

have been imposed in previous orders under this Act by the Acting Chief Justice and Mr. Justice *Harvey*. One of the conditions is that this order is not to operate until the rules about to be promulgated by the Judges under s. 129 of the Act have been brought into operation and this order has been registered under the provisions of those rules. I require an undertaking from the solicitor for the applicant that the order will be registered as soon as possible.

I also direct that the papers in this matter be placed in a sealed envelope, and not opened except at the request of either of these children, or the mother, or the applicant, or by order of the Court.

Solicitor : *Harry W. Baum & Co.*

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Re
D. AND E.
Maughan,
A.J.

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Sept. 19, 24,
25.

Criminal Law—Murder—Competency of jury to find manslaughter—Direction to jury—Crimes Act 1900 No. 40, s. 23 (2)—Evidence—Admissibility—Withdrawing evidence from jury—Miscarriage of justice.

Street, A.C.J.
Ferguson, J.
James, J.

On a trial for murder a judge is not bound in all cases, as a matter of law, to direct the jury that it is competent for them to find the accused guilty of manslaughter. Each case must depend on its own circumstances.

The appellant was convicted on a charge of murdering C. At the trial two defences were relied on, one, that the shot which was fired and caused the death of C. was accidental, the other, that the appellant's mind was so affected by drink at the time of the shooting that he was incapable of forming an intention to commit murder. The judge directed the jury, *inter alia*, first, that in all cases of indictment for murder it was open and competent for a jury to find a verdict of manslaughter, but that the jury would only be entitled to find a verdict of manslaughter, and not of the major charge of murder, where the facts proved to their satisfaction entitled them to do so, taking the law applicable to the case, as he would pronounce it to them later. He, later, again told them that if the facts reduced the killing of C. from murder to manslaughter and showed that the killing was manslaughter, they could so find. After dealing with the defence of accidental shooting, and stating the law as to when drunkenness justified the reduction of a charge from murder to

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manslaughter the judge told the jury that if they were satisfied that the appellant fired the revolver at C. and that C. was hit and died in consequence of the injuries received, primarily the appellant was guilty of murder, but that that might be reduced to manslaughter if they thought that his mind was so affected by drink that he was incapable of forming an intention.

Held, a good direction.

Brown v. The King (17 C.L.R. 570) distinguished.

Prior to and immediately before C. was shot, F. was also shot by the appellant under similar circumstances. After his arrest the appellant said about F. that "he was my best cobbler, we were at the war together." Evidence was tendered to prove that F. had not been to the war, and after objection, was admitted. Afterwards the judge told the jury to discard such evidence from their consideration.

Held, that the evidence was rightly admitted. Further that, assuming that it was inadmissible, there had been no miscarriage of justice as the jury had been warned not to act on it.

CRIMINAL APPEAL.

The appellant was indicted for the murder of one Guy Chalmers Clift. On the afternoon of 10th March, 1924, he was being driven in a motor car from the Cordeaux Dam to Campbelltown on suspicion of having committed some criminal offence. Sitting beside him on the back seat was Constable Flynn and Clift was driving the car. On the way into Campbelltown Clift and Flynn were both fatally wounded by shots fired from a revolver, which had been taken by the appellant from the paymaster's office. The story that the appellant told was that he took it for the purpose of committing suicide; that he attempted to shoot himself with it in the car; that Flynn struggled with him to prevent this; that Clift afterwards struggled with him; and that in the course of these struggles they were both shot accidentally. The evidence showed that he had been drinking heavily the night before the occurrence and, as an alternative defence, it was contended that he was so much under the influence of liquor as to be incapable of forming any intent.

The appellant, after arrest, said of Flynn, that "he was my best cobbler, we were at the war together." Mrs. Flynn, mother of the deceased, gave evidence that her son had never been to the war. The evidence was objected to and admitted.

The directions given to the jury are summarised, sufficiently for the purposes of this report, in the judgment of *Street*, A.C.J.

The jury found the appellant guilty of murder. This was an appeal against his conviction on various grounds, of which the following are material for the purposes of the report : (1) that his Honour was in error in his direction as to the question of a possible verdict of manslaughter ; (2) that his Honour was in error in allowing the evidence of Mrs. Flynn ; (3) that the facts are consistent with the hypothesis of misadventure so far as shooting Clift is concerned.

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Windeyer, K.C., and *M. F. Loxton*, for the appellant.

Coyle, K.C., for the Crown.

