely different procedure from that which obtains in respect of any other offence dealt with in the *Code.*

It is too clear for words that upon the trial of an indictable offence the law is the province of the presiding judge and the findings of fact are the province of the jury. Indeed the jury has no other jurisdiction but to decide the facts, and in matters of law they must follow the directions of the judge.

The learned counsel for the appellant herein would have this court decide that the use in subsection (3) of section 951 of the words "if" (they the jury are) "satisfied that the accused is not guilty of manslaughter" brought into the *Code* an entirely different intention of Parliament, and that these words should be held to mean that the jury alone is to announce its decision that the accused is not guilty of manslaughter and the trial judge, in the instance, is deprived of any right to pronounce upon the law and to direct the jury in accordance with the law.

In the present case, the learned judge charged the jury to the effect that there was no evidence to support the charge of manslaughter and directed the jury to find a verdict of not guilty on that charge. Counsel for the appellant accordingly contends that that was contrary to the provisions of subsection (3) of section 951, and for that reason the trial was abortive.

In doing what he did the learned judge followed the practice outlined by this Court in *Walker* v. *The King* (1), where it was decided that "the proper practice is for the trial judge to direct the jury to acquit" insofar as the charge of manslaughter was concerned. See also *The King* v. *Comba* (2).

The contention of the appellant's counsel would really lead to the conclusion that subsection (3) of section 951 should be treated as a law by itself and should not be governed by the other sections of the *Criminal Code.* But, although subsection (3) is new law, adopted by Parliament in 1938, it is, nevertheless, a part of the *Criminal Code;*

(1) [1939] S.C.R. 214. (2) [1938] S.C.R. 396.

and, of course, standing by itself, it would not be workable, unless all the sections of the *Code* are considered to be applicable to it and to the method and procedure whereby it is to be operated.

As was pointed out in *The Queen* v. *Morris* (1), at p. 95:

> It must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law.

And in *Craies on Statute Law,* 3rd edition, p. 112, it is stated that "to alter any clearly established principle of law a distinct and positive legislative enactment is necessary." Such a rule was applied in this Court in the case of *La Banque Canadienne Nationale* v. *Carette* (2).

It is quite clear, therefore, that there is nothing in subsection (3) of section 951 indicating the intention of the legislator to submit charges within that subsection to be dealt with in the criminal machinery in a way different from that which obtains in all other criminal cases.

In returning a verdict of not guilty on the charge of manslaughter, of course, the jury in the present case was following the direction of the presiding judge on a question of law, to wit, on his statement that there was no evidence adduced in the case to support a charge of manslaughter, but in doing so they were acting in accordance with their duty, as it has always been understood, in the application of the *Criminal Code* in this country; and their verdict that the appellant was not guilty of manslaughter meant that they were satisfied with that result within the meaning of subsection (3).

The appeal should be dismissed.

The judgment of Kerwin, Rand and Kellock, JJ. was delivered by:

KERWIN J.: The appellant was charged with manslaughter by wilful misconduct while driving an automobile on the public highway. There had been a previous trial, at which there was a disagreement of the jury. On the second trial, the appellant called no evidence and in his address to the jury, counsel for the Crown stated that there was no evidence sufficient to justify a verdict of manslaughter but suggested that the appellant might be found guilty under subsection 6 of section 285 of driving

(1) (1867) C.C.R. 90.
(2) [1931] S.C.R. 33.

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recklessly or in a manner dangerous to the public. The trial judge agreed with the statement of Crown counsel and while it is argued that in his charge he withdrew manslaughter from the jury, what he actually did was to direct the jury that they must bring in a verdict of not guilty. In so doing, he was following the proper practice, where he decides there is no evidence to go to the jury: *Walker* v. *The King* (1).

The only point in the appeal may be put thus. Since the trial judge removed from the jury any consideration of the evidence on the manslaughter charge, it cannot be said, in the words of subsection 3 of section 951, that the jury were "satisfied that the accused is not guilty of manslaughter." It is true that in returning a verdict of not guilty of that charge, the jury were only obeying the directions of the judge on a question of law but as it was their duty to follow those directions, the terms of the statute are met; that is, although acting in conformity with the judge's directions and their duty, the jury were satisfied that the accused was not guilty of manslaughter.

The appeal should be dismissed.

TASCHEREAU J.: Section 951(3) of the *Criminal Code* reads as follows:

(3) Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury, and in the province of Alberta a judge having jurisdiction and sitting without a jury, if *satisfied* that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence and such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

The "included offence" in the above section is the following:

285(6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

(*a*) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; or

(*b*) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars or to both such imprisonment and fine.

(1) [1939] S.C.R. 214 at 216.

The appellant was charged with manslaughter arising out of the operation of a motor vehicle, and he was tried before Mr. Justice Leblanc and jury, in September, 1948.

At the conclusion of the evidence for the prosecution, the learned trial judge withdrew from the consideration of the jury the charge of manslaughter, and directed them to find the accused "not guilty" of manslaughter. He further added: "There is no more charge of manslaughter for you to consider". The jury retired and the appellant was found guilty of "reckless driving", which is the offence described in section 285(6) Cr. C. This conviction was upheld by the Court of Appeal, Chief Justice Richards dissenting (1).

It is submitted on behalf of the appellant, that the jury had no jurisdiction to render such a verdict, because before reaching such a conclusion, the jury must *satisfy* themselves that the accused was not guilty of manslaughter, and as the consideration of a finding on the manslaughter charge had been withdrawn from the jury, there was no jurisdiction to consider "reckless driving".

I am of the opinion that this contention fails. It is the duty of the trial judge, when the evidence does not disclose an offence, to withdraw the charge from the jury, and it is also the duty of the jury to accept the direction of the judge. The words found in section 951(3) that "the jury * * * if *satisfied* that the accused is not guilty of manslaughter but is guilty of an offence under subsection (6) of section 285 etc." do not mean only that the jury may be *satisfied* that the facts do not reveal a crime of manslaughter; these words also mean that the jury may be *satisfied* that in law there is no manslaughter, and the trial judge is the only competent authority to advise them on that matter. This is what happened in the present case, and the jury having been *satisfied* that in law there was no offence of manslaughter, could properly bring in a verdict of reckless driving.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: *Limerick & Limerick.*

Solicitor for the respondent: *H. W. Hickman.*

(1) 92 Can. C.C. 366.