1950
*Nov. 14
1951
*Feb. 6

FRANÇOIS ROZON ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Manslaughter—Operation of motor vehicle—Verdict of criminal negligence—Substituted by Court of Appeal for dangerous driving—Whether dissent in Court of Appeal within section 1023(1) of Criminal Code—Sections 285(6), 951(3), 1016(2) and 1023(1) of the Criminal Code.

In 1948, appellant was tried before a jury on a charge of manslaughter arising out of the operation of a motor vehicle. The jury, implicitly acquitting him of that offence, returned a verdict of guilty of criminal negligence. The Court of Appeal was unanimously of the opinion that this verdict could not stand and the majority, therefore, basing itself on sections 1016(2), 951(3) and 285(6) of the *Criminal Code*, substituted a verdict of guilty of dangerous driving. The minority, expressing a doubt as to whether section 1016(2) applied and not wanting to speculate as to what the jury intended by their verdict, would have acquitted the accused.

Held: (Affirming the judgment appealed from) Locke and Cartwright JJ. dissenting, that the appeal should be dismissed as the dissent in the Court of Appeal was not on any ground of law dealt with by the majority, and upon which there was a disagreement in the Court of Appeal. (Expressing a doubt is not dissenting).

*PRESENT: Rinfret C.J. and Taschereau, Locke, Cartwright and Fauteux J.J.

Per the Chief Justice, Taschereau and Fauteux JJ.: As an appeal under s. 1023(1) of the *Criminal Code* is limited to grounds of law alone, upon which there were points of difference in the Court of Appeal, and as the ground raised by the minority, assuming that it was a ground of law alone, was not considered by the majority because of the view they took of the case, there was, therefore, no disagreement in the Court of Appeal on a question of law alone and this Court has, consequently, no jurisdiction to entertain the appeal.

Per Locke and Cartwright JJ. (dissenting): The appeal should be allowed and a new trial ordered as the Court of Appeal had no right to substitute a verdict of dangerous driving under 1016(2) since, because of errors in law in the charge, this verdict could not have stood even if the jury had found it.

Per Locke and Cartwright JJ. (dissenting): To give this Court jurisdiction to entertain an appeal under s. 1023(1), it is not necessary that the dissenting judgment upon which the appeal is based proceeded upon a point of law with which the majority also dealt and upon which the majority and the dissenting judges were in disagreement, but it is sufficient under that section that (*a*) there be a dissenting judgment and (*b*) that a ground upon which such dissenting judgment is based be a question of law.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), substituting, Letourneau C.J.A. and Barclay J.A. dissenting, for a jury's verdict of guilty of criminal negligence a verdict of dangerous driving of an automobile pursuant to section 285 of the *Criminal Code,* affirming the sentence passed by the trial judge and dismissing the appeal.

Jean Drapeau for the appellant.

Noel Dorion K.C. and Lucien Thinel for the respondent.

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

FAUTEUX J.—The appellant has been charged with the offence of manslaughter, arising out of the operation of a motor vehicle on the 17th of October 1947, in the district of Terrebonne, Province of Quebec. On the 26th of October 1948, the jury, implicitly acquitting him of the major offence of manslaughter, returned a verdict expressed in the following terms: "guilty of criminal negligence." The record does not disclose any objection being taken to the verdict, either as to its form or as to its substance, at the time it could have been corrected.

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About two weeks later, Rozon appealed to the Court of King's Bench (Appeal Division) (1) on questions of law alone. There was no appeal on questions of fact or mixed law and fact nor was there any leave granted or even asked to appeal on such questions. Of the three grounds raised on law, one was that the accused having been indicted for manslaughter as the result of the operation of a motor vehicle, the verdict of criminal negligence was illegal.