During argument the following were referred to : *R. v. Grimes & Lee* (15 N.S.W.L.R. 209) ; *Brown v. The King* (17 C.L.R. 570) ; *R. v. Meade* ([1909] 1 K.B. 895) ; *Director of Public Prosecutions v. Beard* ([1920] A.C. 479) ; *R. v. Rodley* ([1913] 3 K.B. 468) ; *R. v. Fisher* ([1910] 1 K.B. 149) ; *R. v. Campbell* (8 C.A.R. 75) ; *R. v. Coulter* (31 W.N. 21) ; *R. v. Scholey* (3 C.A.R. 183) ; *R. v. Naylor* (5 C.A.R. 19) ; *R. v. Morrison* (10 N.S.W.L.R. 197) ; *R. v. Lukins* (19 W.N. 90) ; *R. v. Wolff* (10 C.A.R. 107) ; *R. v. Clinton* (12 C.A.R. 215) ; *R. v. Honeylands* (10 C.A.R. 60) ; *R. v. Peacock* (13 C.L.R. 619) ; *R. v. Stoddart* (2 C.A.R. 217).

C.A.V.

September 25.

STREET, A.C.J. The appellant was indicted for the murder of one Guy Chalmers Clift. On the afternoon of the 10th of last March, accompanied by Constable Flynn, he was being driven in a motor car by Clift from the Cordeaux Dam to Campbelltown. Clift was the resident engineer in charge of the work at the Dam, and the appellant, who was employed there, was being taken to Campbelltown on suspicion of having committed some criminal offence. On the way into Campbelltown Clift and Flynn were both fatally wounded by shots fired from a revolver, which had been taken by the appellant from the paymaster's office. The story that he told was that he took it for the purpose of committing suicide ; that he attempted to shoot himself with it in the car ; that Flynn struggled with him to prevent this ; that Clift afterwards struggled with him ; and that in the course of these struggles they were both shot accidentally. The evidence showed that he had been drinking heavily the

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night before the occurrence, and, as an alternative defence, it was contended that he was so much under the influence of liquor as to be incapable of forming any intent. The jury found him guilty of murder, and he was sentenced to death.

The first ground relied upon by way of appeal is that *Gordon, J.*, who presided at the trial, did not properly direct the jury as to their power to acquit him of murder and find him guilty of manslaughter if they saw fit to do so. Sect. 23 (2) of the Crimes Act 1900, which is a re-enactment of a similar section in the Criminal Law Amendment Act, enacts that where, on a trial for murder, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder and find him guilty of manslaughter. The section does not empower them to find an accused person guilty of manslaughter in such a case unless the act or omission causing death does not amount to murder, but *R. v. Grimes & Lee* (15 N.S.W.L.R. 209) and *Brown v. The King* (17 C.L.R. 570), are authorities for saying that, even though the case be one of murder or nothing, if the jury choose to return a verdict of manslaughter it cannot be interfered with. It does not follow, however, that a judge must of necessity tell the jury in every case that it is competent for them to find the lesser offence, and in my opinion he is not bound to do so, as a matter of law. Each case must depend upon its own circumstances. If, on a trial for murder, there are no grounds for finding a verdict of manslaughter it is no misdirection to abstain from pointing out to the jury that they have the power to find a lesser crime than that charged: *Naylor's Case* (5 C.A.R. 19); *Brown v. The King* (17 C.L.R. 570) *per Barton, A.C.J.*, at p. 578; *Fletcher's Case* (9 C.A.R. 53); and the judge is entitled to tell them that there are no grounds for finding a verdict of manslaughter: *Scholey's Case* (3 C.A.R. 183). In *R. v. Hopper* ([1915] 2 K.B. 431) the Court of Appeal said that it is a judge's duty to put to the jury such questions as appear to him properly to arise upon the evidence; but he is not called upon to do more than this, and, in *Scholey's Case, ante*, Lord Alverstone, C.J., pointed out that when a judge sums up he is not composing a law treatise, but is merely speaking with regard to the facts of the particular case. I know of no authority

which goes so far as to say that when a possible verdict of manslaughter is not suggested, either by counsel or on the facts, the judge is bound to suggest such a verdict to the jury, and, as I understand Mr. Windeyer's argument, he did not so contend. He took his stand upon the law as laid down in *Brown v. The King* (17 C.L.R. 570), and his submission was that this was an analogous case. That was a case of murder, and the jury, on asking whether they were at liberty to bring in a verdict in any other way than one of guilty or not guilty of the crime charged, were told by the presiding judge that they were not and that the only issues were whether the accused did or did not fire the shot which caused the death. It was possible, in the opinion of the Judges of the High Court, to collect from the evidence material on which the jury might have found a verdict of manslaughter, and it was held that, in leaving out the alternative of manslaughter in answer to the jury's question, the Judge told them in effect that they had not the power of finding a verdict for the lesser offence, and so misdirected them. *Barton, A.C.J.*, pointed out the strong distinction that there is between merely abstaining from telling the jury that they are entitled to return a verdict of manslaughter where the evidence gives no ground for such a verdict, and telling them, in answer to a question from them, that they are not at liberty to return such a verdict.

