

1925.

R. v. WITHERS.

June 3, 4;
 July 31. *Criminal law—Crimes Act, s. 23—Criminal Appeal Act, 1912*
No. 16, ss. 5. 6—Crimes (Amendment), Act 1924 No. 10,
s. 33 (5D)—Sentence—Appeal by Attorney-General—In-
crease of sentence.

Street, C.J.
 James, J.
 Campbell, J.

The statutory law of New South Wales puts grossly insulting language on the same footing as blows in considering the question of provocation on a trial for murder, and in every case where there is evidence of grossly insulting language which might have provoked the act causing death, it is for the jury to say whether in its opinion the words used would in an ordinary man so provoke him as to justify the reduction of the crime from murder to manslaughter.

On a charge of murder the accused, who shot his wife, was found guilty of manslaughter, under intense provocation, and the jury added a strong recommendation to mercy. He was sentenced to twelve months' imprisonment with hard labour.

Held, on appeal, that in the circumstances of the case the fact that he had acted under provocation did not justify so light a sentence, and that, though the recommendation of the jury was entitled to the fullest consideration, the sentence should be varied by substituting a sentence of imprisonment for seven years with hard labour.

CRIMINAL APPEAL.

This was an appeal by the Attorney-General under the provisions of s. 33 (5D) of the Crimes Amendment Act, 1924 No. 10, upon the ground that the sentence was inadequate in the circumstances.

The respondent was charged with having murdered his wife at Kingstown on the 10th February last. He was found guilty of manslaughter under intense provocation and with a strong recommendation to mercy. He was sentenced to 12 months' imprisonment with hard labour.

The facts are fully set out in the judgment of his Honour the Chief Justice.

When summing up *Ferguson, J.*, told the jury that if they were not satisfied beyond reasonable doubt that Withers was guilty of murder they should then consider whether he was guilty of manslaughter, pointing out that if it was a mere

accident, if as he said, having the revolver in his hand because he was going to root out Etheridge, his wife bumped his arm and the revolver went off, that would be an accident for which he would not be legally responsible. His Honour added : " Then comes the alternative of manslaughter, Mr. Thomson puts this to you, that the man's state of mind becomes important in considering that, because if he was in such a distraught state of mind that he was not really capable of forming any definite intention, if his wife told him, as he now suggests, that she was not going back to him, that she was not going to look after the children, that she was going to give herself up to an immoral life, and if this so deprived him of self-control that without knowing what he did without any definite intention of killing her he fired the shot, then that may possibly, in fact I ought to put to you, that would reduce the crime of murder to manslaughter. That is to say, that if you were not satisfied that it was a shot intentionally fired in order to kill her, but if you come to the conclusion that without any intention of killing her, he acted in the heat of the moment under extreme provocation, under provocation that would have robbed an ordinary man of self-control, then in that case your duty will be to find him guilty of manslaughter."

In his report *Ferguson, J.*, after referring to the facts, said : " So far as I could judge, the imputation upon Etheridge was absolutely groundless, nor should I have given any weight to the charge against Missen, resting as it did on the uncorroborated statement of the prisoner, which could not be tested by cross-examination. I think that long brooding over his grievances and suspicions had produced in him an unbalanced state of mind, which would gravely affect his credibility, however honestly his statement may have been made.

The fact that he had a loaded revolver with him on the night in question was evidence of premeditation, but the jury were entitled to accept his explanation that he had bought it and was carrying it for self defence in the event of Missen attacking him with a gun. Missen had already threatened him with a gun in his hands. I did not disagree with the verdict of the jury in the sense of considering that it could not be supported by the evidence, though I do not think that I should have

1925.

R.
v.
WITHERS.

1925.

R.

v.

