

KAHU V. THE KING.

1946, October 15, December 12. Court of Appeal, Wellington.
O'Leary C.J., Kennedy, Callan, Finlay JJ.

Criminal Law—Practice—Murder—Conviction—Misdirection—Burden of establishing that a culpable homicide is murder and not manslaughter—Granting of New Trial—Absence of sufficient reason to substitute verdict of manslaughter—Criminal Appeal Act 1945, s. 5 (2) (3)—Crimes Act 1908, s. 184.

Section 184 of the Crimes Act 1908 does not alter the common law as to the burden being on the prosecution to establish affirmatively that a culpable homicide is murder and not manslaughter, and where it appeared that the jury, who found appellant guilty of two murders of which he had been accused in two counts of one indictment with a strong recommendation to mercy, may have misunderstood the law because of matter in the direction and may have given both or either of the verdicts of murder in the belief that a verdict of murder was a proper verdict if it was not clear that the offence was murder or manslaughter, the Court allowed an appeal against the convictions, and, in the absence of some sufficient reason for the exercise of the power conferred upon it by s. 5 (3) of the Criminal Appeal Act 1945, refused to substitute for the verdict of the jury a verdict of manslaughter and then to pass sentence, and ordered a new trial. *Woolmington v. Director of Public Prosecutions* (1935, A.C. 462) and *Mancini v. Director of Public Prosecutions* (1942, A.C. 1) applied; *Rex v. Greenacre* (1837, 8 C. & P. 835); *Packett v. The King* (1937, 58 C.L.R. 190); *Kwaku Mensah v. The King* (1946, A.C. 83); *The King v. Hopper* (1915, 2 K.B. (C.C.A.) 431); *The King v. Barilla* (1944, 4 Dom.L.R. 344) and *The King v. Harrison* (1945, 3 Dom.L.R. 122) referred to.

Smith for appellant.

Currie for Crown.

Smith for appellant:

See Criminal Appeal Act 1946, s. 3 (a). I submit: (1) The trial Judge misdirected the jury as to (a) the onus of proof where the defence of provocation is raised; (b) As to the legal nature of the defence of provocation and what under New Zealand law constitutes, or may constitute, such a defence; (2) A substantial miscarriage of justice has accordingly occurred. (3) The Court should substitute for the verdict of murder found by the jury a verdict of manslaughter, and pass sentence accordingly. If there is reasonable doubt as to whether the verdict should be murder or manslaughter, then the jury should be so directed. *Woolmington v. Director of Public Prosecutions* (1935, A.C. 462, 482); *The King v. Prince* (1941, 3 All E.R. 37, 41); *Mancini v. Director of Public Prosecutions* (1942, A.C. 1, 13); *The King v. Jackson* (1941, 2 D.L.R. 119, 128, 129). As to (1): In the summing up those fundamental principles were not followed. The effect of the direction may be stated thus: (a) If the jury is not satisfied as to provocation, then the verdict must be murder; (b) If the jury is in doubt as to the existence of provocation, then the verdict must be murder. The effect of what His Honour said was quite clearly to throw the onus on the accused. As to (2): The law as to provocation in New Zealand was incompletely and inaccurately put to the jury by the trial Judge. See Crimes Act 1908, s. 184; *R. v. Pickering* (1939, G.L.R. 185, 187; 1938, N.Z.L.R. 363, 374); *Holmes v. Director of Public Prosecutions* (1946, 2 All E.R. 124, 126); *Lawrence v. The King* (1933, A.C. 699, 707); *Kwaku Mensah v. The King* (1946, A.C. 83). As to (3): There are three possible courses open to the Court: (a) Under subs. (2) of s. 4 of the Criminal Appeal Act 1945 the conviction may be quashed and a verdict of acquittal entered. That is not suggested here. (b) The conviction may be quashed and a new trial ordered. (c) Under subs. (2) of s. 5 the Court may substitute a verdict of manslaughter and sentence the prisoner accordingly. There should be a substitution: (i) If there has been a mistrial but it is beyond doubt that the jury were of opinion that at least manslaughter had been committed, then a substitution of manslaughter should be effected under s. 5 (2). (ii) It is in the interests of justice and public policy that an accused person should not be subjected if possible to a number of trials. (iii) In view of the jury's strong recommendation to mercy it would appear that the jury had taken into consideration the propriety of reducing the charge to manslaughter, and they might have done so had they been properly directed. In England there is no power to direct a new trial, but nevertheless the principles enunciated by the English Courts apply here. Substitution should be effected if the jury must have been satisfied that it was at least manslaughter. There should still be substitution if the Court is unable to say that the jury should have found manslaughter and not murder, if properly directed. The power to order a new trial should be exercised where this Court is unable to say that the jury must at least have convicted of manslaughter. If there is a doubt as to the prisoner's guilt at all, then he should be given the benefit of a new trial. The position in England

is stated in *The King v. Hopper* (1915, 2 K.B. 431, 435, 436); *The King v. Thiele* (1928, S.A.S.R. 365); *The King v. Trimarchi* (1932, N.S.W.S.R. 451, 458); *The King v. Barilla* (1944, 4 D.L.R. 344, 347-8); *The King v. Harrison* (1945, 3 D.L.R. 122, 134). The jury's recommendation to mercy is a strong indication that but for the directions they received as to onus of proof and as to the nature of provocation, they would have found the accused guilty on the lesser charge. If the jury was satisfied that there was no provocation then there was no justification for the recommendation.