Mr. Windeyer's submission is that, in this case, the jury were directed in such a way that they might have been misled as to the extent of their power, and that, in that way, the case is analogous to *Brown's Case*. I do not agree. The Judge began his summing up by giving the jury some general directions, and, amongst other things, he told them that in all cases of an indictment for murder it was competent for a jury to find a verdict of manslaughter, but that they would only be entitled to find such a verdict, if the facts proved to their satisfaction entitled them to do so, taking the law applicable to the case as he would pronounce it to them. I think that the obvious meaning of this was that, though they had power to return a verdict of manslaughter, they would not be entitled to do so if on the facts proved they were satisfied that he was guilty of murder, and I have no doubt that it would be so under-

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1924. stood by the jury. So read, I do not think that any exception can be taken to it. He then passed on to the facts of the case, and, before referring to them in detail, he again reminded the jury that, if the facts reduced the case from murder to manslaughter, they could so find. He then proceeded to deal with the defence that Clift was killed by an accidental shot from the revolver in the course of the struggle, and he told the jury that if they did not believe that, but came to the conclusion that the appellant fired at Clift, they would have to consider whether that act, which caused his death, amounted to murder or to manslaughter. Then he discussed the question whether the facts established that the appellant's mind was so affected by drink at the time as to render him incapable of forming the specific intent necessary to constitute the crime of murder, and, towards the end of the summing up, he told them that, if they came to the conclusion that Clift's death was caused by accident, as suggested by the appellant in his statement, he would be entitled to be acquitted; but that, if they thought that that defence was untrue and that the appellant fired at Clift, he would primarily be guilty of murder, and that that might be reduced to manslaughter if they thought that his mind was so affected by drink that he was incapable of forming an intention. I can see no misdirection in any of this of which the appellant is entitled to complain. The case is different, in my opinion, from *Brown's Case*, ante. There the jury asked as to their powers, and were misdirected as to the extent of them. They were told that the only alternatives were a verdict of murder or an acquittal. Here the case was conducted throughout upon the lines that, if the shooting was accidental, there should be an acquittal, and that, if deliberate, the jury might bring in a verdict of manslaughter if they thought that the appellant's mind was so obscured by drink at the time that he was incapable of forming an intention to commit murder. The jury were instructed fully and clearly on these aspects of the case, and though, in the course of his remarks, the Judge said that the appellant could only ask the jury to reduce the crime of murder to manslaughter if they thought that his mind was so deranged by drink that he was incapable of forming an intent, the context shows that he was then dealing with the case on the assumption that the

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defence of accidental shooting was not accepted by the jury. That statement must be read with reference to the facts of the case and the defences raised, and I do not think that it was an improper direction in the circumstances. "Every summing up" said Lord *Alverstone*, C.J., in *Stoddart's Case* (2 C.A.R. 217 at p. 246), "must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively." No other ground for reducing the case to manslaughter than that mentioned was suggested, and no other direction in this respect was asked for, but it is suggested now that there was a misdirection because it is said that there was still a third alternative that was not put to the jury. It is submitted that, even if the shooting was accidental, it might have taken place in such circumstances that the proper finding would be a verdict of manslaughter, and not a verdict of acquittal, and that, as the summing up was equivalent to a direction to the jury that they would not be justified in finding a verdict of manslaughter unless they found that the defence based on intoxication had been established, they were misdirected as to the extent of their powers. In fairness to his client, Mr. Windeyer was bound as a matter of duty to call the attention of the Court to anything that in his opinion was fairly open to discussion, but I do not think that there is any substance in this submission. It has been urged that, if this third alternative was open on the facts, the way in which the case was left to the jury was unfavourable to the appellant, inasmuch as, having regard to the character of the crime and the facts of the case, they would, or might, be unwilling to find a verdict of acquittal on the ground of accident, while they might have found a verdict of manslaughter based on the ground of an accidental shooting, if they had been told that they had the power to do so. In my opinion this is an untenable proposition. It rests upon the assumption that the case was put more favourably to the appellant than was proper in the circumstances, and I do not think that he can be heard to complain of that. In *Clinton's Case* (12 C.A.R. 215) it was held that on an indictment for murder, if the defendant's counsel does not suggest a possible verdict of manslaughter, but only an acquittal on the ground

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of accident, the judge is not bound to suggest a verdict of manslaughter to the jury. Lord *Reading* L.C.J., said (at p. 218): "The defence never raised the question, but, what is more important, on the facts it cannot be said that the appellant has any grievance; the case could not have been left to the jury more favourably to him than it was." That case is analogous to this. The question that, even though the shooting was accidental, the proper verdict might be one of manslaughter was never raised at the trial, and even if it had been the case could not have been left to the jury more favourably for the defence than it was. On their finding it must be taken that they did not accept the evidence that Clift's death was the result of an accident. I think, therefore, that this ground of appeal fails.