WITHERS.

arrived at the same conclusion. I should have given more weight, for example, than the jury seem to have given, to the fact that in his statement to the police on his arrest, the prisoner did not suggest the shooting was unintentional. In considering the question of sentence, I conceived that whatever might be my own view of the facts, I was bound by the view taken by the jury, as indicated by their verdict, just as I should have been bound had they found the prisoner guilty of murder, or had they acquitted him. Their verdict negatived certain elements of the charge as conclusively as it established certain others. It was not a case in which the verdict could be accounted for only on the supposition that the jury really believed the prisoner to be guilty of murder, but had shrunk from the responsibility of so finding. There was a state of facts which it was open for them to find, and which, if my direction was right—and no objection was taken to it—would support the verdict. If I had acted on some other view of the facts,—If, for example, I thought the shooting was pre-meditated and intentional, and had measured the sentence accordingly, I should have felt that I was punishing the prisoner for an offence of which the jury had acquitted him.

The only view of the facts that in my judgment was consistent with the jury's verdict was that put to them by the prisoner's counsel which I have no doubt they accepted—and which I think they were justified by the evidence in accepting—that the prisoner was in a morbid state of mind which for the time being made him almost incapable of rational thought, that the statement made to him by his wife, acting upon him in that state, robbed him of self-control, and that, having the revolver for another purpose, he fired blindly without fully realising what he was doing, and without any intention of killing her. This was the state of facts upon which, though I probably should not have found it myself, I based the sentence."

T. R. Bavin, K.C. (Attorney-General), *Weigall*, K.C. (Solicitor-General) and *A. W. Ralston* for the Crown.

They referred to the Crimes Act, 1900 No. 40, s. 23; *Woodman* (2 C.A.R. 67); *Harris' Criminal Law*, Edtn. 13, at 149; *R. v. Ball* (18 C.A.R. 149); *R. v. Trueman* (9 C.A.R., 45, at 47) and *R. v. Dean* (18 C.A.R. 133).

Alec. Thomson, K.C., and Braddon for the prisoner.

They referred to *R. v. Skinner* (13 S.R. 280); *R. v. Garner* (18 C.A.R. 125) and *R. v. Stubbs* (29 T.L.R. 421).

1925.

R.
v.
WITHERS.

C.A.V.

July 31.

STREET, C.J. On the 22nd of last April one Lyle Samuel Withers was found guilty of manslaughter, and was sentenced to a term of imprisonment for twelve months with hard labour. The Attorney-General now appeals under s. 5 of the Criminal Appeal Act of 1912, as amended by s. 33 (5D) of the Crimes (Amendment) Act of 1924, upon the ground that the sentence was inadequate in the circumstances.

The material facts are these. Withers was charged with having murdered his wife at Kingstown on the 10th of last February. They had been married for about thirteen years, and there were five children of the marriage. In the early part of last year he was engaged to manage a property known as Bald Rock, but, towards the end of the year, fearing that his employment at Bald Rock was coming to an end, he spoke to a man named Missen, an uncle by marriage of his wife, who lived some five miles or so away at Kingstown, about the possibility of getting work there. Missen thought that there was work to be had there, and arranged that Withers and his family should stay with him as no suitable house for them could be obtained there. It was known that Mrs. Missen was going to Armidale at about that time in connection with her approaching confinement, and it appears to have been part of the arrangement that while she was away Mrs. Withers should keep house for Missen and his family. After these arrangements had been made, and after Withers and his family had gone to Kingstown, he succeeded in obtaining permanent employment at Bald Rock and he then became anxious that his wife should return there. For some reason she was unwilling to do so, and notwithstanding his upbraidings and his repeated attempts to compel her to return, she persisted in her refusal to leave Kingstown before Mrs. Missen returned home. Angry scenes took place between them, and he accused her of misconduct with Missen. So violent were the alterca-

