

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.

1937.
July 21, 22.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.

1937.
August 26, 27.
September 3.

PACKETT v. THE KING.

*Criminal Law—Indictment—Charge of two counts of murder—
Criminal Code (14 Geo. V., No. 69), Sec. 311—Misdirection—
Provocation—Self-defence—Burden of proof.*

Sec. 111 of the Criminal Code provides :

"(1) . . .

"(2) Except as provided in sub-section (3) hereof, charges of more than one
" crime may be joined in the same indictment, if those charges are founded
" on the same facts, or are, or form part of, a series of crimes of the same
" or a similar character. In any other case an indictment shall charge one
" crime only.

"(3) No indictment for murder shall contain a charge of any other crime."

Held (by CRISP, A.-C.J., CLARK, J., and HALL, A.-J., and on appeal by the
High Court of Australia, LATHAM, C.J., DIXON, EVATT, and McTIERNAN, J.J.;
STARKE, J., dissenting)—That the section prohibits only the joinder with a
charge of murder, of any charge of a crime other than murder; and that there-
fore two or more charges of murder, if founded on the same facts or the mur-
ders forming the subject of the charges are or form part of a "series" of murders,
may be joined in the one indictment.

The appellant was convicted upon an indictment charging him in two counts
with the murder of two men, Frankcombe and Lawson, at the same time and
place. Upon appeal, it was complained that the trial judge's direction to the
jury upon its true construction was calculated to convey to the jury the meaning
that once it was proved that the appellant fired the shots by which the two
deceased men were killed, the jury was bound to find the appellant guilty of
murder, unless he satisfied the jury that he did not intend to kill the deceased.

Held by CRISP, A.-C.J., and HALL, A.-J.—That the direction of the trial judge
was sufficient.

By CLARK, J.—That the jury may well have understood the general effect of
the whole summing up to be as follows—that the onus was on the Crown to prove
its case beyond reasonable doubt, but that if the Crown proved that the appellant
discharged the gun at either Frankcombe or Lawson the accused must be taken
to have intended to kill him, and that that was what the jury should find unless
the appellant satisfied them to the contrary and that really the only verdict the
jury could find was that the accused was guilty; therefore, the conviction should
be quashed and a new trial ordered.

Also by CLARK, J.—That notwithstanding a ruling by the trial judge that the
matter alleged as provocation is not capable of constituting provocation, the jury
still had, in such a case as this, the right to return a verdict of manslaughter.

Upon application for special leave to appeal to the High Court of Australia,

Held (by LATHAM, C.J., STARKE, DIXON, EVATT, and McTIERNAN, J.J.)—That
special leave should be refused, not because of the correctness and regularity of
the proceedings at the trial, but because of the legal insufficiency of the appellant's
answer to the charges, and because the case was not of such special circumstances
as to justify granting special leave.

Donovan Henry Charles Cruttenden Packett was presented before
the Supreme Court at Launceston upon an indictment which charged
him, in the first count, with the murder of one Gordon Charles

Frankcombe at Moina on April 26, 1937, and in a second count, with the murder of one Henry Francis Lawson at the same place on the same date.

The following statement of the facts is taken from the judgment of DIXON, J., delivered in the High Court of Australia:—

"The two men who were killed were named respectively Frankcombe and Lawson. Lawson is described as a middle-aged man well preserved and active. Frankcombe appears to have been a smaller man but younger. They lived at Moina in Tasmania where, among other things, they did some rabbit trapping. Frankcombe owned a motor truck. About half-past eleven on the morning of April 26, 1937, the bodies of the two men were found lying on the roadway near the motor truck which was drawn up by the roadside. Both had been shot in the head. Frankcombe was dead, and was lying close to the truck with his head almost under the running board. Lawson, who was still living when he was found but died shortly afterwards, lay about twenty feet from Frankcombe's body further along the road. The truck was drawn up about fifteen or twenty yards from the slip panels leading to Lawson's dwelling and the position of his body was between the truck and the panels. On the roadway were four freshly discharged cartridge shells of a .22 calibre rifle. Three of them lay between the two bodies and the fourth further on than Lawson's. Frankcombe bore two bullet wounds, one a clean puncture on the left side of the neck towards the back, the other a powder marked wound between the left eye and ear, evidently fired at close range. The bullet from the second wound entered the brain and, according to medical evidence, must have proved fatal at once. The first wound would not necessarily have brought the victim to the ground, but would have shocked and dazed him.

"Lawson bore a clean bullet wound in the neck which probably would have knocked him down, and a powder marked bullet wound in the temple. There was a third flesh wound under the lower eyelid.

"The dead men appeared to have had no weapon of any sort either upon their persons or in the truck.

"The prisoner, who lived in the neighbourhood, had passed through the slip panels that morning on his way to a block where he too trapped rabbits. He possessed a .22 calibre rifle. On his return in the afternoon, he pretended ignorance of what had happened and next day, when he was questioned by the police, he denied any knowledge of the crime. On the following day, however, he acknowledged that he had shot both men and made a written statement. On his trial proof was given of what he had said orally to the police, his written statement was put in and he gave evidence

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN.
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,

AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

"on oath. These three accounts of how he came to shoot the two men
"are not inconsistent, but, in one or other, details are stated which
"have been omitted in the remaining account or accounts. The
"prisoner's narrative taken from these sources may be reduced to a
"single brief statement. Substantially it is this.

"He had obtained from one, Godwin, who occupied the block already
"mentioned as Crown lessee, the right there to trap rabbits. Frank-
"combe had formerly trapped on the block and claimed to do so still.
"He had put up a notice warning others not to trap there and Law-
"son, who was a friend and companion of Frankcombe, had spoken
"to the prisoner about the latter's trapping on the block. Godwin
"had communicated with the Crown Lands Department and in reply
"had received a letter which he gave to the prisoner to produce to
"Frankcombe and Lawson as his authority 'if they came at him.'
"The two men, particularly Frankcombe, had bad reputations and
"many people feared the former. He had recently endeavoured to buy
"a revolver and the prisoner believed that he had obtained it. Not
"long before the day of the shooting, a fire had occurred in a barn
"and outbuildings of one of the inhabitants of Moina, a motor con-
"tractor named Townshend. Townshend suspected that Frankcombe
"was responsible for the fire and prisoner had supported this view.
"On the morning in question, the latter had gone down to Town-
"shend's and, after having breakfast there, he returned to his own
"dwelling or camp. Between nine and ten o'clock, he set out on
"horseback carrying his rifle. When he reached the slip panels, he
"saw the motor truck drawn up by the roadside and Frankcombe and
"Lawson standing near it. He dismounted and let down the panels,
"holding his loaded rifle probably in his left hand. Frankcombe
"called 'Come here, I want to see you.' The prisoner went over and
"was getting out the letter given him by Godwin when Frankcombe,
"with an appearance of anger, asked—'Did you say I lit the fire at
"—"Townshend's"?' The prisoner replied that he would not say
"whether he said it or not, and that he would please himself what
"he said. Frankcombe was standing with the door of his motor
"truck behind him. Lawson, who was nearer the centre of the road,
"said nothing, but moved behind the prisoner. He was closing in
"upon him. When the prisoner answered that he would please him-
"self what he said, Frankcombe answered 'No you won't' and turned
"round sharply as if to get something from the truck. In fact the
"truck contained nothing but a tyre lever that could be used as a
"weapon, but the prisoner did not know this and said that he had
"heard that Frankcombe had bought a revolver or had asked for one,
"and that he believed that his object in turning to the truck was to
"obtain a weapon of some sort. The prisoner stated that he knew by
"Frankcombe's words and manner he was going to quarrel. He was
"thoroughly alarmed at their actions and was afraid they were going

"to do for him. He could not see what Lawson was doing behind, "but he was closing in and, believing that Frankcombe was about "to attack him with a weapon, he fired at him 'without stopping to "think.' He says he thinks Frankcombe fell when he first fired but "that he does not remember what he did afterwards. The following "are among the things which the prisoner said then occurred. That "he turned to go to the slip panel. That Lawson may have rushed "at him. That he struck at him with the rifle. That Lawson would "not let the prisoner pass, but rushed at him again. That he fired "at Lawson and must have done so again, but does not remember it. "That Lawson jumped at him and he jumped away from Lawson, "reloaded and fired at Lawson who half fell; he again fired at him "and then fired another shot at Frankcombe as he was going away.

