1933

*Nov. 10.
*Nov. 15.

WILLIAM McLEAN ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Murder—Jury—Proper instructions as to circumstantial evidence—Prospective jurors—Examination on voir dire—Not given under oath—Mention by the trial judge as to the possibility of executive clemency.

The appellant was convicted of murder and sentenced to be hanged. Upon appeal the conviction was affirmed, McGillivray J. dissenting. The questions of law upon which the latter based his dissent are: (1) that the trial judge failed to give to the jury a proper direction with respect to the law relating to circumstantial evidence; (2) that his ruling with respect to the questions permitted to be asked of the prospective jurors on their examination on the *voir dire* was erroneous and that the examination was not under oath—the alleged error was that, although the trial judge allowed the accused to ask each juror challenged for cause, if, from what he had heard or read, he had formed an opinion on the case to be tried, he refused to allow a further question as to the nature of that opinion—; and (3) that the direction of the trial judge to the jury respecting the possibility of executive intervention was, as given, insufficient.

Held that the appeal should be dismissed.

On the first point, this Court is of the opinion that the accused had no substantial ground of complaint, taking the charge to the jury as a whole, although the trial judge could have given a more proper direction to the jury as to the circumstantial evidence. There is no single formula which it is the duty of the trial judge to employ; but as a

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon, Crocket and Hughes JJ.

rule he would be well advised to adopt the language, or its equivalent, of Baron Alderson, in the *Hodge* case (2 Lewin C.C. 227): the trial judge should instruct the jury that, in so far as they relied upon circumstantial evidence in the case before them, they must be satisfied not only that the circumstances proved were all consistent with the guilt of the accused, but also that they were inconsistent with any other rational conclusion.

On the second point, this Court is of the opinion that the accused had a fair trial. Whether the accused had a right to have the question, which the trial judge disallowed, put to the jurors, it is unnecessary to determine, for, assuming that he had, he had suffered no prejudice by the trial judge's refusal. As to the objection that the juror witnesses were not sworn, *held* that it was the duty of the accused, as the challenging party, to see that the witnesses he called to support the challenge were properly sworn.

On the third point, although the reference to the executive clemency was an unfortunate one, this Court is satisfied that no harm has been done to the accused, if the trial judge's instructions to the jury are taken as a whole.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta, dismissing his appeal by a majority of the Court from his conviction by Ewing J. and a jury, for murder.

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

E. F. Newcombe K.C. and *Neil Primrose* for the appellant.

J. J. Frawley for the respondent.

The judgment of the Court follows:

THE COURT:—The appellant was convicted of the murder of Walter James Parsille, near Manville, Alberta, and sentenced to be hanged. Upon appeal the conviction was affirmed by the Appellate Division of the Supreme Court of Alberta (McGillivray J. dissenting).

The questions of law upon which McGillivray J. based his dissent, and to which we are confined in this appeal, are set out in the formal judgment of the court as follows:

(1) That the learned trial judge failed to give to the jury a proper direction with respect to the law relating to circumstantial evidence.

(2) That his ruling with respect to the questions permitted to be asked of the prospective jurors on their examination on the voir dire was erroneous and that the examination was not under oath.

(3) That the direction of the learned trial judge to the jury respecting the possibility of executive intervention was, as given, insufficient.

1933

McLEAN
v.
THE KING.

The Court.

(1) The respect in which the learned judge's charge is said to be insufficient as a proper direction to the jury is that he did not instruct them that, in so far as they relied upon circumstantial evidence in the case before them, they must be satisfied not only that the circumstances proved were all consistent with the guilt of the accused, but also that they were inconsistent with any other rational conclusion. This is the rule laid down by Baron Alderson as far back as the *Hodge* case (1), and it has ever since been recognized as a proper direction to jurors.

It is of last importance, we do not doubt, where the evidence adduced by the Crown is solely or mainly of what is commonly described as circumstantial, that the jury should be brought to realize that they ought not to find a verdict against the accused unless convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence. But there is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

One most important element in the case advanced against the appellant was the evidence of one Ward. The accused, Ward deposed, admitted to him when they were in gaol together in Knoxville, Tennessee, that he (the accused) and his father, having decided to rob the deceased Parsille, decided also, in order to avoid a possible subsequent recognition of them by the deceased, that it would be necessary to kill him. This design, according to the statement of the accused as recounted by Ward, was carried out and the deceased was shot by the father in the presence of the son.

The learned trial judge did not explicity tell the jury that they ought not to convict the prisoner unless they believed the testimony of Ward, but, on the other hand, he did not explicitly tell them that it would be open to them to find a verdict against the accused if they disbelieved Ward. As to this there are, first of all, these three relevant sentences:—

> It may be that in the trial of a criminal charge there are facts or sets of facts which are very suggestive but which if standing alone would fall far short of being sufficient to establish the guilt of the accused beyond

(1) (1838) 2 Lewin C.C. 227.

any reasonable doubt. But it may also be that there are facts or sets of facts in sufficient number and of sufficient cogency which combined may amount to proof beyond all reasonable doubt. Such facts or sets of facts if appearing in sufficient numbers and of sufficient force may prove beyond all reasonable doubt not only that the accused committed the offence but that on no other reasonable hypothesis could anyone else have committed it.