By a majority judgment (St.-Jacques, Gagné and MacKinnon (ad hoc), JJ.), that appeal was dismissed; a verdict of reckless driving was substituted for the one expressed by the jury and the sentence imposed by the trial judge was allowed to stand. Mr. Justice Barclay, with the concurrence of the late Chief Justice Létourneau, expressed a dissent clearly limited to the manner in which the appeal should be disposed of in view of the illegality of the verdict expressed by the jury. They would have allowed the appeal and quashed the conviction and the sentence. Thus, there was no dissent as to any of the grounds of appeal raised by the appellant in the Court below and, in point of fact, all the judges, as appears by the following excerpts from the reasons for judgment, agreed that the accused could not, on the indictment, be found guilty of criminal negligence. Mr. Justice St.-Jacques, in reference to the accused, said:

> Il soutient que depuis l'amendement apporté en 1938, à l'article 951 du Code Criminel, un verdict de négligence criminelle sous l'autorité de l'article 284 ne peut plus être rendu. Ainsi formulée, la proposition de l'appelant n'est pas discutable; il faut l'admettre comme bien fondée.

Mr. Justice Gagné:

> Comme M. le Juge St.-Jacques et M. le Juge Barclay, dont j'ai eu l'avantage de lire les notes, je crois qu'en vertu des amendments adoptés aux articles 951 et 285, en 1938, l'appelant ne pouvait pas être condamné pour négligence criminelle.

And, then, Mr. Justice MacKinnon:

> I am in agreement with the Hon. Messrs. Justices St.-Jacques, Barclay and Gagné, whose notes I have had the opportunity of reading and for the reasons given by them that the appellant could not be found guilty of "criminal negligence" on this charge.

Though no reference is made to ss. 2 of section 1016 of the *Criminal Code,* either in the formal judgment or in the reasons for judgment of Mr. Justice St.-Jacques who wrote

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it, it appears from the reasons for judgment delivered by the other members of the Court that the dissent is related to this section, in respect of which the only two questions considered were:

1. Whether section 1016 ss. 2 is, in law, applicable to the case and, if it is,

2. Whether or not, being applied, the substitution of verdict could properly be made in the light of the actual finding and the facts of the case.

It is convenient to quote ss. 2 of section 1016 and, then, relate the views expressed on the two points by the members of the Court.

2. Where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could on the indictment have found him guilty of some other offence, and on the actual finding, it appears to the Court of Appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the court of appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law for that other offence, not being a sentence of greater severity.

Mr. Justice St.-Jacques first deals with the facts of the case, then with the charge, and finally, without referring in terms to ss. 2 of section 1016, concludes, as in the formal judgment, that the jury, really intending to return a verdict of reckless driving, ill expressed themselves in wording it: "guilty of criminal negligence." At page 150, the learned judge says:

Lorsque ce verdict a été rendu, le président du tribunal aurait pu ordonner au jury de le libeller, suivant la preuve et la direction donnée, à savoir: conduite dangereuse ou désordonnée d'une automobile suivant les expressions que l'on retrouve au cours de la charge. Il ne l'a pas fait. Sans doute, parce que tout le monde a compris, à ce moment-là, qu'il s'agissait bien, malgré la rédaction du verdict, de l'offense prévue à l'article 285.

Je ne puis admettre que ce verdict doive être cassé et mis à néant; il peut être modifié dans sa rédaction, sans en affecter la substance qui ressort clairement, et de la preuve et de la charge du juge.

Messrs. Justices Gagné and MacKinnon are clearly of the opinion that the section is applicable to the case and applying it, conclude that the substitution is justified by the finding and the facts of the case. Thus, at page 160, the former says:

Il s'agit de savoir si cette Cour a le pouvoir de modifier le verdict pour le rendre conforme au paragraphe 6 de l'article 285. L'article 1016, paragraphe 2, nous le permet.

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And, having considered the address of the trial judge, he concludes, at page 163, to the substitution of a verdict:

Comme on le voit, le savant juge confond, dans les remarques qui suivent la lecture de l'article 285, par. 6, la négligence criminelle, ou coupable, et ce qu'il appelle la conduite désordonnée d'une automobile. Mais, tout cela est en relation avec l'offense prévue au dit paragraphe qu'il a lu en entier.