"Witnesses were called on behalf of the prisoner to prove that in "the neighbourhood there was a fear entertained of Frankcombe and "they testified that the prisoner bore a good character and was well "regarded. There was nothing to show that the prisoner was pre- "pared for the encounter with the two men, or that, on his side, it "was anything but a chance meeting."

The trial took place before HALL, A.-J. The terms of His Honour's direction to the jury are fully referred to in the judgments hereunder. The appellant was convicted of murder and sentenced to death. He appealed to the *Court of Criminal Appeal* on grounds which are set out in the judgment of CRISP, A.-C.J.

H. J. Solomon for the appellant: A summing up must put the true defence before the jury. (*R. v. Keating* 2 C.A.R. 61; *R. v. Dinnick* 26 T.L.R. 74; *R. v. Richards* 4 C.A.R. 161.) No reference was made in the summing up to evidence of accused's good character. The use of the word "confession" was calculated to convey the impression that the prisoner had admitted his guilt. It was put to the jury that justification does not arise until an assault has been made in the popular sense. There was in effect a direction that the jury could not return a verdict of manslaughter. This is wrong in law. (*R. v. Taylor* 12 V.L.R. 845; *Brown v. Rex* (1913) 17 C.L.R. 570; *R. v. Grimes & Lee* 15 L.R. (N.S.W.) 209; *R. v. Watson* (1906) S.A.L.R. 187; *R. v. Scholey* 3 C.A.R. 183; *R. v. Robinson* 16 C.A.R. 140; *R. v. Clinton* 12 C.A.R. 215.) The judge only rules on the existence of evidence of a wrongful act or insult. (*R. v. Short, Gresley & Plant* (1928) Q.S.R. 246; *Kelly v. R.* 32 C.L.R. 509; *R. v. Walker* (1915) Q.S.R. 115.) It is logical in Sec. 311 to say that "charge of other "crime" means that an indictment shall not contain any other charge than the one contained in the indictment. Two charges of murder cannot be charged in one indictment. (*R. v. Holt*, 7 C. & P. 518; *R. v. Jones* (1918) 1 K.B. 416.) There was a substantial miscarriage of justice. (*Maxwell v. The Director of Public Prosecutions* (1935) A.C. 309; *R. v. Peacock* (1911) 13 C.L.R. 619.)

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

R. N. K. Beedham (with him *M. P. Crisp*) for the Crown: The trial judge did not direct that the onus was on the accused to show justification. He ruled that in Frankcombe's case there was no evidence of self-defence. The judge did not direct the jury that in the case of Frankcombe the verdict of the jury could only be one of murder. He merely ruled that there was no matter in the evidence capable of constituting provocation. He merely pointed out that as to what took place at the scene of the shooting the only evidence was that of the accused. The judge may express his own view of the evidence provided that he warns the jury that they may disagree with him if they like, as the facts are for them. (*R. v. Porter* (1936) 55 *C.L.R.* 182.) There was no question of accident in this case. At the beginning of his summing up the judge clearly told the jury that the onus was on the Crown to prove intent.

As to the indictment, Sec. 311 does not say "shall not contain a "second count." It assumes the possibility of more than one charge. (Compare Sec. 567 of Queensland Criminal Code (1899) and Sec. 397 of N.Z. Crimes Act 1908.)

(Counsel also referred to *R. v. Jackson* (1918) *N.Z.L.R.* 363; *Brennan v. The King* (1936) 55 *C.L.R.* 253; *R. v. Russell* (1933) 58 *V.L.R.* 59; *Thorpe's case* (1925) 18 *C.A.R.* 189; *R. v. Grimes & Lee* (1894) 15 *N.S.W.L.R.* 209.)

C.A.V.

CRISP, A.-C.J.: The appellant was charged upon an indictment which contained 2 counts:—(1) That on April 26, 1937, at or near Moina in Tasmania he murdered one Frankcombe. (2) That on the same day and at the same place he murdered one Lawson. He was convicted on both counts and sentenced to death.

He now appeals against the convictions on several grounds. I propose to deal with the last one (No. 11) first. It is this, that the indictment was irregular, and should have been quashed, inasmuch as it contained a charge of two crimes of murder contrary to the provisions of Section 311 of The Criminal Code.

I do not think there is any substance in this ground of appeal. For the appellant to succeed on this head, he must contend that an indictment for one murder cannot contain any other charge, and I do not read Sub-section 3 of Section 311 thus. The Sub-section says:—"No indictment for murder shall contain a charge of any "other crime," and this indictment did not contain a charge of any other crime than murder.

Coming to grounds of appeal 1 to 10 inclusive, it must be remembered that the case regarding the shooting of Frankcombe differed in many respects from the case relating to the shooting of Lawson. I shall endeavour to distinguish between these two cases as and when it seems to me necessary to do so.

Ground 1 of the Notice of Appeal is as follows:—"That the learned trial judge was wrong in law in directing the jury that the statement made by the accused on April 28, 1937, was a confession."

The trial judge in his direction to the jury certainly once referred to the "confession" of the prisoner, but I do not think that the jury could reasonably have taken that to mean that the learned judge was directing them that the trial was all over, and that the prisoner's confession concluded the matter against him. In fact the prisoner had made several statements of his actions that day. He informed Constable Freiboth that, on the day of the shooting, he had been at Black Jack all day. On April 27, he made a statement to Detective Brown, a statement which was taken down in writing, and in which he denied having any part in the shooting. On April 28 he made another statement, which was put into writing and signed by him in the presence of a J.P., and in this statement he confessed to the shooting of both men. And, on his trial, he gave evidence on oath again admitting the shooting. The trial judge in his direction to the jury dealt with all these statements, and left it to the jury to say which of these statements they could rely on. His Honour had previously impressed upon the jury that they were the sole judges of the facts.

2. "That the learned trial judge was wrong in law in directing the jury that the onus was on the accused to show justification." I do not think that the trial judge gave any such direction. As I read the notes of his summing-up, his direction amounted to this, that in Frankcombe's case there was no evidence that the shooting was done in necessary self-defence; and in Lawson's case, page 8 of the notes of the summing-up makes it clear to me that the jury were told it was entirely a question for them to decide. To make the matter quite clear *Mr. Beedham*, for the Crown, at the conclusion of His Honour's direction to the jury, asked for a specific direction on the point, and His Honour gave it to the jury.

3. "That the learned trial judge was wrong in law in directing the jury that there was no question of the accused having been assaulted by Frankcombe inasmuch as Frankcombe had not touched him," and

4. "That the learned trial judge was wrong in law in directing the jury that the plea of self-defence was groundless."

His Honour directed the jury upon the effect of Section 46 of the Code. As I understand his direction in this regard, he expressed the opinion that the provisions of Section 46 of the Code did not touch this case as regards Frankcombe: and I entirely agree.

As regards Lawson the judge left the matter for the jury to decide.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

5. "That the learned trial judge was wrong in law in directing the jury that in the case of Frankcombe the verdict of the jury could only be one of murder."

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

The judge told the jury what was murder. He informed them that the onus was on the Crown; he dealt with the aspects of self-defence and provocation (see page 8 of the notes of the summing up); and, in particular, regarding provocation, he gave the jury a direction upon the effect of Section 160 of the Code. He pointed out that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. Then he dealt with Sub-section 2, and went on to Sub-section 3. This Sub-section has been amended, so that now the question whether any matter alleged is or is not capable of constituting provocation is a matter of law. And His Honour directed that, in the case of Frankcombe, none of the circumstances set up by him in any of the statements he made were capable of constituting provocation. And I agree with him. In the case of Lawson His Honour ruled otherwise, and left the matter for the jury to decide.

PACKETT
v.
THE KING.

6. "That the learned trial judge was wrong in law in directing the jury that it was unnecessary for them to consider all the evidence given in the case."

I cannot see that the trial judge said any such thing.

7. "That the learned trial judge was wrong in law in directing the jury that the onus was on the accused to disprove intent on his part," and

8. "That the whole summing up upon its true construction was calculated to convey to the jury the meaning that once the firing of the shots by the accused was proved they were bound to find the accused guilty unless he satisfied the jury that he was justified."