If these sentences contain a suggestion that the jury might find a verdict of guilt without regard to Ward's testimony, then they seem also to convey, pretty clearly, the caution that, if they should proceed upon the circumstantial evidence alone, they must be satisfied beyond reasonable doubt that the only rational conclusion, consistent with the facts proved, was that the accused was guilty. But the final sentence of the learned judge's remarks on this subject is this:

> You will weigh all the evidence in this case including all these statements alleged to have been made to Ward and if you believe them to have been made and if you believe them to be true you will say whether or not they satisfy you beyond all reasonable doubt of the guilt of the accused.

We think that this sentence, when read with the learned judge's exposition of the facts and the evidence in the earlier part of his charge, would be calculated to convey to the jury the impression that their verdict ought to turn chiefly, if not entirely, upon their belief or disbelief of the testimony of Ward and of the truth of the statement of fact which, according to Ward's account, was made to him by the accused.

We are satisfied that the accused has no substantial ground of complaint under this head.

(2) The error alleged in the judge's ruling as to the questions which might be put to prospective jurors on their examination on the voir dire was, that, although the judge allowed the accused to ask each juror challenged for cause, if, from what he had heard or read, he had formed an opinion on the case to be tried, he refused to allow a further question as to the nature of that opinion.

The accused had challenged several jurors for cause, and the challenges were tried. In the case of three jurors the triers found against the challenge and declared the jurors indifferent. In each such case the accused challenged peremptorily. When the full complement of jurors had been sworn the accused had one peremptory challenge left, and he had a jury, every man of which the accused, through

1933
McLEAN
v.
THE KING.
The Court.

his counsel, had expressly declared to be unobjectionable. Notwithstanding this the accused now contends that he had a right to put to each of these jurors the question which the learned judge disallowed, and that, as his rights were denied him, he is entitled to a new trial.

We are fully conscious that in the administration of criminal justice nothing is more important than that the constitution of the jury should be free from all objection and that the accused should have the full advantage of every safeguard which the law has provided to enable him to secure this right, which is of the very essence of a fair trial. We, however, think that the accused had a fair trial. Whether the accused had a right to have the question, which the trial judge disallowed, put to the jurors, it is unnecessary to determine, for, assuming that he had, he has suffered no prejudice by the judge's refusal. By his own act in peremptorily challenging these jurors, he elected to pursue that remedy instead of having the question of their indifference as between himself and the King determined by way of challenge for cause. This was held in the case of *Whelan* v. *The Queen* (1). In that case the accused desired to challenge for cause one S., one of the jurors called. The judge ruled that he must first exhaust his peremptory challenges. In deference to the judge's ruling the accused challenged S. peremptorily. Afterwards, having exhausted his twenty challenges, including S., he claimed the right to challenge peremptorily one H. on the ground that he had been compelled to challenge S. peremptorily and should not be obliged to count him as one of the twenty. It was held that the trial judge was wrong in ruling that the accused must exhaust his peremptory challenges before challenging for cause and that if S. had been sworn there must have been a *venire de novo,* but it was also held that by the peremptory challenge of S., which excluded him from the jury, the error in the judge's ruling was nullified. As to H. the objection could not be maintained because the accused had, in fact, twenty peremptory challenges. That judgment was given by a very strong court and, in our opinion, the point was rightly determined, and governs the objection now under consideration.

(1) 28 U.C.Q.B. 108.

In reference to the further objection that these juror witnesses were not sworn, it is sufficient to point out that it was the duty of the accused, as the challenging party, to see that the witnesses he called to support the challenge were properly sworn.

As to the third ground of objection, the passage in question is in these words:—

> You need not concern yourselves with the penalty that is attached to this or to any offence. It does not follow that because a man is convicted on a capital charge that he will necessarily be hanged. It is true that the Criminal Code of Canada makes it incumbent upon the Court to pronounce the sentence of death but the responsible officers of the Crown may in their wisdom if they see fit commute that sentence. In any case that responsibility is theirs and not yours or mine. The oath which you have taken calls upon you to decide this case upon the evidence which you have heard from this witness box and upon nothing else. And I need scarcely add you need have no moral fear about doing your duty whether that duty leads you to conviction or to acquittal.

We have no doubt that the reference to the executive clemency was an unfortunate one. There was not the least ground for supposing that a verdict against the accused founded on the evidence adduced and on a proper charge would be interfered with. Such a reference could not assist the jury in performing their duty to decide the issue of fact before them, and there is always some risk that a suggestion that the verdict is to be reviewed may result in some abatement of the deep sense of responsibility with which a jury ought to be brought to regard their duty in passing upon any criminal charge, and, preeminently, when the offence charged is murder, to which the law attaches the capital penalty. Such observations as those addressed to the jury by the counsel for the defence can always, if they seem likely to be harmful, be counteracted without resorting to suggestions which may mislead the jury into a misconstruction of their own duty.

In this case, however, we are satisfied that no harm was done. There is, first, the immediate context of the impeached observations; which in itself was perhaps sufficient to counteract the effect of those observations. But, however that may be, the learned judge's observations, as a whole, were admirably calculated to impress upon the jury a sense of the duty, with which they were charged, to examine for themselves, and to bring to the test of their own judgment, all the matters submitted to them; and the con-

1933

McLEAN
v.
THE KING.

The Court.

text of the two sentences of which the accused complains must, we are satisfied, have made it quite clear to the jury that those sentences were not intended to qualify the instructions already given to them, or to modify the impressions they must have received from what had already been said.

The appeal will therefore be dismissed with costs.

Appeal dismissed.