Le jury n'a pas pu comprendre qu'il puisse s'agir d'autre chose. L'expression employée au verdict est impropre, mais c'est bien l'offense de conduite dangereuse que le jury avait à considérer, et c'est de cette offense qu'il a voulu déclarer l'accusé coupable.

Finally, referring to the evidence, the learned judge says:

Ce qui s'est passé avant et après l'accident, d'après la preuve, et l'état du cadavre lorsqu'on l'a trouvé, démontrent de façon tellement évidente la culpabilité de l'appelant, que le jury n'a pas pu être influencé par les quelques inexactitudes que signale le savant procureur.

Mr. Justice MacKinnon, at page 166, states:

I consider that under Art. 1016, paragraph 2, C.C., this Court has the right to substitute for the verdict as found a verdict of guilty of an offence under paragraph 6 of Art. 285, C.C.

And, at the same page, on the second point, he concludes:

As pointed out by the Hon. Messrs. Justices St.-Jacques and Gagné, the judge in his address to the jury made no reference to Art. 284 which defines criminal negligence. He did however read to the jury paragraph 6 of Art. 285 C.C. which deals with reckless driving. To me it is evident that taking the judge's charge as a whole that he intended to direct the jury that it could bring in a verdict of guilty of manslaughter or reckless driving and that it was the offence of reckless driving which the jury considered when it found the appellant guilty of criminal negligence. For the reasons given by Messrs. Justices St.-Jacques and Gagné, with which I concur, I would substitute for the verdict given a verdict of guilty of reckless driving and would allow the sentence to stand.

For the minority judges, Mr. Justice Barclay did not consider the facts at all. Dealing first with the second point, he concludes, at page 159:

. . . With all these directions to the jury, I am of the opinion that speculation as to what they really intended would be most unfair to the accused.

And, dealing then with the first point, he expresses a doubt:

I am also very doubtful as to whether Article 1016-2 is applicable to the present case.

And he ends his notes of judgment in saying:

I consider therefore that we have no right to substitute any other verdict.

On the alleged basis of this dissent and under the provisions of ss. 1 of section 1023, Rozon now appeals to this Court, formulating as follows his grounds of appeal:

(*a*) The verdict of criminal negligence was illegal in view of the indictment for manslaughter resulting from an automobile accident against the appellant in the present case;

(*b*) The Court of Appeal erred in substituting as it did a verdict of reckless driving to the verdict of criminal negligence rendered by the jury;

(*c*) The Court of Appeal, for the reasons mentioned in the foregoing grounds of appeal, should have quashed the conviction.

It may, at first, be stated that the sole question of law, if any, on which a dissent may be suggested by the appellant to establish the jurisdiction of this Court and its limit is in ground (*b*). For it clearly appears from the above excerpts from the various reasons for judgment that there is no dissent as to ground (*a*) and what is alleged as ground (*c*) does not point to a dissent but to the manner in which the appeal should have been disposed of had the majority agreed with the minority that the substitution was not appropriate under ss. 2 of section 1016.

So, whether, on the issue, the different conclusions reached by the majority and the minority groups in the Court below rest on a point of difference on a question of law and, if so, the merit of such point of law, are the matters to be considered. For this purpose, what was said by the members of the Court below as to each of the three features conditioning the exercise of the special powers given to the Court of Appeal under ss. 2 of section 1016, may now be examined.