1925

R.
v.
WITHERS.
—
Street, C.J.
—

tions between them that on one occasion Missen threatened him with a gun, and afterwards forbade him to come to the house at all. This was the state of affairs when she was taken last January by her brother to a solicitor in Tamworth, who drew up an agreement for signature by the parties. It contained admissions by Withers that he had been guilty of cruelty, that he had constantly denied the paternity of his children, and that he had been unclean and indecent in his habits, and it contained an agreement on the part of Mrs. Withers to live with him as his wife upon his admission that the charges of unchastity which he had made against her were false, and upon his promise to amend his ways in future. He was not in any way a party to the preparation of the document, but he signed it at Missen's house on the 23rd of January. His wife, however, refused to sign, because, as she said, if she did she would be compelled to return to Bald Rock. After it was signed Missen withdrew the embargo which he had placed upon Withers' visits to the house, and Withers began to go there again. Apparently his relations with his wife improved to some extent, but it is evident, I think, that his bitterness against her, by reason of her refusal to return to Bald Rock, remained undiminished. He stayed at Missen's house from Saturday, the 7th of February, until Tuesday, the 10th, and on Monday evening his relations with the members of the household were outwardly so amicable that he joined in a game of cards with Missen and others. Before he left the house, however, on Tuesday morning, he and his wife had a quarrel of some kind. He returned the same night, and, without going into the house, he called to her from the garden fence, a distance of some seventy feet or so from her bedroom. Missen said that he heard him call, and that he heard them talking in low tones for some little time. He watched them for some time from his window, and then, after returning to bed, he heard a revolver shot. He jumped out of bed and ran out of doors, just in time to see Withers galloping away on horseback. Withers was arrested at Narrabri the next day, and after his arrest he made a voluntary statement. In the course of it, he spoke of his efforts to persuade his wife to return home and of Missen's interference, and he made suggestions of improper conduct

between them. He then went on to say :—" The wife and I had a bit of an argument on Tuesday morning before I went home. I came back on Tuesday night called her out to the fence and was talking to her at the fence. I wanted her to come home. She said the way she was situated she couldn't come home and she wasn't coming home any more. She also said that she was going to have a good time, and it was no harm to have a good time as long as it wasn't made known to the public. I asked her a couple of times after was she going to come back she gave me the same answer No. With that I shot her then, and rode away home through the bush, and then came by car to here."

He did not give evidence on his trial, but he made a statement from the dock in which he told a different story. He went into a long explanation of his relations with his wife, accusing Missen of having caused all the trouble between them, and, with some very unpleasant detail, he accused her of having immoral relations, not only with him, but also with another man named Etheridge who was then for the first time introduced into the case, and in respect of whom the charges made had apparently no shadow of a foundation in fact. He had bought a revolver a week or so previously, and he said that he had it with him in his pocket that night for defence against any attack that might be made by Missen. He also said that he could see Etheridge in his wife's room, and that he wanted to go in and get him out, but that she would not let him, saying : " It does not matter so long as it is not made known to the public." He then went on to speak of some further discussion that took place between them, in connection with her continued refusal to return home and her statement that he would have to take the children and do the best he could for them, and then he said :—" I was going to go in and get Etheridge out. I know the wife bumped the revolver and it went off. She bumped the revolver and it went off. I was nearly out of my mind and did not know what I was doing at the time." That story was quite inconsistent with his earlier story to the effect that he shot her because she said that she was going to have a good time and refused to go home, and, if accepted, it would have entitled him to be acquitted on the ground that the killing

1925.

R.
v.
WITHERS.
—
Street, C.J.
—

1925.

R.

v.

WITHERS.

