HIS MAJESTY THE KING ..... APPELLANT;

1942

* Oct. 6, 7, 8.
* Nov. 12.

AND

ROBERT HUGHES, JOHN PETRYK, WILLIAM G. BILLAMY, FLOYD BERRIGAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Murder—Shooting during attempted robbery—Four accused engaged in the robbery—Victim shot by one of the four—Struggle between the latter and the victim—Jury instructed that accused guilty of murder or nothing—Whether verdict of manslaughter should have been left open to jury—Definition of murder—Ss. 252 (2), 259 (d) and 260 Cr. C.

The respondent H., with two companions, entered a shop kept by the father of the victim for the purpose of robbery. The family of the victim and the victim were sitting in a room, in the rear of the shop, separated by a half door with curtains. The mother, hearing the store bell, entered the shop, saw H. carrying a revolver and gave a warning to the family that a hold up was in progress. H. fired a first shot through the wooden partition of the side of the doorway and a second one through the curtains. The first of the shots wounded the victim in the hand and the second in the arm. The victim immediately came into the shop and grappled with H. in an effort to disarm him. The accounts of the actual shooting by the mother and a brother of the victim did not agree. The mother testified that, during the struggle, the victim was attempting to take the pistol from H. "but could not reach because he was quite high" and that she heard then only one shot, her son falling down; while the brother stated that H. broke away from the victim, was leaving the shop and, just as he was opening the door, turned and fired at the victim a third shot which killed him; but the brother agreed with his mother that the victim "had H.'s wrist raising it up in the air" during the struggle. A witness for the Crown testified that H., on the evening of the date of the crime, had made a statement to him "that the gun accidentally went off". The trial judge charged the jury that H. was guilty of murder or of nothing. All four respondents were convicted of murder, H. for having effected the act of shooting and the three others as conspirators with H. and, as such, responsible for the crime. A majority of the Court of Appeal ordered a new trial, holding that the trial judge erred in not instructing the jury that they could have returned a verdict of manslaughter, if they believed some of the evidence that the revolver was accidentally discharged.

Held that the judgment appealed from (78 Can. Cr. C. 1) should be affirmed. The trial judge properly instructed the jury that it was their duty to find H. guilty of murder, if they accepted the evidence of the brother of the victim; and that they could render a similar verdict, if they accepted the mother's testimony, as they could properly infer that the shot which occurred during the struggle,

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

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following at once the two shots fired into the sitting room, was intentionally fired by him in a state of mind evincing disregard of the consequences of his shooting and with the knowledge that his conduct was endangering the lives of the people whose premises he was invading. But the trial judge did not deal with the third hypothesis, the possibility that they might find the pistol was discharged by accident in the sense that it was not discharged by any act of H. done with the intention of discharging it. The trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the pistol was not discharged by the voluntary act of H. and that H. did not anticipate and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused.—Also the trial judge proceeded rightly in instructing the jury that, in the circumstances of the case, the law to be applied was to be found in the Criminal Code (S. 252 (2) Cr. C.) *Graves* v. *The King* (47 Can. S.C.R. 568) applied.

APPEAL by the Crown from the judgment of the Court of Appeal for British Columbia (1), allowing an appeal by the four respondents in this case, quashing their conviction for murder on a joint trial before Sidney Smith J. and a jury and ordering a new trial.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

R. L. Maitland K.C. and *Alfred Bull K.C.* for the appellant.

A. Branca for the respondent Hughes.

W. A. Schultz for the respondent Petryk.

J. S. Burton for the respondent Billamy.

T. F. Hurley for the respondent Berrigan.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The respondents were convicted of the murder of Yoshyuki Uno in Vancouver on the 16th of January, 1942. The act of shooting by which it is alleged the murder was effected was, it is charged, the act of the respondent Hughes; the other respondents were charged and found guilty as conspirators with Hughes and, as such, responsible for the crime.