The first condition is that the appellant must have been convicted of an offence. The appellant contended that the existence of this condition is not established because the offence of which he was found guilty by the jury—criminal negligence—was not, in the case at bar, an offence included in the indictment. Mr. Justice Barclay dealt with this point but left it as above indicated with no conclusion but simply the expression of a doubt. And if the sentence at the very end of his reasons: "I consider there-

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fore that we have no right to substitute any other verdict" cannot, because of inconsistency with the doubt expressed, be related to the point being considered, I should not hesitate to say that there is no dissent within the meaning of section 1023 and, consequently, no jurisdiction for this Court to deal with this point for *dubitante* is not tantamount to *dissentiente*. (*The King* v. *Bailey et al* (1)).

Assuming, however, that this conclusion with respect to the lack of right to substitute another verdict could be related to the point under discussion, and that our jurisdiction cannot otherwise be questioned, I must confess that I fail to see the difficulty. Again the first condition reads: "Where an appellant has been convicted of an offence . . ." It does not read: "Where an appellant has been convicted of an offence *included in the indictment.*" To accept the appellant's suggestion would be tantamount to add a qualification to the first condition. It would equally curtail the field of the operation of the section to the limits of the authority assigned in section 951 to a jury to bring a verdict of guilty for a lesser offence. That ss. 2 of section 1016 includes a like power for a Court of Appeal is certain but it goes further for the second condition to its applicability does not read: "And if the jury could, on the indictment, have found him guilty of a lesser offence," but reads: ". . . of some other offence." In brief, the evident purpose of the section is to authorize the Court of Appeal to give effect to the finding of the jury or of the trial judge, if at all possible within the conditions prescribed. And such authority is consistent with the principle governing the disposal of appeals in criminal matters that, failing miscarriage of justice or substantial wrong, the appeal generally should be dismissed, even if it might, on the grounds raised, be decided in favour of the appellant.

The second condition to the right of substitution is that it must have been open to the jury on the indictment to find the appellant guilty of the offence proposed in substitution. The provisions of ss. 3 of section 951 were specifically enacted for the purpose of giving the authority to find "reckless driving" and this verdict, substituted by the Court of Appeal, is precisely the only one, the appellant

(1) [1939] 2 D.L.R. 481.

contended, which could—failing a verdict of manslaughter or an acquittal—have been rendered on the indictment. As to the second condition, there is not even a discussion.

The third condition is that, on the actual finding, it must appear to the Court of Appeal that the jury must have been satisfied of facts which proved the appellant guilty of that other offence,—in the premises, reckless driving. From their reasons for judgment, it is clear that the judges of the majority have exhaustively dealt with all the material available in the record to consider and answer the question implied in this condition. To that end, and to that end only—for there was then no other issue legally before the Court—they considered the verdict expressed by the jury, the facts revealed in the evidence put before the latter, and the address of the trial judge. They ultimately concluded that, on the actual finding of "criminal negligence," not only was it clear to them that the jury were satisfied of facts which proved the appellant guilty of the offence of "reckless driving," but that there was no other rational conclusion. In point of fact, they formed the opinion that, as expressed in the formal judgment, the jury ill expressed themselves.

For the minority judges, Barclay J. proceeded on quite a different basis with, naturally, quite a different result. He completely dismissed from his examination the facts proven. Dealing simply with the address of the trial judge and finding confusion as a result of some misdirections—which were not in issue as such but which he found—he concluded:

> With all these directions to the jury, I am of opinion that speculation as to what they really intended would be most unfair to the accused.

And, at the end, he said:

> I consider that we have no right to substitute any verdict.

In substance, and as I read it, the dissent of the minority rests on the view that the Court of Appeal cannot, as a matter of law, substitute a verdict under section 1016 subsection 2 when speculation, needed to ascertain what the jury intended by their actual verdict, would, because of misdirections, be unfair to the appellant.

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In brief, what was really intended by the jury—this was the issue and this cannot be a question of law alone—was clear to the majority, while it was obscure to the minority the members of which, for the reason they indicated, refused to speculate.