Another ground of appeal relied upon was this. The facts relating to the shooting of the two men were so inseparably associated together as practically to form one transaction, but, at the outset of the case, the Judge told the jury that evidence connected with Flynn's death was only to be considered by them so far as it threw light upon the circumstances in which Clift met his death. On behalf of the Crown it was proved that, after his arrest, the appellant said that Flynn was his best friend at the war, and evidence was then tendered to prove that Flynn had not been at the war and therefore that this statement was untrue. This was objected to by the defence, but it was admitted. In summing up the Judge repeated what he had said as to the evidence relating to Flynn's death, and went on to tell the jury that, though he had admitted evidence that Flynn had not been to the war, he thought upon further reflection that it was so remotely connected with the charge against the appellant of having murdered Clift that he asked them to put it entirely out of consideration and to pay no attention to it. I think, upon consideration, that this evidence was sufficiently material to be admissible. It did not merely prove that the appellant told a lie. He was asserting a friendship with Flynn of such a character as to make it improbable that he would have been guilty of murdering him, and, if evidence of this was admissible, as it clearly was, I think that evidence showing that he was untruly exaggerating

the extent of the friendship was also admissible. Assuming, however, that it was inadmissible, the jury were warned not to act upon it, and I think that it was so unimportant, and was so remotely connected with the shooting that the case is one in which the jury would have arrived at the same verdict even if it had not been admitted. If so there has been no miscarriage of justice and there is no reason for interfering with the verdict of the jury. In *Makin's Case* ([1894] A.C. 57), Lord *Herschell*, L.C., in delivering the judgment of the Privy Council, said that they desired to guard themselves against being supposed to determine that the proviso to s. 423 of the Criminal Law Amendment Act of 1883, which dealt with cases where there had been no substantial miscarriage of justice, might not be relied upon in cases where it was impossible to suppose that the evidence improperly admitted could have had any influence on the verdict of the jury; and, on the assumption that this evidence was improperly admitted, I think that this is one of those cases. In *Ibrahim v. Rex* ([1914] A.C. 599), Lord *Sumner*, in delivering the judgment of the Privy Council considered the principles on which a Court of Criminal Appeal should act in cases where evidence had been wrongly received, and, after quoting the passage from the judgment of Lord *Herschell*, L.C., in *Makin's Case*, to which I have just referred, he said (at pp. 616, 617):—"The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute 'highly improbable' for 'impossible' in Lord *Herschell's* reservation above quoted." He also pointed out that in England, where the trial Judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal, under the similar words of the Criminal Appeal Act 1907, s. 4, may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict; or if evidence has been admitted inadvertently or erroneously, which is inadmissible but is of small importance or most unlikely to have affected the verdict. In *Peacock v. The King* (13 C.L.R. 619) *Barton*, J., said at p. 659:—"It is impossible to make the administration of justice proof against occasional accidents such as the original reception of the evidence, and when they occur the only course

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possible is to strike out the matter complained of and to warn the jury strongly to leave it entirely out of consideration. This is the practice adopted so far as my knowledge and experience extend, on the criminal as well as the civil side, and is the only possible means of rectifying the mishap. To hold that on all such occasions the whole proceedings are rendered abortive would be to place a fatal obstacle in the path of the administration of justice." I think, therefore, that this ground also fails.

Another ground relied upon was that the Judge misdirected the jury in telling them that it was for the appellant to satisfy them affirmatively that he was so much under the influence of drink as to be incapable of forming an intent. I do not agree. I think that it is clear upon authority that, if the appellant relied upon drunkenness as a defence to the charge of murder, the burden of establishing this affirmatively lay upon him.

The only remaining ground relied upon is that the evidence of the circumstances was consistent with a reasonable hypothesis of innocence of the charge of murder, and that the Court should therefore reduce the verdict to one of manslaughter. I do not agree. It is for the jury in every case to decide, when the whole of the facts are before them, what version they will accept, and if they accept a version which it is open to them to accept, and which is inconsistent with any inference but that of guilt, the Court cannot interfere merely because they might, if they chose, have accepted another version which might be capable of a different interpretation. The verdict of a jury based on circumstantial evidence can only be set aside when the facts before them, whatever version they accept, are reasonably susceptible of more than one interpretation. That was not the case here.

I think, therefore, that the appeal fails upon all grounds, and that it must be dismissed.

FERGUSON and JAMES, JJ., concurred.

Appeal dismissed.

Solicitor for the appellant : *W. M. Niland.*