I shall deal first with the case of Hughes. The evidence shows that on the date mentioned Hughes with two companions entered the shop kept by the father of the victim

(1) (1942) 78 Can. Cr. C. 1; [1941] 3 W.W.R. 1; [1942] 3 D.L.R. 391.

at 305 West 4th Ave., Vancouver, for the purpose of robbery. The family, his wife, the mother of the victim, a daughter, the victim and another son, lived with him in the rear of the shop which was separated from a sitting room, or living room, by what is called a half door with curtains on the store side extending to the floor. There is a bell which rings in the sitting room when the street door of the store opens.

On the occasion with which we are concerned Mr. and Mrs. Uno were sitting in the sitting room with the deceased son and the other son and daughter. The store bell having rung, the father left the room for some reason and the mother entered the shop. She says Hughes was carrying a revolver and she uttered some expression which gave a warning to the family in the sitting room that a hold-up was in progress. They had formerly gone through the same experience and this expression was understood. Mrs. Uno says that Hughes went immediately toward the curtains of the door leading into the sitting room and, as he approached, he fired a shot which passed through the wooden partition at the side of the doorway. When he got to the curtains he fired another shot through the curtains. The first of these shots wounded Yoshyuki Uno in the hand and the second in the arm. Yoshyuki immediately came into the store and grappled with Hughes in an effort to disarm him. The brother and the mother were in the store at this time together and the brother agrees with the mother that this struggle took place. Their accounts, however, of the actual shooting of the victim do not agree. The brother says that Hughes broke away from Yoshyuki and left the shop and, just as he was opening the door turned and fired at Yoshyuki a third shot which took effect in his head and killed him. The mother says that in the struggle Yoshyuki was attempting to take the pistol from Hughes "but could not reach because he was quite high". She adds:—

* * * Hughes was holding gun, and my son grabbed his wrist.

Q. Does she mean that Hughes was holding the gun in his hand?

A. Yes, and my son was doing his best, and trying to bring it down, but he was quite weakened because he sustained injury already.

She says that while they were struggling she heard a shot and afterwards did not hear another, that after the

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shot her son fell down and Hughes made off. She distinctly remembers one shot fired during the struggle but heard no later shot. It ought to be observed perhaps that the brother's evidence, while generally agreeing with his mother's statement that there was a struggle, is to the effect that Yoshyuki "had Hughes' wrist raising it up in the air". If the jury accepted the brother's account of the shooting they had before them, of course, a plain case of murder. The controversy turns entirely upon the alternative hypothesis that the third shot occurred during the struggle, as the mother says.

The majority of the Court of Appeal have held that it was open to the jury, if they took a certain view of the evidence, to find that the pistol went off by accident in the sense that it was not discharged by any act of Hughes done with the intention of discharging it, and that if they so found they might properly have brought in a verdict of manslaughter and that the learned trial judge erred in not leaving that issue to them.

The Crown appeals.

The jury would view the acts of Hughes from the moment Mrs. Uno entered the shop as swiftly succeeding phases of a single outrage and without doubt as evincing a reckless disregard of the consequences of his shooting, and they would be quite justified in ascribing to him a knowledge that his conduct was endangering the lives of the people whose premises he was invading. They might not improperly infer that the shot which occurred during the struggle (if they accepted the mother's story), following at once upon the two shots fired into the sitting room, was intentionally fired by him in that state of mind. If that was their conclusion, it would be their duty to find him guilty of murder under section 259 (*d*) of the Criminal Code. I think the learned trial judge in effect instructed them in this sense. He also properly instructed them that they might find the same verdict if they accepted the evidence of the brother.

Unfortunately, he did not deal with the third hypothesis, the possibility that they might find the pistol was discharged by accident in the sense mentioned.

The Crown adduced in evidence against the accused the testimony of one Ciminelli, who deposed to an account of

the shooting given to him by Hughes in a conversation on the evening of the date of the crime, the 16th of January, 1942. In examination in chief Ciminelli said that Hughes told him on that occasion that

> the Jap came for him and struggled with him and then * * * and the gun went off.