Currie for Crown:

Woolmington's case (*supra*) has little application. It was a decision at common law, whereas the matter before the Court is one of statutory interpretation: see *Packett v. The King* (58 C.L.R. 190, 198). The law in New Zealand is as it used to be stated in *Halsbury's Laws of England* (2nd ed., Vol. 9, p. 434, para. 745) and not as in *Woolmington's case*. Section 184 alters and extends the common law: See N.Z. Criminal Code Bill 1885; Report of the English Criminal Code Commissioners 1878; (Command Paper 2345, at p. 24); *R. v. Jackson* (1918, G.L.R. 11; 1918, N.Z.L.R. 363). In New Zealand the area of matters of provocation is very much wider than in England, and it would be an impossible burden for the Crown to discharge if it had to disprove provocation. When the law was codified in New Zealand *The King v. Greenacre* (8 C. & P. 35), (now overruled), was regarded as correctly stating the law. See *Halsbury's Laws of England* (2nd ed., Vol. 9, p. 426, para. 721). *Woolmington's case* omits a class of exceptions. *The King v. Oliver* (1944, K.B. 68). If I am correct as to the law, then the summing-up was correct. The reference to the English common law was irrelevant but was not unfair to the accused. It is difficult to see how provocation could have been inferred: there was no evidence on the part of the accused to reduce the verdict of murder to one of homicide. Coupled with the introductory words, the summing-up, looked at as a whole, does not mislead and does not fail adequately to direct the jury.

Smith in reply:

As to the question of onus or proof, see *Woolmington's case* (*supra* at p. 480). The onus of proof unless placed by statute upon the accused is upon the prosecution. There are passages in the summing-up which suggest that it is upon the defence. On the question of substitution, see 1946 *New Zealand Law Journal* (30, 31) and *Kwaku Mensah v. The King* (*supra*) where the Privy Council applies *Woolmington's case* and *Mancini's case* in a case to which a criminal code applied and contained a similar definition of provocation.

Cur. adv. vult.

The Court, per CALLAN J.—The prisoner was convicted of two murders of which he had been accused in two counts of one indictment, namely the murder of his wife and of a man named Massey Amunsden. The jury added a strong recommendation to mercy. He was sentenced to life imprisonment in accordance

with the requirement of the law. He appeals against conviction.

The record of the direction to the jury contains this passage:

"This is a criminal case, and in all criminal cases the onus lies upon the Crown affirmatively to establish the guilt of the accused person, so that if the case as presented to you leaves you in doubt as to whether or not this killing was due to provocation as recognized by the Statute,—if you are in doubt as to whether that is or is not the case, the accused would be entitled to an acquittal."

No complaint as to this could be or is made on behalf of the prisoner. And, assuming that the phrase "entitled to an acquittal", means "acquittal of murder", no complaint could be made by the Crown. But this is not the only passage in the direction in which the topic of burden of proof was dealt with. And, in particular, at the end of the record of the direction, this passage occurs:—

"This case resolves itself into deciding the question whether this man is guilty of manslaughter or murder. If you are satisfied that he did kill them when acting under the influence of passion which arose as the result of something which occurred suddenly and caused him to lose his head, you would be entitled to reduce the charge to manslaughter. Otherwise, your plain duty would be to bring in a verdict of murder."

These two quotations from the direction are not consistent. The second states the law as it was stated in *Halsbury* (2nd ed., Vol. IX, para. 731, p. 426). But, as it acknowledged in the supplement—1944 edition, p. 377, this has since been authoritatively declared to be an incorrect statement of the Common Law. *Woolmington v. Director of Public Prosecutions* (1935, A.C. 462), *Mancini v. Director of Public Prosecutions* (1942, A.C. 1), and other cases cited in the Supplement. The earlier quotation from the direction does not conflict with the statement of the law made in *Woolmington's case* and in *Mancini's case*. But counsel for the prisoner submits that as the whole of the direction did not adhere to the statement contained in an early portion thereof, and as a contrary statement was made to the jury just before they retired, there is danger of miscarriage.

Counsel for the Crown meets this by a submission that what was said in *Woolmington's case* and in *Mancini's case* as to the burden being on the prosecution to establish that the crime is murder, and not manslaughter is not law in New Zealand, because our Criminal law depends on our Crimes Act and not on the Common Law, and because, so he submits, s. 184 of the Crimes Act alters the Common Law and throws on the accused person the burden of establishing that a culpable homicide committed by him is not murder, but only manslaughter. For the following reasons, this submission is not accepted:

(1) To enact, as was done in s. 184 that culpable homicide which would otherwise be murder *may be reduced* to manslaughter if certain factors are present is a matter of definition, but enacts nothing as to whether the burden rests on the accused of proving the existence of those factors, or on the prosecution of proving their absence. The statute being silent on that topic, the Common Law as enunciated in *Woolmington* and *Mancini* is applicable in New Zealand.