Both at the beginning and end of the summing up the jury were, in my view, correctly directed upon the onus of proof.

9. "That the whole summing up upon its true construction was calculated to convey to the jury the meaning that the facts had been decided by the judge and were not to be decided by them," and

10. "That the whole summing up upon its true construction was calculated to convey to the jury the meaning that they had no option but to find the accused guilty of murder."

I think the judge, except for the direction he felt bound to give under Section 160, Sub-section 3 as amended, left the facts to be decided by the jury.

An argument was addressed to us under Section 333 of the Code.

This section provides that upon an indictment for murder the accused may be convicted of (*inter alia*) manslaughter, and *Brown v. The King* 17 C.L.R. 570; *Robinson's case* 16 C.A.R. 140; and many other authorities were cited. But I think a perusal of Section 332 will show that these alternative verdicts are only possible where the evidence warrants them. In a given case murder may be reduced to manslaughter, in consequence of provocation under Section 160: or the evidence may show culpable homicide but not murder. It is my view that there was no evidence here justifying a verdict of manslaughter: certainly not in the case of Frankcombe.

I may say a word regarding *Mr. Solomon's* reference to the evidence of character.

He argued that the trial judge failed to remind the jury that there was evidence that the prisoner was of good character, and that there was also evidence that Frankcombe was one who tried earnestly to redress a wrong done him. But failure to deal with this evidence specifically does not, I think, amount to mis-direction or non-direction. There was no evidence that either Frankcombe or Lawson was a violent man.

And finally let me refer to the argument that the prisoner, upon words arising between himself and Frankcombe, may have found himself beset by the combined forces of Frankcombe and Lawson, and fearing death or grievous bodily harm at their hands, shot to protect himself. The prisoner is the only living man, so far as we can ascertain, who knows what happened on that fatal day. He has made several statements concerning it; but he admits the shooting, and it is my opinion that the jury could hardly do otherwise than conclude that he shot down, at least Frankcombe, without any one circumstance of justification or excuse.

I think the direction given to the jury by the trial judge was sufficient; but, in any event, my view is that Section 412 (2) of the Code should be applied, and that this Court should say that no substantial miscarriage of justice has actually occurred, in a case practically undefended.

I see no reason to disturb the verdict; and the appeal should be dismissed.

CLARK, J.: The appellant in this case was tried at a recent sitting of the Supreme Court at Launceston upon an indictment which charged him in the first count with the murder of one Gordon Charles Frankcombe at Moina on April 26, 1937, and in a second count with the murder of one Henry Francis Lawson at the same place on the same date.

The appellant was convicted of murder on both counts, and sentenced to death.

He has now appealed to this Court from both convictions.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

The notice of appeal as amended on the hearing of the appeal states 12 grounds of appeal. Nine of these (numbered in the notice of appeal as 1, 2, 5, 6, 7, 8, 9, 10, and 11 respectively) are as follows:—
(His Honour read the grounds).

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

Of these grounds No. 11 calls to be dealt with first.

This ground is based upon Sub-section (3) of Section 311 of The Criminal Code.

Section 311 is as follows:—(His Honour read the Section).

*High Court
of
Australia.*

Counsel for the appellant contended that the true construction of Sub-section (3) is that if an indictment contains a charge of murder it must not contain any other charge of any crime.

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

Counsel for the Crown contended that it only prohibits the inclusion in an indictment, which contains a charge of murder, of a charge of any crime other than murder.

If I had to read Sub-section (3) apart from the context provided by the whole of Section 311, I would have read the words "any other crime" as meaning "any crime other than murder."

PACKETT
v.
THE KING.

Read apart from the context, this is clearly the natural meaning of the words. The antithesis (when the Sub-section is read apart from the context) is not between a specific individual charge of murder (with its incidents of persons, act, time, place, and other circumstances) and any other specific individual charge of crime, but between the crime of murder as a crime of a particular nature and crimes of all other natures.

But the whole section must be read together, and indeed, as Sub-section (2) excepts Sub-section (3) from its operation, Sub-section (2) provides a context in which Sub-section (3) must be read.

Sub-section (1) speaks of "the specific crime or crimes with which the accused person is charged."

The word "crime" here obviously means a specific (individual, concrete) crime.

In Sub-section (4) the word "crime" has the same meaning.

Sub-section (2), after excepting the provisions of Sub-section (3), provides that charges of more than one crime may be joined in one indictment *if they are founded on the same facts, or are or form part of a series of crimes of the same or a similar character*, and concludes by providing that "in any other case an indictment shall charge one crime only."

Sub-section (3) is set out above.

If the words of Sub-section (3) are written into Sub-section (2) in place of the words "as provided in Sub-section (3) hereof" then Sub-section (2) would read as follows:

"Except that no indictment for murder shall contain a charge of any other crime, charges of more than one crime may be joined in the same indictment, if those charges are founded on the same facts, or are or form part of a series of crimes of the same or a similar character. In any other case an indictment shall charge one crime only."

Does this show that the word "crime" in Sub-section (3) is used in the sense of a specific (individual, concrete) crime (that is to say, any specific crime other than a specific crime of murder which is charged in the indictment)?

When the words "founded on the same facts" are read with the words "or are or form part of a series of crimes of the same or a similar character," it is clear that several charges of crime which are founded on the same facts may be joined in one indictment whether the crimes are of the same nature or of different natures. (Cf. The Imperial Statute "The Indictments Act, 1915," Section 4.) Two or more charges of crimes of different natures may be charged in one indictment if they are founded on the same facts; and two or more charges of crimes of the same or a similar character may be joined in one indictment if the charges are based on the same facts or the crimes are, or form part of, a "series" of crimes (cf. Rule 3 of the Rules made under "The Indictment Act, 1915").

It follows that the word "crime" in the expression "charges of more than one crime" means a specific crime.

Then what is the meaning of the word "crime" in the expression "one crime only"?

The expression "one crime only" is antithetical to the earlier expression "more than one crime" and thus the word "crime," in this case also, means a specific crime (one specific crime).

The concluding sentence of Sub-section (2) (in all other cases, &c.) states the general rule, and the earlier provisions as to the joinder of "charges of more than one crime" state the exceptions to it.

If Sub-section (2) had provided only for the joinder in one indictment of two or more charges of specific crimes (in cases in which the charges are based on the same facts or the crimes charged constitute a series of crimes of the same or a similar character) there would have been much to be said for a contention that the word "crime" in Sub-section (3) meant specific crime, because Sub-section (3) is excepted from the operation of the first paragraph of Sub-section (2).

But as in fact Sub-section (2) provides not only for the joinder in one indictment of charges of two or more specific crimes (if the charges are based on the same facts or the crimes are, or form

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,

AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

part of, a series of crimes of the same or a similar character), but also for the joinder of charges of two or more crimes of different natures (if the charges are based upon the same facts); and as the words of Sub-section (3) when given their natural meaning make the words of exception in Sub-section (2) effective (by way of qualifying the limited right conferred by Sub-section (2) to join two or more specific crimes of different natures), there is no reason for giving the words of Sub-section (3) any meaning other than their natural meaning.

I am therefore of opinion that the only limitation which Sub-section (3) imposes on the provisions of Sub-section (2) is that it prohibits the joinder with a charge of murder of any charge of a crime other than murder; and that therefore two or more charges of murder, if founded on the same facts or the murders forming the subject of the charges are, or form part of, a "series" of murders, may be joined in one indictment. (Cf. *Stephen—History of Criminal Law*, Vol. 1, p. 514.)

The word "crime" is used in one sense (that of a specific crime irrespective of the nature of it) in Sub-sections (1) and (4) and in the concluding sentence of Sub-section (2), in a somewhat different sense in the first paragraph of Sub-section (2) (in that, there, while meaning a specific crime there is also present in it a recognition of the difference in the nature of crimes), and in a third sense (that is to say, the nature of the crime)—in Sub-section (3).

I will now turn to the other grounds of appeal set out above.

These are objections to the summing-up, and it is necessary for a Court that has to consider such objections to remember that a charge to a jury is not to be examined too critically, and that particular words, sentences, and passages are not to be isolated from their context, but the charge must be read as a whole and with due regard to the evidence given on, and the conduct of the case, at the trial.