On cross-examination Ciminelli said that on the preliminary hearing he had given this version of the conversation:—

> Q. What was the conversation? A. He told me that he was in a jam.
> Q. What kind of a jam? A. He told me he took some store, and the guy came for him, and struggled with him, and the gun accidentally went off.
> Q. Do you remember giving that evidence? A. That is right.
> Q. Your recollection was clearer then than it is to-day, I take it? A. That is right.

As Parke J. said in *Rex* v. *Higgins* (1):—

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

If the jury accepted Ciminelli's version of Hughes' statement given at the preliminary hearing ("that the gun accidentally went off") as a true account of that statement, then that statement in its complete form was evidence in favour of the accused. It was, of course, for the jury to consider whether this statement, having regard to all the other evidence before them, satisfied them that the pistol in fact went off by accident and not by the voluntary act of Hughes, or that it was only of sufficient weight to leave their minds in a state of doubt on the point. If the jury thought the pistol did not go off by the voluntary act of Hughes, or were in serious doubt about it, then another question might arise; and here emerges the real point for decision on this appeal.

Before stating that point, I quote subsection (2) of section 252 and subsection (*d*) of section 259 of the Criminal Code:—

> Section 252 (2): Homicide is culpable when it consists in the killing of any person * * * by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death * * *

(1) (1829) 3 C. & P. 603, at 604, also cited by the Chief Justice in *Eberts* v. *The King* (1912) 47 Can. S.C.R. 1, at 31.

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Section 259: Culpable homicide is murder.

* * *

(*d*) If the offender, for an unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

I think I ought to say now, in the clearest terms, that, in my opinion, even if the jury thought the pistol went off by accident (or were not satisfied that it did not go off in that manner) they might still have properly found a verdict of murder under these sections if they were satisfied that the conduct of the accused was such that he ought to have known it to be likely to induce such a struggle as that which actually occurred, and that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle.

At p. 583 of his judgment, delivered on behalf of the majority of the Court, in *Graves* v. *The King* (1), Anglin J. (as he then was) says:—

> For the purposes of this appeal I assume that under this provision it was not necessary, in order to bring the charge of culpable homicide within it, that the jury should have found that the acts of the defendants were such as they knew or should have known were likely to cause the very acts to be done or the precise situation to arise which in fact resulted in the homicide, or to cause the death of the person who was killed, but that it would suffice if the jury had found that the accused did an act which they knew or should have known would be likely to induce the doing of anything or to bring about any situation likely to cause the death of some person—the person killed or any other person.

I think this passage ought to be accepted as stating the law as it is, not merely as it is assumed to be. To repeat, I think the act of Yoshyuki in attempting to disarm Hughes and the ensuing struggle were so clearly the natural and ordinary consequences of Hughes' conduct that the jury might well, as reasonable men, have inferred that Hughes ought to have anticipated some such occurrence and the probable involuntary discharge of the pistol as a natural incident of the occurrence; it would then be for them to say whether the conditions of clause (*d*) of section 259, when read with subsection (2) of section 252, were fulfilled. The learned trial judge did not put this to the jury explicitly, but possibly it is within the scope of his language.

(1) (1913) 47 Can. S.C.R. 568.

The learned judge, however, gave the jury to understand that the accused must be acquitted if they did not find them guilty of murder. I am forced to the conclusion that this was misdirection.

The argument on behalf of the Crown was based upon two decisions, *Director of Public Prosecutions* v. *Beard* (1), and *Rex* v. *Elnick* (2).

The rule laid down in the House of Lords in *Beard's* case (1) is that homicide arising from an act of violence in furtherance or in the course of the crime of rape constitutes murder. In *Beard's* case (1) it was proved that there was a violent struggle in which the accused overpowered the child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death.

I cannot agree that you can bring within this rule the accidental discharge of the pistol admitted by Hughes. If the pistol went off accidentally, in the sense mentioned above, it could hardly be said as matter of law to be an act of violence done by the accused "in furtherance of or in the course of" the crime of robbery in the sense of the Lord Chancellor's judgment.