It is thus manifest that with different elements in mind in the consideration of the question in issue,—the members of the minority dismissing the evidence from the study of the question,—the members of the Court naturally had a different view of the same and for reasons entirely unrelated, were led, in the result, to a different conclusion. And while the decision of the majority rests on a question of fact, i.e., the intent of the jury, the dissent of the minority rests on the question of law above stated. On this point of law expressed by the latter, the former never dissented either expressly or by implication. Nor did, upon the view they took, even the occasion to consider the point of law ever arise.

The appeal to this Court being taken under subsection 1 of section 1023, as enacted in 1925 c. 38 s. 27 in substitution to the relevant part of what was then section 1024, it is convenient to quote the material parts of the two sections and a few of the decisions of this Court rendered thereunder with respect to the limits of the jurisdiction of this Court in the matter.

Before 1925, section 1024 read:

> Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction . . .

In *Davis* v. *The King* (1), Newcombe, J., delivering the judgment of the majority, said, at page 526, in reference to section 1024 above:

> The interpretation of the latter section has frequently been considered by this Court and it is established by a long and practically uniform course of decision which has become firmly embedded in the practice of the Court that the only questions open to consideration upon appeals under that provision are the *points of difference* between the dissenting judge or judges and the majority of the Court of Appeal.

(1) [1924] S.C.R. 522.

Subsection 1 of section 1023, applicable to this case, reads:

> Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

It may be observed that the latter provision, clearer in this respect than the former, does not read "any question of law in the dissent" but reads "any question of law *on which* there has been dissent in the Court of Appeal."

In *Manchuk* v. *The King* (1), the appeal being taken upon subsection 1 of section 1023 above, Sir Lyman Duff, the then Chief Justice, delivering the judgment of the majority, said at page 346:

> The appeal is, by law, necessarily *limited to the grounds upon which the learned judges dissented.*

In *The King* v. *Décary* (2), the same learned jurist, again delivering the judgment for the Court, stated at page 82:

> It is well settled by the decision of this Court that such grounds must raise the question of law in the strict sense and that it is not a competent ground of appeal if it raises only a mixed question of fact and law.

And having proceeded to compare the reasons for judgment of the majority with those of the minority, in order to find the *points of difference on law,* Sir Lyman concluded with respect to the reasons of the former:

> It is quite plain that the judgment does not rest upon any view of the majority upon a question which is a question of law alone.

And with respect to the reasons of the latter:

> Turning now to the judgment of the minority, Mr. Justice Hall simply says: "I am of opinion that this appeal should be dismissed." Plainly there is no dissent upon any question of law. Mr. Justice Walsh, in the reasons delivered by him for his conclusion that there should be a new trial, does not say either expressly or by implication, that this conclusion is based upon an opinion that the majority proceeds upon any error in point of law alone.

Being of opinion that the judgment of the majority in this case does not rest upon a question of law alone and that the judgment of the minority rests on a question of law upon which there was no expressed or implied dissent from the majority, I must conclude that it is not within the jurisdiction of this Court to review the answer given

(1) [1938] S.C.R. 341. (2) [1942] S.C.R. 80.

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by the Court of Appeal to the question implied in the third condition of section 1016 subsection 2.

For the appellant, it was suggested, at first, that the point of law ultimately raised by the minority is that subsection 2 of section 1016 cannot apply to a case where, the verdict proposed in substitution to the actual verdict would, on the state of the record, have been bad in law, had it been found by the jury. And then, it was said that the minority effectively found misdirections which, in their views, could have vitiated the verdict of reckless driving, had it been rendered.

With respect to the first branch of this contention, I must say with deference, that I am unable to read this proposition of law as being either expressed or implied in the views of the minority. It is certainly not expressed and, even if and with the necessity of involved construction, it could be said to be implied, again I should not fail to observe that the members of the majority, because of the view they took, never considered nor had to consider this proposition for the conclusion they reached and, therefore, never dissented upon it.