Street, C.J.

was accidental. *Ferguson*, J., so directed the jury, and he also told them that, if they did not accept Withers' story that what took place was an accident for which he was not responsible, they would have to consider whether the shot was fired intentionally with the object of killing or wounding Mrs. Withers, or whether there were such circumstances of provocation as to make it manslaughter. Dealing with the question of manslaughter he said this :—" Then comes the alternative of manslaughter. Mr. Thomson puts this to you that the man's state of mind becomes important in considering that, because if he was in such a distraught state of mind that he was not really capable of forming any definite intention, if his wife told him, as he now suggests, that she was not going back to him, that she was not going to look after the children, that she was going to give herself up an to immoral life, and if this so deprived him of self-control that without knowing what he did, without any definite intention of killing her he fired the shot, then that may possibly, in fact I ought to put to you, that would reduce the crime from murder to manslaughter. That is to say, that if you were not satisfied that it was a shot intentionally fired in order to kill her, but if you came to the conclusion that without any intention of killing her, he acted in the heat of the moment under extreme provocation, under provocation that would have robbed an ordinary man of self-control, then in that case your duty will be to find him guilty of manslaughter."

The jury found him guilty of manslaughter under intense provocation, with a strong recommendation to mercy, and *Ferguson*, J., in imposing a sentence of imprisonment for twelve months with hard labour said this :—" I am satisfied in this case that the view the jury have taken is that the accused honestly believed that his wife was unfaithful to him ; that he was sincerely anxious to get her to leave the house where she was living, and to come back home and bring the children home ; that her refusal to come home coupled with his belief as to her conduct preyed upon his mind to such an extent that the final refusal to come home robbed him of the power of self-control, and amounted to such provocation that he cannot be held to have acted with deliberate intent in shooting his wife. That is the interpretation which I put upon their verdict of

manslaughter, and upon their strong recommendation to mercy."

1925.

R.

v.

WITHERS.

Street, C.J.

It is submitted on behalf of the Crown that the learned Judge misdirected the jury as to the law relating to provocation, as a ground for reducing the crime from murder to manslaughter, and that in this case there was no evidence of any such provocation as would be sufficient for that purpose either at common law or under s. 23 of the Crimes Act. It is not contended that the jury's finding that the prisoner was guilty of manslaughter, and not of murder, can be interfered with. That must stand, and the only crime for which the prisoner can be punished is that of manslaughter; but it is submitted that, in passing sentence, the learned Judge did not give sufficient weight to all the surrounding circumstances including the prisoner's conduct, apart from the actual shooting, and that the sentence is inadequate inasmuch as it does not record the sense of abhorrence with which the community looks upon the offence of homicide, and does not furnish a sufficient deterrent to others in similar circumstances.

No provocation, however great, can render homicide justifiable or excusable. All that it can do, if it is sufficiently considerable, is to reduce the offence to manslaughter. The old common law rule was that to constitute sufficient provocation to reduce homicide from murder to manslaughter a blow was necessary, or at least a provocation equal to a blow; as for instance if a man, in the heat of passion, on discovering his wife in the act of adultery, were to kill the adulterer. Mere words or gestures, however, were never regarded as sufficient provocation until the ruling of *Blackburn, J.*, in *R. v. Rothwell* (12 Cox. C.C. 145, at p. 147) that a provocation by words alone might be accompanied by special circumstances of such a character as to give it that effect. He said:—"As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter." That exception to the general