(2) Counsel for the Crown relies on *Rex v. Greenacre* (1837, 8 C. & P. 835), and submits that our section 184 has given legislative effect to that case. But that case was expressly disapproved in *Woolmington* (at 1935, A.C. 482), as not being a correct statement of the Common Law, and s. 184, properly interpreted, does not deal with the burden of proof.

(3) The view that such a section as our s. 184 deals merely with definition, and not with burden of proof is supported by matter in judgments delivered in the High Court of Australia, in *Packett v. The King* (1937, 58 C.L.R. 190), per Dixon J. at pp. 212 and 213, and per McTiernan J. at p. 222.

(4) The decision of the Judicial Committee of the Privy Council in *Kwaku Mensah v. The King* (1946, A.C. 83), manifests a strong disinclination by their Lordships to hold that the rule as to the burden of proof as enunciated in *Woolmington* and *Mancini* has been displaced by legislation. The *ipsissima verba* of the relevant code then under consideration are not quoted in the report, but matter which appears at p. 88 in the report of the argument, and at p. 93 in the judgment which was delivered by Lord Goddard, suggests that this was a case in which a stronger argument could be presented for the view that legislation had altered the burden of proof than it is possible to found on our s. 184. Yet Lord Goddard is reported as using language which appears to imply that in this particular case the onus was not on the accused to prove manslaughter as distinct from murder, but on the prosecution to prove murder as distinct from manslaughter. We refer to the passage on p. 94 where His Lordship speaks of "an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether the *prosecution had discharged the onus which lay upon them of proving murder as distinct from manslaughter*." In the circumstances of the particular case, this may have been an *obiter dictum*. But the phrasing which we have italicized appears to have significance.

In New Zealand, as in England, it is for the prosecution to establish affirmatively that a culpable homicide is murder and not manslaughter. This jury, because of matter in the direction, may not have understood that. In a case where the evidence raised no question of manslaughter, such a misunderstanding might be irrelevant and not capable of occasioning miscarriage. But it cannot be said that this is such a case. In New Zealand, because of the provisions of s. 184 (3) of the Crimes Act, provocation is a question of fact. In the evidence in this case there was matter fit for consideration by the jury which might have been held by them to raise a doubt as to whether the homicides were murder or manslaughter. Both or either of the verdicts of murder may have been given in the belief that a verdict of murder was the proper verdict if it was not clear whether the offence was murder or manslaughter. Therefore the verdicts of murder cannot stand.

So far, the argument of counsel for the prisoner is accepted. But he asks this Court not to order a new trial, but, in exercise of the power conferred by s. 5 (2) of the Criminal Appeal Act 1945, to substitute for the verdict of the jury, a verdict of manslaughter, and

then to pass sentence. It is not thought proper to accept this submission. Section 4 (3) appears to indicate that where an appeal against conviction succeeds, the normal course will be a verdict of acquittal or a new trial, and that some sufficient reason should be shown for the exercise of the power conferred by s. 5 (3). It does not appear that any sufficient reason here exists. English cases are not helpful, e.g. *Rex v. Hopper* (1915, 2 K.B. (C.C.A.) 431), where the Court of Criminal Appeal exercised a power similar to that conferred by our s. 5 (3), namely that conferred by s. 5 (2) of the Criminal Appeal Act 1907. But that Act gave no power to order a new trial. Also, in countries where capital punishment exists, there may be a natural disinclination to put a man twice in peril of his life. In the Canadian case of *Barilla* (1944, 4 Dom.L.R. 344), a majority of two Judges in a Court of three were for substituting a verdict of manslaughter for a verdict of murder, and appear to have been influenced by the consideration that the prisoner had already been in peril of his life. The Chief Justice dissented and favoured a new trial. Next year in the case of *Harrison* (1945, 3 Dom.L.R. 122), four Judges out of five were for a new trial. The dissentient would have substituted a verdict of manslaughter for the jury's verdict of murder, and would have imposed twenty years' imprisonment.

A perusal of the record of the evidence given at the trial of Kahu, which took place at Hamilton on the 6th, 7th, 8th February, 1946, does not suggest any respect in which there is danger of a miscarriage of justice owing to absence of witnesses or deterioration of testimony if a new trial be ordered. Finally, it appears quite impossible to say that a new jury correctly understanding all questions as to burden of proof, might not announce themselves as satisfied that the hypothesis of manslaughter was definitely excluded as to both or either of the homicides. This, coupled with the other matters already mentioned, indicates that the proper course is to direct a new trial.

Appeal allowed. New trial at the next Hamilton Sessions, namely those commencing Tuesday, 4th February, 1947, is directed.

Solicitors: for appellant: *King, McCaw & Smith*, Hamilton; for respondent: Crown Law Office, Wellington.