No question of accident in the relevant sense arose in *Beard's* case (1). There was no question that the act which caused the suffocation, the act of the prisoner in placing his hand on the mouth of the victim, was his voluntary act. In the report of the case in the Criminal Appeal Reports (3), there appears this passage in the judgment of the Lord Chief Justice:—

> During a discussion on the law applicable to the case the learned judge said that he should tell the jury that if a man is engaged in violating the honour of a woman and she does her best to defend herself and struggles, and the man does something which kills her, to prevent her from screaming or struggling, it is murder. In summing up he directed that "if a man is assaulting a woman or girl, and the woman or girl, in order to resist him screams and struggles, and the man, in order to effect his purpose, puts his hand upon her mouth and suffocates her, he is guilty of murder, and it is no use at all to say, 'I only intended to stop her screaming. I did not intend to kill her.' That is no defence, in my judgment."

(1) [1920] A.C. 479.
(2) (1920) 30 Man. R. 415; 33 C.C.C. 174; [1920] 2 W.W.R. 606.
(3) (1919) 14 C.A.R. 110, at 114.

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And at page 116:—

> It was proved that there was a struggle of a horrible description between this man, seeking to consummate his desire, and this 13 years old girl. No questions were put in cross-examination by Mr. Artemus Jones for the defence, to minimize the effect of the testimony about the struggle that must have taken place. The child was straining every nerve and muscle to escape him, and in order to overpower her and to stop her struggles and screams he eventually did the act which resulted in her death. By the law of England that is murder: it is an act of violence done in the course or in furtherance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder.

Again the judgment of the Lord Chancellor makes it quite clear that the defence founded upon drunkenness was not that Beard was so drunk as to be incapable of forming the intent to commit rape, but that he was incapable of measuring or foreseeing the consequences of his violent act, or that at the time of placing his hand on the child's mouth he was incapable of knowing that what he was doing was dangerous. At p. 307 he says:—

> There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.

In this country a charge arising out of circumstances such as those considered in *Beard's* case (1) would be disposed of under the law laid down in section 260 of the Criminal Code.

As regards *Rex* v. *Elnick* (2), Mr. Justice Cameron says at p. 431:—

> The jury should have been told that on the undisputed and admitted facts the killing of De Forge was caused by an act of violence done by Elnick in furtherance of a crime of violence, that the killing was therefore murder and that it was their duty to return a verdict of guilty.

That is really the basis of the decision in that case. Such a direction could not properly have been given in this case, in view of the evidence set forth above as to accidental discharge.

The learned trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the pistol was not discharged by the voluntary act of Hughes, and that Hughes did not anticipate

(1) [1920] A.C. 479.

(2) (1920) 30 Man. R. 415.

and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused.

Mr. Justice Fisher thinks that on the evidence no reasonable jury could find that the discharge of the pistol was accidental, or that there was sufficient evidence to raise a doubt upon that point. There is much, very much, to be said for that view; I am not satisfied, however, that if the issue of manslaughter had been left to the jury, they must necessarily have found the verdict they did.

I think the learned trial judge proceeded rightly in instructing the jury that in the circumstances of this particular case the law to be applied is to be found in the Criminal Code. He might well have called the attention of the jury to the second subsection of section 252 and to the judgment of Anglin J. in *Graves* v. *The King* (1). As this Court thought in *Graves* v. *The King* (1), I am quite satisfied that the law to be applied to the circumstances of this case is to be found in the Code and that we need not pass upon the question whether the definitions in sections 252, 259 and 260 Cr. C. are exhaustive.

The appeal, therefore, from the judgment of the Court of Appeal, as it affects the conviction of Hughes, should be dismissed; and it follows necessarily that the appeal in respect of the other respondents must also be dismissed.

Appeal dismissed.

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(1) (1913) 47 Can. S.C.R. 568.