1925. rule has been recognised in later cases, and in *R. v. Palmer* ([1913] 2 K.B. 29, at p. 31) *Channell*, J., in delivering the judgment of the Court of Criminal Appeal said that the reason upon which it rests is that a sudden confession by a wife of past adultery is treated as equivalent to a discovery of the act itself. In *R. v. Birchall* (109 L.T. 478, at p. 479) *Bray*, J., in delivering the judgment of the Court, referred to *R. v. Rothwell* and said :—" In that case it was held that words amounting to a confession of adultery by a wife were sufficient provocation, but it is an extreme case, and this court is of opinion that the doctrine then enunciated should not be extended," and in *R. v. Creening* ([1913] 3 K.B. 846, at p. 849) the same learned Judge said :—" Only the sudden discovery of the gravest possible offence which a wife can commit against her husband has given rise to this particular case of provocation." In *R. v. Ellor* (85 J.P. 107), where a wife told her husband to put his head under a train and said that she was going to enjoy herself that night, meaning, according to his contention, that she was going to commit adultery, and he struck her a blow and killed her, it was held that her words did not constitute a sufficient provocation to justify the reduction of the crime from murder to manslaughter. Lord *Reading*, C.J., said :—" Counsel for the appellant has contended that there are grounds for the proposition that if a wife told her husband that she was going to commit adultery and he then struck her a blow and killed her, it would be open to the jury to reduce the crime from murder to manslaughter. But no authority can be cited in support of such a proposition, and it is not the law of England. A statement by a wife that she was going to live with another man, or that she was about to commit adultery, would not amount to provocation so as to reduce the crime of killing from murder to manslaughter. The authorities which have been cited support the contrary view. If a man discovers his wife in the act of adultery and kills the adulterer, the law regards the killing in such a case as manslaughter, because it regards the act of adultery as equivalent to a blow struck at the husband, that is to say, in its effect on his self-control. The principle has been extended to meet the case of a sudden confession by a wife that she has committed adultery : *Reg. v. Rothwell* (*supra*),

and all subsequent cases have been treated as special exceptions to the general rule of law, which is, that words cannot constitute sufficient provocation to justify the jury in reducing the crime from murder to manslaughter, except in very special circumstances."

1925
R.
v.
WITHERS.

Street, C.J.

That is how the law stands in England at the present time as to the extent to which the old common law rule as to provocation by words has been broken in upon. Whether the old rule that no provocation by gestures is sufficient still stands there without modification is perhaps not clear. In *R. v. Greening* ([1913] 3 K.B. 847) *Atkin, J.*, in summing up to the jury, laid down the law in that way, but *Bray, J.*, in delivering the judgment of the Court of Appeal, said that there might perhaps be a doubt as to whether in certain circumstances a gesture might not amount to provocation. If, then, the case had to be decided upon the principles of the English common law, I think that it is clear upon authority that it could not be said that there was any evidence of such provocation as, according to that law, would justify the reduction of the crime from murder to manslaughter. Taking the prisoner's story, as he told it in his statement from the dock, the revelation made to him by his wife, on the night on which he killed her, was no new or sudden discovery for him. He was not merely suspicious of her infidelity before that, but, according to what he said, he had had evidence of it. The case of *R. v. Ellor* (*ante*) is directly in point, and, if the principles of the English law had been applicable, I think that it would have been the duty of the Judge to tell the jury there was no evidence of such provocation as could reduce the killing from murder to manslaughter. In New South Wales, however, the law is different. The English common law rules have been altered. In s. 23 (1) of the Crimes Act (which is a re-enactment of a provision introduced into the Criminal Law Amendment Act of 1883) it is provided that, where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language or gestures on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow; but in sub-s. 2 it is also provided that in no case shall the crime be reduced from murder

1925.

R.
v.
WITHERS.
—
Street, C.J.
—

to manslaughter by reason of provocation unless the jury find (1) that the provocation was not intentionally caused by anything said or done by the accused; (2) that it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of his power of self-control, and (3) that the act causing death was done suddenly in the heat of passion caused by the provocation, and without the intention of taking life. The effect of that section, is, as is pointed out by the authors of *Hamilton and Addison on Criminal Law and Procedure*, to place killing upon provocation arising from grossly insulting language or gestures on the part of the person killed in the same position as killing upon provocation arising from a blow. In considering in any case whether the provocation offered was sufficient to justify a reduction of the crime it is important to bear in mind, as was pointed out in *R. v. Lesbini* ([1914] 3 K.B. 1116), that the test is not whether it was sufficient to deprive the particular person charged with murder of his self-control, but whether it was sufficient to deprive a reasonable man of his self-control. Provocation acting upon the mind of a person of deficient mental balance is not sufficient to justify a reduction of the offence, if it would not have been sufficient to rob a reasonable man of his self-control. If it were otherwise, the result would be, as was pointed out by *Avory, J.*, during the argument in *R. v. Lesbini* (at p. 1118), that a bad tempered man would be in a more favourable position than a good tempered one. Lord *Reading, C.J.*, said in that case (at p. 1120):—"This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts," and I wish to say the same of this Court also.