Before considering the summing-up, I should also state that Counsel for the appellant did not (so I understand), in his addresses to the jury, raise the defence that if the appellant shot Frankcombe and Lawson or either of them, he did so in self-defence.

But in view of certain evidence by the appellant and the witnesses called by him, the question was mentioned by the Counsel for the Crown in his address to the jury. And five of the ten pages of the shorthand note of the summing-up supplied to us, are devoted to the question. And at the conclusion of the summing-up, Counsel for the appellant asked for a further direction on the matter.

The summing-up can be divided into seven parts as follows—

(1) The opening.

(2) A direction as to self-defence considered in relation to the killing of the deceased Frankcombe.

(3) A like direction considered in relation to the killing of the deceased Lawson.

(4) A direction as to manslaughter considered in relation to the killing of Frankcombe.

(5) A like direction considered in relation to the killing of Lawson.

(6) The conclusion.

(7) Further directions given in response to requests therefor by Counsel.

The only part of the opening which need be set out was as follows:

"I have told you that the Crown has presented this man on a charge of murder—two charges of murder. Now, by the Code we are going under, first of all it refers to homicide, which is the killing of a person by another human being. Homicide is culpable when caused by an act intended to cause death or bodily harm, when that act is not justified. Culpable homicide is first of all murder if committed with the intention to cause death or bodily harm—manslaughter, if done in the heat and passion of sudden provocation—if the offender acts on the sudden and before there has been time to cool. That is the gist of it.

"The onus is on the Crown to prove the charges that they lay. If they failed in doing that, your verdict would be Not Guilty. In a recent case that went on appeal in England it was held that a trial for murder must prove that death is the result of a voluntary act of malice, and that when evidence of death and of that malice has been given the prisoner is entitled to show that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with the prisoner's explanation, or, on a review of the evidence, are left in reasonable doubt, even if the explanation be not accepted, the prisoner is entitled to be acquitted.

"On the question of reasonable doubt, I would say that you may not convict unless you are satisfied beyond all reasonable doubt that the accused is guilty. It must amount to a moral certainty, such as to leave an ordinary man without any doubt—real doubt. You cannot convict on a mere probability as you must feel such certainty of his guilt that would leave a reasonable man without a doubt.

"The Crown usually gathers up all the evidence they can that would suggest the guilt of the person accused. In this case the Crown could have relied merely on the confession they had from the prisoner, but the Crown are not satisfied with that. There is always a doubt that a person suspected of a crime is likely to think that he acted under an illusion. In order to put the thing

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

"beyond all doubt, the Crown usually produces evidence of other acts tending to show that the story presented is correct. You have had evidence here that the police, on the death of these two men, searched the district to see if they could find any gun that would correspond with the gun which caused death, and ultimately traced it down to the defendant—the rifle which could have committed the crime. He had in his possession cartridges which could have been used in such a crime. You have seen from the questions asked that he was in the vicinity of the crime at the time when it might have been committed. It has been shown that he had the weapon and had the cartridges, and that he was there when the men were killed. It is a fact that it has been admitted that he did fire the shots at the men, and I don't think it is a very difficult inference to come to that those shots caused their death. Under these circumstances I put it to you, you have not much room to hesitate whether the shots fired by this man killed the two men on the 26th April. I should leave it to you to draw your own conclusion, but I feel that there the conclusion is somewhat obvious to you—that it is easy to draw. I want to impress upon you that on the questions of fact you are the sole judges of what has taken place. I may hint that such and such a fact is proved, but I only do it where I think your task is clear. You are not in any way obliged to follow me on anything I suggest to you on the facts—you have a perfect right to investigate those things for yourself."

This part then clearly states that the onus was on the Crown to prove the charges made in the indictment, and that if the Crown failed to do so the jury should return a verdict of "Not Guilty."

It also contains a clear and correct statement as to the degree of proof required in order to warrant a conviction, and an emphatic statement that questions of fact were for the jury. The reference to the recent case in England is obviously a reference to *Woolmington's case*.

But the statement of the law which follows is an incomplete, if not inaccurate, statement of the law as laid down in that case.

It omits the statement that the accused can show not only by evidence but "by examination of the circumstances adduced by the "Crown" that the act on his part which caused death was either unintentional or provoked. (The use of the term "malice," without an explanation of its meaning in this connection, was calculated to mislead the jury—but prejudicially to the Crown only. The provisions of the Code as to homicide advisedly avoid the use of the term.)

I will not, at this stage, discuss His Honour's direction that the Crown could have relied merely on the "confession" they had from the appellant but that the Crown were not satisfied with that, and

that "there is always a doubt that a person suspected of a crime is likely to think that he acted under an illusion. *In order to put the thing beyond all doubt the Crown* usually produces evidence of other acts tending to show that the story presented is correct" (the italics are mine).

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

The learned judge then proceeded to deal with the question of self-defence. As I have stated, this occupies five of the ten pages of the shorthand note of the summing-up.

*High Court
of
Australia.*

On the hearing of the appeal, Counsel for the Crown contended that there was no evidence that the appellant acted in self-defence fit to be left to the jury, and that the learned judge need not have dealt with it, or need only have said that there was no evidence of it fit for the consideration of the jury.

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

Having read the evidence, and having regard to the fact that Counsel for the appellant had not, prior to the summing-up, raised the defence of self-defence, I think this was so.

PACKETT
v.
THE KING.

As His Honour did in fact deal with it, it is not necessary to consider the position which, if he had not done so, would have arisen when Counsel for the appellant raised it at the conclusion of the summing-up. (Cf. *Dinnick v. R.* 3 C.A.R. 77, but as to putting to the jury the question of manslaughter (on a charge of murder), even if raised, when the judge is of opinion there is no evidence of it fit to be considered by the jury, see *Brown v. R.* 17 C.L.R. 570 and *Thorpe v. R.* 18 C.A.R. 189 at p. 192.)

Counsel for the Crown also said that all this half of the summing-up (that is, the portion dealing with self-defence) amounted to was a direction to the jury that there was no evidence of self-defence fit for their consideration.

So far as it related to Frankcombe, I think that is so. So far however as it related to Lawson the matter was, at this stage, left to the jury. But I agree that when the summing-up was concluded the jury may well have understood the whole of it to mean that there was nothing in the defence of self-defence either in relation to Frankcombe or in relation to Lawson.

But notwithstanding the view I take of the evidence, I think it proper to state the part of the summing-up which dealt with self-defence.

It was as follows:—

"Suppose you come to the conclusion that those two men were killed by the shots which were fired by the accused, the next question which you might suggest to yourself is 'Has he any justification for it?' It has not been defined in so many words—the reason for shooting him. I don't think it has been precisely named. One thing might excuse him altogether—that is a plea of self-defence—

*Court of
Criminal
Appeal.*

"necessary self-defence. Or the crime could be reduced from what
"would be in the ordinary case murder, to manslaughter if he had
"the necessary provocation.

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

"Dealing with Self Defence, I will quote again to you from our
"Criminal Code:—"

(His Honour quoted Section 46.)

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

"The person who is unlawfully assaulted not having provoked
"such assault"—Take the position of the people here on the day of
"their deaths. Lawson and Frankcombe are apparently in company
"when the accused comes along. There is no question of the accused
"having been assaulted, because no one had touched him. Nor, on
"the evidence, did anyone intend to touch him. I dare say it is well
"in your minds, and you will have to say whether from that person's
"action—that is Frankcombe's—there was any reasonable probability
"that he was going to assault the accused. The story is that Frank-
"combe called the defendant to him—he said 'Did you say I lit
"Townshend's fire?' or something of that sort. The accused said 'I
"am not going to tell you whether I said it or not,' and Frankcombe
"according to the accused seemed to be in a bad temper or passion.
"He said 'No, you won't'—in answer to 'I'll say what I like.' Then
"he turned 'towards the motor.' From that term 'Turned towards
"the motor' it was claimed on behalf of the defendant that he feared
"Frankcombe was going to get some weapon, and he rather seemed
"to think in his mind at the time that it was a revolver. He might
"have been going to get a revolver or a gun. There does not seem
"to have been a revolver or gun, but he says he might have been
"going to get a tyre lever with which he could inflict deadly damage.
"Then he turned—well, supposing he did turn—first made a step
"towards the accused, and then turned to go to the motor. Do you
"think it is reasonable for an ordinary individual to say that because
"Frankcombe made a step towards him first, and then turned in
"the direction of the motor that he was going to get a gun, or tyre
"lever? There may have been endless reasons. One—it might have
"been that he thought when the accused said 'I won't tell you
"whether' etc.—Frankcombe might have gone to the lorry to get
"right away (drive away). You can ask yourselves what he might
"have gone there for. Do you think it is a reasonable inference
"that he might have gone there to get a tyre lever? Supposing that
"he went there to get something—he did not get it, so we have not
"the satisfaction of knowing what he turned for. (Reading on from
"Code) . . . 'If from the violence with which the assault is originally
"made and with which the assailant pursues his purpose the accused
"acts under a reasonable apprehension . . . etc.' He did not give
"Frankcombe that opportunity—the man simply turned towards the
"car. How can you say from that that he showed the intention of
"getting a gun or weapon—which we know now was not there—or

PACKETT
v.
THE KING.