As to the second branch of the contention, it must be assumed that, had this been the reasoning of the minority, they would not have failed—as they did—to deal with the facts of the case in order to consider whether or not, in the light of the principle of subsection 2 of section 1014, the result, notwithstanding these misdirections, would inevitably have been the same. And in the event of a doubt on this question, they would, in view of the evidence on the record, have ordered a new trial.

I may finally add that, if an affirmative conclusion, as to the existence of such a dissent within the meaning judicially approved of section 1023 could have been reached, it would then have been necessary, in the consideration of the merit of the alleged point of law, to note that this Court in the *Manchuk* case (1) applied subsection 2 of section 1016 though clearly of the opinion that there were, in the address of the trial judge, misdirections amounting, in the result, to a mistrial.

For the above reasons, the appeal should be dismissed.

(1) [1938] S.C.R. 341.

The dissenting judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.—This is an appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (1) pronounced on the 12th of May, 1949, substituting for a verdict of "guilty of Criminal Negligence" a verdict of "Dangerous driving of an automobile pursuant to section 285 of the *Criminal Code*", affirming the sentence passed by the learned trial judge and dismissing the appeal. Létourneau C.J. and Barclay J. dissenting would have allowed the appeal and directed the acquittal of the accused.

The appellant was tried before Cousineau J. and a jury on a charge of manslaughter arising out of the operation of a motor vehicle. The jury brought in a verdict of guilty of criminal negligence. This verdict was entered and the appellant was sentenced to fifteen months imprisonment. An appeal was taken, the grounds of appeal being as follows:

1. Le verdict de négligence criminelle était illégal vu l'acte d'accusation porté contre l'appelant dans la présente cause;
2. Les commentaires illégaux du procureur de la Couronne dans son adresse aux jurés sur le fait que l'accusé n'a pas témoigné et le refus du président du Tribunal d'arrêter les procédures et d'ordonner un nouveau procès, tel que demandé par le procureur de l'appelant;
3. Le président du Tribunal a erré dans sa charge aux jurés en omettant de leur donner les directives requises par la loi dans le cas de preuve de circonstances.

The Court of Appeal held unanimously that the verdict of guilty of criminal negligence could not stand and the correctness of that holding was not questioned before us. It is, I think, clear that, as a matter of law, on an indictment for manslaughter arising out of the operation of a motor vehicle only three verdicts are possible, (i) guilty of manslaughter, (ii) guilty of the offence created by section 285(6) of the *Criminal Code* (which by implication is a finding of not guilty on the charge of manslaughter);

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or (iii) not guilty. The majority of the Court of Appeal were of opinion that the proper course was to substitute a verdict of guilty of dangerous driving, pursuant to section 285(6), taking the view that this course was authorized by the provisions of section 1016(2) of the *Code*.

From this judgment the appellant appeals to this court, the grounds of appeal being stated as follows:

> The grounds of law on which the present appeal is based are those set forth in the dissenting judgment of the Honourable Messrs. Justices Barclay and Létourneau of the Court of King's Bench, Appeal Side, for the Province of Quebec, which heard the case and in the formal judgment of the other judges and also those mentioned in the appeal, to wit:
>
> A) The verdict of criminal negligence was illegal in view of the indictment for manslaughter resulting from an automobile accident against the appellant in the present case;
>
> B) The Court of Appeal erred in substituting, as it did, a verdict of reckless driving to the verdict of criminal negligence rendered by the jury;
>
> C) The Court of Appeal, for the reasons mentioned in the foregoing grounds of appeal, should have quashed the conviction;

I agree with the view of Barclay J. that the Court of Appeal had no right to substitute a verdict of guilty of dangerous driving.

It must, I think, be clear that the Court of Appeal can convict an accused of an indictable offence of which he has not been convicted by the court of first instance only if statutory authority can be found for such a course. It is suggested that such authority is conferred by section 1016(2).

Before section 1016(2) can be effective to confer this power upon the court in an appeal following a trial by jury there appear to be three conditions which must exist.

(1) The appellant must have been convicted of an offence.