I have thought it advisable to refer to the law as to provocation as it is in England, and to contrast it with the local law on the subject, because of the argument that was pressed upon us that there was no evidence of provocation in this case, and that the prisoner got the benefit of a misdirection in that respect by the presiding Judge. I do not think that he did. The effect of the statutory alteration of the law in New South Wales is to put grossly insulting language on the same footing as blows

in considering the question of provocation, and it follows, I think, that in every case where there is evidence of grossly insulting language, which might have provoked the act causing death, it is for the jury to say whether in its opinion the words used would in an ordinary man so provoke him as to justify the reduction of the crime from murder to manslaughter. The section does not in terms say that the questions whether the words used amounted to provocation, and whether the person provoked was deprived by them of his power of self-control, are questions of fact for the jury, but I do not think that there can be any doubt that they are. If there is no evidence of any such provocation by words as would justify the jury in reducing the crime from murder to manslaughter it is the duty of the Judge to tell them so, but if there is evidence which, in the opinion of reasonable men, might amount to provocation, in the circumstances of the case, it is his duty to leave the question of its sufficiency, and of the extent to which the accused person was induced by it to act as he did, to the jury for their determination. That is what *Ferguson, J.*, did in this case, and in my opinion he did so properly. Probably, no two judges would ever sum up to a jury in precisely the same way on the same set of facts. Different aspects of the case might impress themselves differently on different minds, and in various ways the individuality of the speaker would display itself, but I do not think that there is anything in the way in which *Ferguson, J.*, left the case to the jury which can be reasonably complained of as incorrect or as amounting to a misdirection. He called their attention to the inconsistency between the prisoner's two versions of what took place; he pointed out that the fact that he believed in his wife's infidelity, if he did so believe, would afford no justification for killing her; he pointed out that this belief was not something which came upon him suddenly, but was a belief which he had held for some time; and he pointed out that for half an hour or so before he shot her he and she were talking quietly together according to the evidence. The jury found a verdict of manslaughter, in circumstances of intense provocation, and strongly recommended the prisoner to mercy. Whether we think that we should or should not have arrived at the same conclusion

1925.

R.

v.

WITHERS.

Street, C.J.

1925. on the facts is immaterial. Speaking for myself I think that
R. I should probably have taken a less favourable view of them,
v. but the jury are the sole judges of fact, and their decision was
WITHERS. arrived at after both seeing and hearing the witnesses. Their
Street, C.J. verdict stands, and the only crime for which the prisoner can
be punished is that of which he was found guilty.

The only question therefore which we have to determine is whether in the circumstances, taking everything into consideration, including the strong recommendation to mercy, any case has been made out by the Crown which would justify this Court in varying the sentence of twelve months' imprisonment with hard labour which was imposed, and substituting a severer punishment. The question is not merely whether we think the sentence inadequate, and whether we should have imposed a heavier penalty. Again speaking for myself, I may say at once that the sentence imposed appears to me to be quite inadequate in the circumstances, but, in reviewing it on an application for an increased punishment, we must be guided by principle, and the principles by which we must be guided are those which we laid down in *R. v. King* (25 S.R. 218). We said there that the principles to be followed in such cases were those enunciated by the Court of Criminal Appeal in England in *Sidlow's Case* (1 C.A.R. 28), and by the High Court of Australia in *Skinner's Case* (16 C.L.R. 336), and to that we still adhere. Tested in this way then, was the sentence now under consideration not merely inadequate but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles or undervalued or overestimated some of the material features of the evidence. On consideration I have come to the conclusion that it was. Homicide, that is to say the unlawful killing of a fellow creature, is one of the gravest offences known to the law. Provocation may extenuate the offence of taking life to some extent, but it cannot do more than reduce it to manslaughter; which, though not so serious a crime as murder, is a serious crime the punishment for which varies with the circumstances of each case, but may be anything from imprisonment for life to a merely nominal penalty. There is no offence in which the permissible degrees of punishment cover so wide a range, and