"that he was going to pick up the tyre lever? Therefore self-defence based on that is groundless.

"A shot was fired—we don't know which shot. There is a theory raised by Dr. Firth that the first shot fired at Frankcombe struck him in the back of the neck, and he said that the effect of that shot would be to daze him and put him out of action. If that is the position, what happened after that? The defendant ejected the cartridge shell from the rifle, reloaded and at some time or other fired another shot into Frankcombe. What excuse could he have? Supposing the first shot only dazed him—only stunned or rendered him senseless—if the first shot did do that, the man was unconscious at the time when the second shot was fired. There could not have been any need for the second shot—the accused could not have been under apprehension of assault from him. The question of self-defence fades away and there could be nothing but murder. If the first shot killed, there was no reason again for the second shot, and there must have been an interval of some time while the cartridge was ejected from the rifle and it was reloaded for the accused to kill the man or otherwise fire the shot into the body, and there was no need for it. It only seems to show what state of mind the man must have been in to do that. From what the accused said in the statement to the Justice of the Peace at Sheffield, and from what Dr. Firth told you, it seems most likely that the first shot was the one that came into the back of the neck and rendered him more or less unconscious and the second shot killed him.

"If it was, I put it to you, he had no excuse for the second shot and therefore it would be murder.

"On the question of what happened at the interview—we have only the evidence of the accused himself. He has given us at least three different versions of what happened. One was to Detective Inspector Brown, and in that he said

"I left my camp . . . I did not see Lawson on my way out neither 'did I see Gordon Frankcombe. The only man I saw from the 'time I left home till I got to Black Jack was a man on a motor 'cycle . . .'

"That seems to have been the first statement that he definitely made on the question of these deaths. Very soon after that Detective Inspector Brown went to see him again and Packett according to the evidence:—"

(Portions of the statement are read) [I interpolate the full statement, which was as follows—"I was thinking nearly all last night about the statement I made to you yesterday. I want to tell you now that I did shoot Frankcombe and Lawson: that I was coming along on Monday last. I saw Frankcombe's lorry and Frankcombe

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,

CLARK, J.,

AND

HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

PACKETT
v.
THE KING.

"was standing with his back against the door of the lorry talking to Lawson a few yards away. Frankcombe called out to me 'Come over here. Did you tell any person that I lit the Townshend's fire?' I replied 'I won't say whether I said it or not.' Lawson was closing in on me and I was afraid of him and I shot Frankcombe and then Lawson. I don't care if I get 20 years for it."]

"Dr. Firth has said that it was the first shot at Frankcombe that disabled him—I don't think he has got a theory as to whether the second shot was at Lawson or Frankcombe. The second either struck Lawson or Frankcombe and the fourth shot also struck Lawson or Frankcombe.

"Those are the two statements the accused made—and then he was brought here yesterday when he gave us a statement which did not quite coincide with either of these. He is a man of strange memory. In the first statement he told the Police he did not seem to give them a great amount of information, but in rendering the statement next day he went into details, and now after a lapse of two months he made a statement on oath—he was now sworn to tell the truth, he was not on oath before—which contains very much less than the second of these statements. It will be material to you to consider when he was most likely to be able to tell the truth, or as much as he intended to disclose. Is this statement of 28th April less accurate than the one he made in Court here or is it more accurate and has his memory gone since then?

"You heard how he could not quite remember how the shots were fired, what shots were fired . . . except that he fired at Frankcombe first he could not tell how they went. This is something which you might consider—which of these statements you can take as more accurate. What I think is making it more difficult is that we don't know more than we do about what took place at this interview. He says, 'He made to come at me—Lawson was closing in and without stopping to think I fired the rifle. I hit Frankcombe and he fell'—'Lawson jumped at me . . . etc.'" [The remainder of the statement was as follows] "I jumped away from Lawson, reloaded again and fired at Lawson. The shot hit him and he half fell. I loaded and fired again at Lawson and another shot at Frankcombe as I was going away. I then went around my traps. I set my traps. I shifted and set my traps all day. You know the rest; I told you yesterday. I was very much afraid they were going to do for me. You have the rifle; you took it yesterday."

"Do you think that is all that happened? Frankcombe is shot and falls to the ground—do you think there is not going to be an interval while the gun is reloaded, and that during the interval Lawson never said or did anything?"

(Quotes "Lawson jumped at me . . . etc.")

"Supposing immediately Lawson jumped at him the prisoner jumped away, could he be throwing out the cartridge shell and reloading? and would Lawson say nothing?"

(Quotes again.)

"I cannot help thinking Lawson must have said something while the rifle was being reloaded. It is a pity we don't know a little more—I don't think we have been told the whole story yet. The accused says 'Lawson was closing in closer and without stopping to think I fired with the rifle'—Is there anything there on which you could frame a case of self-defence?"

"It has been pointed out to you that Lawson had the power to arrest the defendant after he shot Frankcombe. I don't know—I would suggest that it is very likely doubtful whether Lawson was attempting to make an arrest, but what more natural than that he would want to disarm him—not to make an assault on him but to prevent him doing any further harm. I don't know what his conduct could have been to make him fire the second shot. There might have been something further. Even an unloaded rifle in the hands of a man who is going to use it is a dangerous weapon, and whether Lawson would try to make an assault with only his bare hands is very doubtful. If he made an approach towards the accused it would be more in the nature of trying to disarm him. Lawson may have feared for himself, and could have been trying to wrest it out of his hands before it was reloaded. Except that Lawson jumped at him, there is no evidence of an assault on the part of Lawson. If you can say that Lawson jumped at him with the intention of assaulting him, it means this: The assault by Lawson was with nothing more than Nature had given him—he had only his boots—I don't say Nature gave him his boots—his feet and legs and arms and fists, and this man had a gun. Do you think Lawson would attack a man with a loaded gun, or do you not rather think that if Lawson did rush at him it was to disarm him and nothing else? And if it was to disarm him, that does not appear to me to constitute an assault. If Lawson did assault him then

(Quotes "Justified . . . if he believes on reasonable grounds that he cannot otherwise preserve himself therefrom.")

"Has he in any way brought himself under that provision? Unless you can say that he had a reasonable apprehension he is not justified in causing death or grievous bodily harm, and it seems to me that, under those circumstances, it is the only possible ground on which he can raise a plea of self-defence. It is suggested that Lawson was going to assault him, but is it not a probability that Lawson was not going to assault him? Unless you can say he had reasonable apprehension, he had not the right of shooting him."

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,

A.-C.J.,

CLARK, J.,

AND

HALL, A.-J.

1937.

*High Court
of
Australia.*

LATHAM,

C.J.

STARKE,

DIXON,

EVATT, &

McTIERNAN,

J.J.

1937.

PACKETT

v.

THE KING.

An examination of the evidence may have shown that there was nothing in the defence of self-defence, but if the evidence was to be discussed at all in relation to that defence, I do not think it should have been dealt with as it was.