(2) It must have been open to the jury on the indictment to have found him guilty of some other offence.

(3) It must appear to the Court of Appeal on the actual finding that the jury must have been satisfied of facts which proved the accused guilty of such other offence.

In the case at bar it is evident that the second condition set out above is satisfied.

Dealing with the first condition mentioned above, Mr. Drapeau argues that the offence of which the appellant has been convicted must be an offence of which it was possible in law that he could be convicted on the indictment and that a conviction of an offence neither charged nor included in the indictment is a legal nullity and not a conviction at all. We were not referred to any case in which this argument appears to have been considered and I have not been able to find one. I have examined a number of cases decided either under section 1016(2) of the *Criminal Code* or under section 5(2) of the English Criminal Appeal Act, 1907, 7 Edward VII c. 23, which is in substantially the same words, but I have found only one in which it appeared that the verdict for which a different verdict was substituted was one which could not in law have been found on the indictment. The case to which I refer is *The King* v. *Quinton* (1) affirming 1947 O.R. 1. In that case the accused was tried on an indictment charging attempted rape. The jury returned a verdict of "guilty of assault on a female causing actual bodily harm." The Court of Appeal for Ontario held unanimously, and it was apparently not disputed in this court, that the last mentioned offence is not included in a charge of attempted rape, the only other offences included in that charge being indecent assault and common assault. The Court of Appeal substituted a conviction for common assault and passed a lesser sentence. The Crown appealed to this court arguing that a conviction for indecent assault should have been substituted. The appeal was dismissed. There is nothing in the reasons for judgment of the Court of Appeal or of this court to indicate that the argument put forward in the case at bar by Mr. Drapeau was advanced or considered and the point appears to me to be still open for consideration in this court. I do not find it necessary to pass upon it in this appeal and I think it very doubtful whether it is open for our consideration in view of the manner in which the dissenting judgments are expressed.

In my view the third condition mentioned above is not fulfilled in the case at bar. It will be observed that it

(1) [1947] S.C.R. 234.

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must appear to the Court of Appeal on the actual finding that the jury must have been satisfied of facts which proved the appellant guilty of a breach of section 285(6). In determining whether on the actual finding the jury must have been satisfied of facts which proved the accused guilty of such offence no doubt the Court of Appeal would find it necessary to examine the evidence and the charge of the learned trial judge. If, in the course of such examination, it should appear that there was error in law in the charge, so grave that had the jury found a verdict of guilty of dangerous driving it must have been set aside on appeal, I think that section 1016(2) would not empower the Court of Appeal to enter such a verdict. The section must, I think, contemplate a situation where if the jury had found the verdict proposed to be substituted such verdict would on the state of the record have been good in law. To hold otherwise would bring about the startling result that the Court of Appeal could substitute for a verdict, which for some reason can not stand, another verdict which if the jury had found it must have been set aside.

In my view, for the reasons given by Barclay J., because of what was, I think, a fatal defect in the charge of the learned trial judge, a verdict of guilty under section 285(6) could not have stood even if the jury had made it. I think that in effect the learned trial judge charged the jury that they could, and indeed should, find the accused guilty if, in their view of the evidence, his conduct was such as to amount to what is commonly called civil negligence. I think that this was clearly wrong. The learned trial judge appears to have adopted a passage from one of the judgments delivered in *McCarthy* v. *The King* (1), without giving effect to the explanation of that judgment contained in *The King* v. *Baker* (2). In my view this is entirely a matter of law and this ground is I think stated in the dissenting judgment of Barclay J.