none perhaps in which the exercise of so large a discretion is called for in determining the appropriate penalty. In determining what that is to be the presiding Judge is bound to take into consideration all the circumstances surrounding the manslaughter of which the prisoner has been guilty, and it is his duty to give full and careful consideration to any recommendation of the jury; but the responsibility of apportioning the punishment is his, and in the final determination of that he must act upon his own view of the circumstances surrounding the crime which, on the verdict of the jury, was committed. Now in this case the jury found that, though the prisoner unlawfully shot his wife, he was induced to do so by intense provocation on her part. In view of the way in which the case was presented to them, and properly presented, by *Ferguson, J.*, in his summing up it must be assumed that in their opinion something was said by Mrs. Withers, during that fateful conversation at the fence, which not only robbed the prisoner of his self-control, but which was of so provocative a character that it would have robbed any ordinary man of his self-control, and that in the heat of passion caused by it, and without any intention of taking life, he shot her. All this was necessarily involved in their finding, but I do not think that more than this was necessarily involved, and it is here I think, with great respect to *Ferguson, J.*, that he departed from principle. I think that he read into the verdict more than he was entitled to, and I think that in sentencing the prisoner he was influenced by assumptions which he made in his favour, but which, on the evidence and on the verdict, he was not justified in making. I have already referred to what he said in sentencing him, and in his report to this Court he emphasized his reasons for imposing so light a sentence. He said :—"The only view of the facts that in my judgment was consistent with the jury's verdict was that put to them by the prisoner's counsel which I have no doubt they accepted—and which I think they were justified by the evidence in accepting—that the prisoner was in a morbid state of mind which for the time being made him almost incapable of rational thought, that the statement made to him by his wife, acting upon him in that state, robbed him of self-control, and that, having the revolver for another pur-

1925.

R.

v.

WITHERS.

Street, C.J.

1925. pose, he fired blindly without fully realising what he was doing
and without any intention of killing her. This was the state
of facts upon which, though I should probably not have found
it myself, I based the sentence.” With great respect I do not
think that that was the only view of the facts which was con-
sistent with the jury’s verdict. Their finding—for it must be
assumed that they so found—that the prisoner was provoked
by something which his wife said, and which would have been
sufficient to rob an ordinary man of his self-control, and that
in the heat of passion he fired at her without intending to kill
her, did not necessarily mean that they took the view of the
facts suggested. I do not think that it can be assumed that
they thought that he was in a morbid state of mind which for the
time being made him almost incapable of rational thought,
merely because they found that he received provocation which
would have robbed an ordinary reasonable man of his self-
control, nor do I think that it can be assumed that he had the
revolver with him for another purpose. It was not until he
made his statement from the dock, while on his trial, that he
said that he had it with him to protect himself against Missen,
and it was in that statement that he said that the shooting was
accidental. Obviously the jury did not believe the latter part
of his statement, and for all that I know, or that anyone else
knows, they may have also disbelieved his statement that he
took a revolver with him for his own protection. Nor can it
be assumed in his favour that they thought that he fired blindly
without realizing what he was doing. They evidently thought
that he fired in the heat of passion without intending to take
his wife’s life, but quite consistently with that they may have
thought that he knew quite well what he was doing when he
fired at her, but that he did so recklessly and in passion without
thought of the consequences. I say it with very great respect
to the very capable, very careful, and very conscientious Judge
who presided at the trial, but I do not think that either the
finding of the jury, or their recommendation to mercy, justified
him in assuming that the view of the facts on which he acted
in sentencing the prisoner was the only one consistent with the
verdict, and I think that he erroneously reasoned himself into
the belief that the prisoner was in a state of mind in which he