In the statements of the appellant (which were put in as part of the Crown case) and the evidence of the appellant and his witnesses, there were statements to the following effect:—

That shortly before April 26, 1937 (the date on which Frankcombe and Lawson were killed), a cowshed and a barn containing 3½ tons of hay belonging to the witness Townshend were burnt—that Frankcombe was a dangerous man towards those who crossed his path (“if you did anything to cross him he would always do something “back” (Godwin)—“he was regarded as dangerous by most people” (Lincoln)—“everybody in the district seemed to fear to cross him” (Townshend))—that there had been some trouble between the appellant and Frankcombe as to the right to trap over a certain area of land known as the “Black Jack” run—that about 6 weeks or 2 months before the shooting Frankcombe asked the witness Kenny if he knew where he (Frankcombe) could buy a cheap second-hand revolver and that he gave Kenny a 1*l* note to buy one for him, if Kenny found one for sale, and that Kenny had told this to others—that Lawson was a friend of Frankcombe—that on April 26, 1937, the appellant met Frankcombe and Lawson at the place at which they were killed and that Frankcombe was then standing a few yards from the lorry referred to in the evidence with his back towards its right-hand door, and that Lawson was standing on Frankcombe’s right but more to the centre of the road—that Frankcombe said to the appellant “Come “here I want you”—that the appellant went to him thinking that Frankcombe wished to speak to him about trapping on the “Black “Jack” run—that then Frankcombe who “appeared angry” said to the appellant “Did you say I lit that fire of Townshend’s”—that the appellant replied “I would not tell you whether I did or not, I will “please myself whether I said it or not”—that Frankcombe then said “No you won’t” and “turned round sharply as if he was going “to get something from” the lorry—that Lawson had by this time moved to the back of the appellant (“Lawson had got to the back “of me”—appellant in his evidence at the trial)—that the appellant was thoroughly alarmed at the actions of the two men, and, having been told that Kenny had bought a revolver for Frankcombe, or that Frankcombe had given Kenny money to buy one for him, thought that Frankcombe was going to get a weapon of some kind from the lorry—that the appellant, thinking that he was about to be knocked down by the two men, fired his gun (perhaps twice) and hit Frankcombe and that Frankcombe fell to the ground—that then the appellant turned to go to the slip panel—that then Lawson jumped at him—that the appellant hit Lawson on the arm or forehead—that Lawson then stepped back but prevented the appellant from

passing and then Lawson rushed at the appellant and the appellant then fired two shots at him, or one shot at him and another at Frankcombe (or in the reverse order).

The evidence for the defence to the effect that Frankcombe was regarded by the local inhabitants as a dangerous man to those who crossed him was not even mentioned in the summing-up. And (the question of self-defence having been entered upon) I do not think the evidence of the appellant that before he fired any shot both Frankcombe and Lawson—not merely Frankcombe or Lawson but both of them—had acted in a way which, according to the appellant's evidence, made him believe that they were about to "knock him over," was adequately put to the jury.

The learned judge said "From that term 'turned towards the motor' it was *claimed on behalf of the defendant* that he feared Frankcombe was going to get some weapon and *he rather seemed to think in his mind* at the time that it was a revolver."

But the *appellant* had given evidence at the trial that he *did* fear that Frankcombe was going to get a weapon.

The learned judge no doubt referred to the evidence that Frankcombe said "No you won't," but later on, he said this—"Then he turned—well supposing he did turn—first made a step towards the accused, and then turned to go to the motor. Do you think it is reasonable for an ordinary individual to say that because Frankcombe made a step towards him first, and then turned in the direction of the motor, that he was going to get a gun or tyre lever? There may have been endless reasons. One might have been that he thought when the accused said 'I won't tell you whether 'I did or not' Frankcombe might have gone to the lorry to get away. You can ask yourselves what he might have gone there for. Do you think it is a reasonable inference that he might have gone there to get a tyre lever. Supposing that he went there to get something—he did not get it—so we have not the satisfaction of knowing what he turned for."

And then after quoting from the Criminal Code His Honour continued as follows—"If from the violence with which the assault 'is originally made and with which the assailant pursues his purpose 'the accused acts under a reasonable apprehension, etc.' He did not give Frankcombe that opportunity—the man *simply turned towards the car*. How can you say that *that* showed the intention of getting a gun or weapon—which we know was not there—or that he was going to pick up the tyre lever. Therefore self-defence based on *that* is groundless." (The italics are mine.)

Although His Honour was here only dealing with the evidence in relation to self-defence these remarks were not, I think, an adequate presentation of the evidence.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM.
C.J.
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

PACKETT
v.
THE KING.

The appellant's evidence was not that Frankcombe "simply turned "towards the car" (cf. also "Then he turned—well, supposing he did "turn—first made a step towards accused and then turned to go to "the motor"), but that Frankcombe appeared angry and (after the appellant had replied to his question) said "*No you won't* and turned "round sharp as if he was going to get something."

In discussing the question of self-defence from an assault by Lawson, the learned judge said "The accused says 'Lawson was "closing in closer, and without stopping to think I fired with the "rifle"—Is there anything there on which you could frame a case of "self-defence?" Then His Honour said "It has been pointed out to "you that Lawson had the power to arrest the defendant after he "shot Frankcombe. I don't know—I would suggest that it was very "likely doubtful whether Lawson was attempting to make an arrest, "but what more natural than that he would want to disarm him—not "to make an assault on him, but to prevent him doing further "harm . . . Except that Lawson jumped at him, there is no evidence "of an assault on the part of Lawson. If you can say that Lawson "jumped at him with the intention of assaulting him, it means this: "The assault by Lawson was with nothing more than nature had "given him—he had only his boots—I don't say nature gave him his "boots—his feet and legs and arms and fists and this man had a gun. "Do you think that Lawson would attack a man with a loaded gun "or do you not rather think that if Lawson did rush at him it was "to disarm him and nothing else It is suggested Lawson was "going to assault him, but is it not a probability that Lawson was not "going to assault him?"

If the jury were to be asked to consider whether "Lawson jumped "at" the appellant "with the intention of assaulting him," or whether Lawson was attempting to arrest him, or to disarm him, I think the evidence that Lawson had "closed in" on the appellant and got to the back of him before any shot was fired, and the evidence as to Frankcombe's words and actions before any shot was fired, that is to say, the actions of both men and the words of Frankcombe (before any shot was fired) should have been put to the jury in such a way as to direct their attention to it when they were considering what Lawson's intention was.

It is true that His Honour had said "The accused says Lawson was "closing in closer and without stopping to think I fired with the "rifle—Is there anything there on which you can frame a case of "self-defence?" but that does not adequately present the point I have mentioned.

Having dealt with the question of self-defence His Honour passed to the question of manslaughter.

He first of all dealt with the question in relation to Frankcombe and what he said in that connection was as follows:—"The only "other" (this of course is a mere slip) "ground on which it could be "reduced from murder to manslaughter is that he had provocation.

"As to that provocation:

(Quotes "Culpable homicide which would otherwise be murder "may be . . .")

(Then quotes amendments to Sub-sec. 3.)

"Gentlemen, that is the position. If the circumstances ordinarily "would be murder, it may be reduced to manslaughter if the person "causing death does so in the heat of passion. We know from Dr. "Firth that the shots entering the neck of each of those two persons "would not have caused death—the shots that caused death were the "shots in the forehead. I don't know that it is going to matter very "much. As regards Frankcombe the accused told us that, in the state- "ment made on April 28 to the Justice of the Peace at Sheffield, that "the first and the last shots were the shots that were fired into Frank- "combe. Between the first and the last shots he had had the matter of "Lawson, and in that time he had been able to twice or three times "eject cartridge cases from his rifle. He would eject after firing at "Frankcombe first, then two shots into Lawson—he would twice re- "load the rifle. Now, it might be necessary to decide whether he had "got into a passion—whether during that interval and what had "happened between him and Lawson his passion would have subsided "and he had cooled down. It makes it difficult not knowing the order "in which the shots were fired; but I think I will have to take the "burden of telling you, that in the case of Frankcombe, there was "not any wrongful act or insult of such a nature as would be suffi- "cient to deprive an ordinary person of his power of self-control. I "tell you that because Frankcombe I do not think did anything in the "first instance which would drive him into a passion or deprive him "of his control, as far as we know. There may have been words, "which we do not know, that passed between the two, but we cannot "jump to the conclusion that such words were used. There is no "evidence of them.

"If you follow out what I have told you about him, I very much fear "there is no option for you. If you are satisfied that the defendant "did fire the shots as has been alleged, then there is no option for "you but to find him guilty of murder."