It is argued for the Respondent that this ground is not open for our consideration. It is said that it was not taken in the notice of appeal to the Court of King's Bench (Appeal Side) and is not a ground of dissent. It is true

(1) (1921) 62 Can. S.C.R. 40 at 46. (2) [1929] S.C.R. 354.

that the defect in the charge referred to above was not made a ground of appeal to the Court of Appeal but this seems to me, in this case, to be unimportant. The conviction from which the appeal was taken was bad in law as not being possible on the indictment. I do not think that the appellant was required to set out other grounds or to anticipate that the Court of Appeal would substitute a different verdict and to state reasons why that course should not be followed. The appeal to this court is expressly stated to be based on "the grounds of law set forth in the dissenting judgment." While it may be proper that the notice of appeal should state with particularity what those grounds are said to be, it is in the reasons for judgment given by the dissenting judge rather than in the notice of appeal that our jurisdiction must be found. The only question as to which there was disagreement in the Court of Appeal was whether the verdict of guilty of criminal negligence having been annulled, the Court of Appeal could or should substitute another verdict. If and in so far as this decision turned on matters of fact or of mixed fact and law we have no jurisdiction to review it, but if and in so far as it turned on matters of law and if and in so far as such matters of law form part of the grounds of dissent, we have jurisdiction. I read the reasons of the minority as holding *inter alia* that section 1016(2) cannot be applied because there was such misdirection by the learned trial judge as to the kind of negligence which must be found to exist to warrant a verdict of guilty of dangerous driving under section 285(6) that as a matter of law a verdict of dangerous driving even if the jury had found it could not have stood.

It will be observed that at the commencement of his reasons Barclay J. says "In the view which I take of this case, it is not necessary to consider the facts." After holding that the jury could not on the indictment legally find a verdict of criminal negligence, the learned judge goes on to discuss the question whether a verdict of dangerous driving should be substituted under section 1016(2). He quotes the fatal misdirection referred to above, adds other criticisms of the charge and continues: "With all these directions to the jury, I am of the opinion that speculation

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as to what they really intended would be most unfair to the accused." He then expresses a doubt, but does not decide, as to whether section 1016(2) applies unless the verdict proposed to be substituted is included in the offence found by the jury; and concludes "I consider therefore that *we have no right* to substitute any other verdict."

I do not think it is a forced construction of the reasons of the learned judge to read them as indicating that one of the grounds which moved him to hold that the Court of Appeal had no right to substitute a verdict was the misdirection referred to above.

In *The King* v. *Décary* (1), in quashing an appeal on the ground that there was no dissent on any question of law, the judgment of the court at page 84 reads as follows: "Mr. Justice Walsh in the reasons delivered by him for his conclusion that there should be a new trial, does not say, either expressly or by implication, that this conclusion is based upon an opinion that the majority proceeds upon any error in point of law alone."

In my view, in the case at bar, Barclay J. does point out an error in law, the misdirection referred to above, and does, I think expressly but certainly if not expressly then by implication, base his judgment upon it. I think the point is properly before us.

It has been suggested that it is a condition of this Court's jurisdiction to entertain an appeal under section 1023(1) of the *Criminal Code* that the dissenting judgment upon which such appeal is based shall proceed upon a point of law with which the majority also deals and upon which the majority and the dissenting judge or judges are in disagreement. I am unable to accept this view. It is not, I think, disagreement between the judges of the Court of Appeal on a point of law which gives jurisdiction. If that were so there would be a right of appeal in a case in which one judge expressed definite disagreement on a point of law dealt with by the other members of the court but agreed with them that the appeal should be dismissed. In my opinion the existence of the following two conditions is sufficient to give this court jurisdiction: (i) that there be a dissenting judgment in the

(1) [1942] S.C.R. 80.

Court of Appeal, that is a judgment differing from the result proposed by the majority and (ii) that a ground upon which such dissenting judgment is based be a question of law.

I would allow the appeal and quash the conviction but under all the circumstances of the case I think that the proper course is not to direct a verdict of acquittal to be entered but to direct a new trial on the charge of a breach of section 285(6) of the *Criminal Code*.

Appeal dismissed.

Solicitor for the appellant: *Jean Drapeau.*

Solicitor for the respondent: *Lucien Thinel.*