R.
v.
WITHERS.
—
Street, C.J.
—

was almost absolved from responsibility for what he did, and that for that reason he imposed so light a punishment. In so doing I think that he proceeded upon a wrong principle, and upon a wrong view as to what was necessarily meant by the verdict. The jury's recommendation to mercy was entitled to the fullest consideration, but their finding that the prisoner was guilty not of murder but of manslaughter did not involve any assumption that he was not fully responsible for the consequences of the crime of which they found him guilty, and it was the duty of the Judge to pass sentence upon him in the light of all the surrounding circumstances. The spirit of jealousy when it comes upon a man, the morbid fear that his wife, if not already unfaithful to him, prefers another, may distort his view and may lead him into strange excesses, but it affords no excuse for killing either her or her suspected lover. "Certainly" said Lord *Hewart*, C.J., in *Ball's Case* (18 C.A.R. 149, at p. 156) "it would be ludicrous to suggest that in this country the knowledge that a man's wife has been debauched by another is an excuse for shooting the offender." If a man's wife is unfaithful to him he has his remedy, but no man is allowed to give way to his passion or his anger, or to take the law into his own hands. In this case the fallacy into which *Ferguson*, J., fell was in assuming that the jury's finding involved an assumption that the prisoner's mental balance was affected by reason of his jealous suspicions, and then in assuming that, because he came to this meeting with his wife with a mind already inflamed and distorted with jealousy, and in that condition was provoked by something she said into an act which caused her death, he was entitled to leniency. There is no evidence of any kind worthy of consideration going to show that there was any foundation for his suspicion of her infidelity, and the plain facts of the case are that he sought out this meeting with her at night, and that then, after a conversation which lasted for some thirty minutes or so, he took her life, provoked to do so, as the jury found, and robbed of his self-control, by something that she said. In these circumstances I do not think that the fact that he acted under provocation justified so light a sentence as twelve months' imprisonment, and, though the jury's strong recommendation

1925

R.
v.
WITHERS.
—
Street, C.J.
—

1925.

R.
v.
WITHERS.
Street, C.J.

to mercy is properly entitled to the fullest consideration, the fact is that this man used a lethal weapon upon his wife and the mother of his children, and that, having shot her, he not only rode callously away without waiting to see the result of what he had done, but next day, when arrested, he first of all denied that he had come from Kingstown and then denied his guilt. People with violent passions must learn to control them, and if they do not, if they give way to their passions and commit crime, they must put up with the consequences. To my mind an intolerable state of affairs would be created if it were thought that a man might kill his wife in such circumstances as these, and escape with so light a punishment. On full consideration, and realizing the responsibility that rests upon us in increasing a sentence imposed by so experienced and conscientious a Judge as *Ferguson, J.*, I think that the case is one which calls for severe punishment, and I think that the sentence imposed should be varied by substituting a sentence of imprisonment for seven years, with hard labour, to date from the date of conviction. If it were not for the jury's strong recommendation to mercy I should have thought it right to impose a still heavier sentence than this.

JAMES and CAMPBELL, JJ., concurred.

Solicitors for the prisoner : *Mervyn Finlay*, agent for *G. M. Edwards* (Uralla).

1925.

CONNOLLY v. THE LABOR DAILY LTD.

July 27,
28, 29.

Contract—Personal service—"Subject to satisfactory service"

Street, C.J.
James, J.
Campbell, J.

The plaintiff was appointed by the defendant company as editor of its newspaper, upon certain written conditions, which included the following term :—" Subject to satisfactory service, we undertake to continue this appointment for a period of 12 months."

Held, on an action for damage for wrongful dismissal, that the question for the jury was not whether in their opinion the plaintiff had performed his duties in a way of which reasonable men could not reasonably com-