The position therefore is that as regards the killing of Frankcombe the learned judge directed the jury that there was no evidence of manslaughter, and that if they were satisfied "that the defendant did "fire the shots" as was alleged then there was "no option" for the jury "but to find him guilty of murder"—His Honour did not say "murder or nothing."

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

His Honour next dealt with the question of manslaughter in relation to Lawson and in doing so said this:—

“With regard to Lawson, he had told you that Lawson jumped at him. Well, it is for you to decide the fact there, as to what is meant by that—whether it was a wrongful act or whether, as I have suggested to you, Lawson did not jump with the intention of assault or beating him down, but perhaps jumped with the intention—if he did jump at all—of wresting this weapon from him. If his intention was only to disarm him and to prevent him doing any further damage, that is something which Lawson had the power to do. He had power to arrest him and I should say the power to disarm him would be included in that. We have no evidence of an unlawful act other than jumping at him. If Lawson did not have any evil intention in jumping at him, I should have to rule that here also there was no provocation in Lawson’s case to reduce the crime from murder to manslaughter, but if Lawson jumped at him with the intention of beating him to the ground—you must try to settle that matter, whether his intention was to do some hurt to the accused or whether it was not. If it was to do some hurt, it would depend upon the amount he was going to do. I’ll put it this way: If that intention to hurt was such as would put the defendant into what we call the heat of passion—if the defendant acted immediately it might amount to provocation and would reduce it in his case from murder to manslaughter.”

His Honour then told the jury that the question whether the killing of Lawson was only manslaughter was a matter for them.

But in this part of the summing-up His Honour only referred to the evidence that Lawson “jumped at” the appellant.

No reference is made to the evidence as to the initial action of Lawson in moving to the back of the appellant and the practically simultaneous words of Frankcombe “No you won’t,” and Frankcombe’s sharp turn “as if he was going to get something from the” lorry.

If on the second count the question of manslaughter was to be left to the jury, that is to say, without a direction that the matter alleged as provocation was not capable of constituting provocation, I think they ought to have been told that they were entitled to look at the actions of *both* Frankcombe and Lawson and the words of Frankcombe.

His Honour concluded his summing-up as follows:—“There is one point of view in this particular matter; it is one of the simplest things you might expect to have to decide here. You have only the evidence of the accused, but he has admitted so much that it saves you trouble—you don’t have to go through the evidence of a number of people. It is a simple matter and I don’t think I need say anything further to you.”

What may the jury have fairly taken this to mean?

"There is one point of view in this particular matter." What was it?

"You have *only* the evidence of *the accused* and he has admitted *"so much that it saves you trouble"*

I think the jury may well have understood this to mean that really the only thing they could do was to find the appellant guilty.

A judge can express his opinion on the evidence—provided he makes it clear to the jury that he leaves all findings of fact to them. But I do not think he is warranted in making a statement to a jury which they may fairly construe as a statement that the only point of view in the case is that the accused is guilty.

His Honour had of course, in the opening part of his summing-up, given the direction set out above as to the onus of proof, and that if the Crown had failed to prove its case the jury should find a verdict of Not Guilty, and that all questions of fact were for them.

But he had also stated that the Crown could have relied merely on the appellant's confession, but it was not satisfied with that, and he then told the jury what the Crown usually did "to put the thing *"beyond all doubt."*

Neither Counsel for the appellant, nor the Counsel for the Crown, was satisfied with His Honour's directions, and both of them, before the jury retired, asked for further directions to be given to the jury.

Counsel for the appellant asked His Honour to give the jury a more explicit direction, with particular reference to *Woolmington's case*, as to the onus of proof being always on the Crown and as to Section 46 of the Criminal Code (one of the sections dealing with self-defence).

The senior Counsel for the Crown joined in this request "and" (I quote from the note supplied to us of what was said at this stage) "discussed with His Honour the effect of that case" (*Woolmington's case*) "with particular reference to the fact that the onus on the Crown never shifts—that it is not at any stage the duty of the accused to prove justification, but that even if no justification were established it would still be necessary for the Crown to establish the guilt of the accused beyond reasonable doubt." "And it should also be made clear that it is not sufficient that the accused fired shots which caused the death. It must further be shown that he fired those shots with one or other of the intents set forth in Section 157 (1), I, II., or III." (of the Criminal Code).

At this stage (or immediately after the above statement of Counsel which concludes with the words "beyond reasonable doubt"—but it would seem at this stage) His Honour gave the following further directions to the jury "The shooting may not be culpable if either *"justified or unintentional. Could the accused have meant anything*

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

"else from shooting but death or bodily injury? I told you the Crown must prove their case beyond reasonable doubt. As to the question of intention if a man uses a rifle and discharges it in the direction of a human being, unless he can show the contrary he is taken to intend the natural effect. It is for the accused to show. I have put to the jury that if the Crown has not proved its case they must acquit."

Then the learned Counsel for the Crown "submitted" (I still quote from the note supplied to us) "that the jury should be directed not merely that Lawson had the power of arresting accused but that he was under a duty so to arrest him."

The note of the junior Counsel for the Crown as to what His Honour said in response to that request is as follows:—

"If it was his intention to arrest then he had the power to do it."

The note of Counsel for the appellant is as follows:—

"Whether it was right or duty—you can take it either way."

Then Counsel for the Crown asked His Honour to give the following further directions so far as the case related to Lawson: —

(1) That there was no evidence of any matter capable of constituting provocation.

(2) That there was no evidence that the accused caused death by anything done "in the heat of passion."

His Honour refused to give that direction.

(3) That the mode of resentment must bear a reasonable proportion to the provocation and that the provocation must be great indeed to warrant the use of a deadly weapon.

The note supplied to us states that there was a "direction accordingly."

Let us look at the first further direction which His Honour gave.

It is set out above—"The shooting may not be culpable if either justified or unintentional."

"Could the accused have meant anything else from shooting but death or bodily injury? I told you the Crown must prove their case beyond reasonable doubt. As to the question of intention if a man uses a rifle and discharges it in the direction of a human being, unless he can show the contrary he is taken to intend the natural effect. It is for the accused to show. I have put it to jury that if Crown has not proved its case they must acquit."

It seems to me that the jury might fairly have understood that to mean, that if the Crown had not proved its case they must acquit, but that if the Crown had proved that the appellant discharged the gun in the direction of either Frankcombe or Lawson, the accused must be

taken to have intended to kill him, and that that is what the jury should find unless the appellant satisfied them to the contrary.

This is contrary to *Woolmington's case*.

Before I proceed to state how I think the jury may have understood the whole summing-up, I will deal with His Honour's direction that on the first count (which charged the murder of Frankcombe) the jury had no option but to find the appellant guilty of murder—not murder or nothing.

On the hearing of the appeal this direction gave rise to some discussion as to the present law of this State as to what may amount to provocation, and as to the powers of the trial judge in directing a jury thereon, and as to the right of a jury in any case to find a verdict of manslaughter.

I will deal very shortly with each of these questions.

Section 160 of the Criminal Code as originally enacted was as follows:—

"160—(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

"(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

"(3) Whether the conditions required by Sub-section (2) hereof were or were not present in the particular case is a question of fact.

"(4) No one shall be held to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

"(5) Whether or not an illegal arrest amounts to provocation depends upon all the circumstances of the particular case, and the fact that the offender had reasonable grounds for believing, and did, in fact, believe, that the arrest was illegal, shall be taken into consideration in determining the question whether there was provocation or not."

It was suggested that this altered the common law and *R. v. Jackson* ((1918) *N.Z.L.R.* 363) was cited as an authority to that effect.

The enactment which had to be considered in *Jackson's case* was Section 184 of the (New Zealand) Crimes Act, 1908 (which is founded on the provision in the English Bill of 1880 which was founded on Section 176 of the draft Code of 1879—Cf. Section 176 of draft Code

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

which contained the words "whatever may be its nature" (of the wrongful act or insult) and Section 269 of the Queensland Code).

But in 1934 Section 160 of our Criminal Code was amended by the addition to Sub-section (3) of the words "but the question whether any matter alleged is or is not capable of constituting provocation is a matter of law."

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

Counsel for the Crown contended that the effect of this amendment was to restore the law as laid down in *Thorpe v. R.* (18 C.A.R. 189).

*High Court
of
Australia.*

Whatever the position was before the amendment, I think that now the law is as stated in that case.

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

The next question is whether when a trial judge rules that there is nothing in the evidence which is alleged to constitute provocation which is capable of constituting provocation, he can direct the jury that they have no right to find a verdict of manslaughter.

Counsel for the appellant referred to Sections 332 and 333 of the Criminal Code, and cited *R. v. Grimes & Lee* (15 N.S.W.L.R. 209) and *Brown v. R.* (17 C.L.R. 570) as authorities that those sections confer on a jury a right to find a verdict of manslaughter notwithstanding that the trial judge has ruled that there is no evidence fit to be considered by them on the question whether the crime (if any) might in the circumstances be manslaughter only and not murder.

PACKETT
v.
THE KING.

The enactment in question in *Brown's case* was Section 23 (2) of "The Crimes Act, 1900," of New South Wales, which provided as follows:—"Where on any such 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 and he shall be liable to punishment accordingly."

The words "it appears" in this section no doubt mean if it appears on the evidence, and if the section is so read I do not think there is any material difference between it and the Tasmanian section 332.

Counsel for the Crown also contended that as Section 333 of the Tasmanian Criminal Code provides that on an indictment for murder the accused may be convicted of either manslaughter, concealment of birth, or causing the death of a child before birth, *Brown's case* had no application.

But it would be absurd to construe Section 333 as meaning that in such a case as this the jury could find either of the two last mentioned verdicts, and *Lex rejicit superflua pugnancia incongrua*.

Counsel for the Crown also contended that *Brown's case* had no application because Section 160 (3) contains the provision that the question whether any matter alleged as provocation is or is not capable of constituting provocation is a question of law. But *Brown's case* decided that a trial judge in New South Wales has the power

in a proper case to direct the jury that there is no evidence of manslaughter fit to be considered by them and the question whether or not there is such evidence is a question of law.

I am of opinion that in such a case as this the jury has the right to return a verdict of manslaughter, notwithstanding that the trial judge has ruled that any matter alleged as provocation is not capable of constituting provocation.

"There can be no doubt that on a charge of murder the jury are entitled to return a verdict of manslaughter, though on the facts 'the case be one of murder or nothing' (BARTON, A.C.J., in *Brown v. R.* (*supra*) at p. 578, and see also judgment of ISAACS, J. (as he then was) and POWERS, J., at pp. 591-592).

In *R. v. Phillis* (32 T.L.R. 414) the trial judge seems to have directed the jury that they had no option but to find the accused guilty of murder. The report, however, is very short.

Such a direction would virtually amount to the judge finding the verdict.

This he cannot do.

In *Woolmington's case* (1935) A.C. the LORD CHANCELLOR at p. 480 said—"If it is proved that the conscious act of the prisoner killed a 'man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder. It is 'difficult to conceive so bare and meagre a case but that does not mean that the onus is not still on the prosecution. If at any period 'of a trial, it was permissible for the judge to rule that the prosecution had established its case, and that the onus was shifted on to 'the prisoner to prove that he was not guilty, and that unless he discharged that onus the prosecution was entitled to succeed, it would 'be enabling the judge in such a case to say that the jury must in law 'find the prisoner guilty and so make the judge decide the case and 'not the jury, which is not the common law."

Now as to the effect of the *whole* summing-up.

The *Court of Criminal Appeal* has said that "the critical parts of 'a summing-up are the beginning and the end, like the exordium and 'the peroration of a speech."

In the opening of the summing-up now under consideration there is a statement that the onus of proof is on the Crown, and that if the Crown had failed on that the jury should return a verdict of Not Guilty, and that is followed by the statements introduced by the reference to *Woolmington's case* which I have referred to above.

There is a correct statement of the law with respect to the degree of proof required, and as to "reasonable doubt," and that all questions of fact were for the jury.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

PACKETT
v.
THE KING.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
J.J.
1937.
—
PACKETT
v.
THE KING.
—

But there is also the statement that the Crown could have relied merely on the appellant's confession, but that it was not satisfied with that and that there is always a doubt that a person suspected of a crime "is likely to think that he acted under an illusion," and that the Crown "in order to put the thing beyond all doubt" usually adduces evidence tending to show that the story in the confession was correct.

As this states that *in this case* the Crown was *not* satisfied to rely on the appellant's confession, it necessarily refers to the other evidence of the Crown, and the jury were then told what (in view of the doubt as to the existence of an illusion of the nature stated by His Honour) the Crown usually does "to put the thing beyond all doubt," and that that is to adduce evidence tending to show that the story in the confession is true. (By the "evidence" of the appellant referred to in the concluding passage of the summing-up—the passage next to be referred to—His Honour no doubt meant his statements as well as his evidence—but all the rest of the evidence is eliminated.)

At the very end of the summing-up there is the passage reading—"There is one point of view in this particular matter: it is one of "the simplest things you might expect to have to decide here. You "have only the evidence of the accused, but he has admitted so much "it saves you trouble—you don't have to go through the evidence of a "number of people. It is a simple matter and I don't think I need "say anything further to you."

Then after a joint request from Counsel on both sides His Honour gave the further direction on the subject of the onus of proof which I have set out above and commented on.

Having regard to the fact that this further direction was given as the result of a request (made in the presence of the jury) from both Counsel that the subject of the onus of proof might be cleared up, and was made just before the jury retired, I think it must be taken as the predominant direction on that subject.

I think the jury may well have understood the general effect of the whole summing-up to be as follows—that the onus was on the Crown to prove its case beyond reasonable doubt, but that if the Crown proved that the appellant discharged the gun at either Frankcombe or Lawson the accused must be taken to have intended to kill him, and that that was what the jury should find unless the appellant satisfied them to the contrary, and that really the only verdict the jury could find was that the accused was guilty.

If this is so then what ought the Court to do?

The case falls within Section 402 of the Criminal Code, and therefore, *prima facie*, the Court is required to allow ("shall allow") the appeal, unless it is of opinion that the case is within Sub-section (2) of that Section, in which case the Court "may" dismiss the appeal.

Counsel for the Crown stated that if it became a question of considering whether the power conferred by Sub-section (2) should be exercised, he would not think of asking the Court to exercise it.

That is a circumstance which the Court will no doubt consider, but it cannot relieve the Court from passing upon the matter.

On the one hand, the evidence on which the appellant was convicted is what it is.

On the other hand, I think there was a misdirection on such a fundamental matter as the onus of proof, and that as the result of the whole summing-up the jury may well have understood the learned judge to tell them that the only verdict really open to them was one of guilty, whereas it is fundamental that the verdict must be the verdict of the jury in fact and not merely in form.

It is the case too that this Court (unlike the English Court of Criminal Appeal) has the power to grant a new trial.

I think that the Court should not exercise the power conferred by Sub-section (2) of Section 402, but should quash the conviction and direct a new trial.

HALL, A.-J.: I had hoped that I would not have had to say anything at all in this matter. I understand that it is necessary for three judges to be present to constitute a *Court of Criminal Appeal*; that is the reason for my presence.

I have a pretty good idea, I think, of what I said in my summing-up. I am not saying that it was anything like perfect; but I did think that I left it fairly to the jury, and they were the sole judges of the facts. That was my impression at the time; but looking at it as a matter in retrospect now, I still cannot see that I did anything to prejudice the fair trial of the case. It looked to me that the jury had no option; that Packett after he had disabled Lawson went back and put a shot into them. If that is not murder, I don't know what is. I agree with the judgment of the Acting Chief Justice.

The appellant applied for special leave to appeal to the High Court of Australia.

H. J. Solomon for the appellant.

Maughan, K.C., and *R. N. K. Beedham* for the Crown.

C.A.V.

The written judgments of LATHAM, C.J., STARKE, DIXON, EVATT, and McTIERNAN, JJ. will be found reported in (1937) 58 C.L.R. 190.

Solicitor for the appellant: *H. J. Solomon*.

Solicitor for the respondent: *A Banks Smith*, Crown Solicitor.

*Court of
Criminal
Appeal.*

CRISP,
A.-C.J.,
CLARK, J.,
AND
HALL, A.-J.
1937.

*High Court
of
Australia.*

LATHAM,
C.J.,
STARKE,
DIXON,
EVATT, &
McTIERNAN,
JJ.
1937.

PACKETT
v.
THE KING.