[HIGH COURT OF AUSTRALIA.]

KELLY . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1923.

MELBOURNE, *Oct.* 18, 26.

Knox C.J., Gavan Duffy, Rich and Starke JJ.

Criminal Law—Murder—Verdict of manslaughter—Misdirection—Miscarriage of justice—Appeal to High Court—Jurisdiction of High Court—New trial for manslaughter.

On a trial for the murder of a woman there was no suggestion of manslaughter until after the jury had retired. On the jury returning into Court after a retirement of six hours, the foreman asked the trial Judge whether, if the death of the woman was caused by the accused but not wilfully, there should be a verdict against the accused. Subsequently the trial Judge directed the jury to the effect that if they found that the accused brought about the death of the woman by neglect to provide her with proper medical attendance, they might then bring in a verdict of guilty of manslaughter. The jury brought in a verdict of not guilty of murder but guilty of manslaughter.

Held, by the whole Court, that in the circumstances the jury were not properly instructed as to manslaughter, and that the accused had not had an opportunity of defending himself against that charge; that a miscarriage of justice had thereby occurred, and therefore that the conviction should be quashed.

Held, also, by the whole Court, that the High Court had jurisdiction to order a new trial on a charge of manslaughter only; and that the accused, having been found not guilty of murder, should not be again presented or tried on that charge.

Held, further, by a majority of the Court, that in the circumstances the public interest would be best served by ordering a new trial on a charge of manslaughter only.

Decision of the Supreme Court of Victoria: *R.* v. *Kelly*, (1923) V.L.R., 704; 45 A.L.T., 60, reversed.

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APPLICATION for special leave to appeal, and hearing of appeal, from the Supreme Court of Victoria.

David Kelly was tried before *Schutt* J. and a jury of twelve on a presentment charging him with the murder of Ada Florence Overall. The jury found a verdict of not guilty of murder but guilty of manslaughter. *Schutt* J. having given a certificate under sec. 593 (*b*) of the *Crimes Act* 1915 (Vict.) that the case was a fit one for an appeal, the accused appealed to the Full Court, which dismissed the appeal: *R.* v. *Kelly* (1).

The accused now applied to the High Court, on notice to the Crown, for special leave to appeal from that decision.

The other material facts are stated in the judgment hereunder.

T. Brennan, for the appellant. The only kind of manslaughter that can be attempted to be supported by the evidence is manslaughter by negligence; and in respect of that there was not a sufficient direction, since the jury were not told that they must find that the accused owed some duty of care towards Mrs. Overall. This non-direction amounted to a substantial miscarriage of justice within the meaning of sec. 594 (1) of the *Crimes Act* 1915, and the appeal to the Supreme Court should have been allowed.

Owen Dixon K.C. (with him *Macindoe*), for the respondent. Special leave to appeal should be refused. No general question of law is raised. The only substantial ground of appeal is that there was an insufficient direction as to manslaughter. But it is clear from what took place that the jury believed that the accused killed Mrs. Overall, and were not satisfied that he had an intention to kill her. The jury, in such circumstances, might have found a verdict of manslaughter without any direction as to manslaughter (*R.* v. *Taylor* (2)), and there is ample evidence to support that verdict, and the addition of an insufficient direction is not a ground for granting special leave. Another fact to be considered in determining whether special leave should be granted is that the Judges of the Supreme Court are satisfied that no substantial miscarriage

(1) (1923) V.L.R., 704; 45 A.L.T., 60.

(2) (1886) 12 V.L.R., 845; 8 A.L.T., 97.

of justice has taken place. If the appeal is allowed, there should be a new trial for murder. The presentment was for one single charge. The verdict is on that presentment, and is a single verdict (*Hawkins' Pleas of the Crown*, vol. II., pp. 619-620) by which the jury negatives one allegation in the presentment and affirms another, with the result that if the verdict is set aside it should be set aside as a whole and a new trial for murder directed. This Court has jurisdiction to grant a new trial for manslaughter.

T. Brennan, in reply. The verdict of not guilty of murder is conclusive on that charge, and, as on the evidence the case is one of murder or nothing, there should not be a new trial on a charge of manslaughter. [Counsel referred to *R.* v. *Hopper* (1); *Hargan* v. *The King* (2).]

Cur. adv. vult.

Oct. 26.

THE COURT delivered the following written judgment:—

The appellant, David Kelly, was presented on a charge of murder. On that presentment he was liable to be convicted either of murder or of manslaughter, but the Prosecutor for the King put the case to the jury as one of murder, and in charging the jury *Schutt* J. dealt with it only in that aspect, and until the jury were brought into Court, six hours after they had retired to consider their verdict, no suggestion had been made by the Prosecutor for the King or by counsel for the accused or by the learned Judge that it was open to the jury on the evidence to consider whether the accused was guilty of manslaughter. After a retirement of six hours the jury were brought into Court, and the foreman, in answer to the Judge, said that with a little information they might be able to arrive at a verdict.

What then took place was recorded at the trial as follows:—"His Honor:—'I do not want to know what opinions you have formed. I think you had better not say anything about that. If there is any question you wish to ask with a view to throwing any light on any important matter, I should be glad to answer it. Have

(1) (1915) 11 Cr. App. R., 136. (2) (1919) 27 C.L.R. 13.

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you formulated any question ?' Foreman :—'I am just trying to do so. Supposing that her death was caused by the accused and his action was not wilful, would that be a verdict against him ?' His Honor :—'Do you mean if he caused her death accidentally and not intentionally or deliberately ?' Foreman :—'Yes.' His Honor :—'Well, that would not be murder ; but, of course, there is nothing to suggest that her death was caused in the way that you mention, but if you think there is anything of that sort to indicate that it was caused in that fashion—I do not think there is myself—it would certainly not mean he was guilty of murder. To be guilty of murder his act in killing her would have to be deliberate and intentional. Would you like to retire for a little while to consider that, gentlemen ?' The jury retired again. Mr. Macindoe :—'With regard to that matter, your Honor, I do not know but I presume what the jury is really driving at is as to whether he caused her death by wilful neglect—no act of commission but acts of omission. I certainly have never put it, but I submit there is evidence upon which the jury might find a verdict of manslaughter if they came to that conclusion.' His Honor :—'It is very hard to say. The jury may be entitled in any case of murder to bring in a verdict of manslaughter, and it may be that is what the jury are suggesting.' Mr. Macindoe :—'I would suggest that your Honor tells them that.' His Honor :—'Tells them what ?' Mr. Macindoe :—'Tell them that if the death was caused by wilful neglect that would be manslaughter.' His Honor :—'Have you anything to say about that, Mr. Bateman ?' Mr. Bateman :—'As far as I can see, this case was presented on a charge of murder, and manslaughter was never put to the jury at all ?' His Honor :—'No, it was not. Do you contend that the jury are not at liberty to find a verdict of manslaughter if they think on the evidence that there is something to sustain that charge ?' Mr. Bateman :—'Manslaughter was never put to the jury. Of course, I am handicapped by Mr. Brennan not being here.' His Honor :—'In Mr. Brennan's absence I have to ask you what you say about it.' Mr. Bateman :—'That is all I have to say. So far as I can see, it is not your Honor's duty to point out to the jury that they can in this case bring in a verdict of manslaughter at all. It has never been put to the jury. I submit it is murder or

nothing.' His Honor :—'Supposing there are facts upon which they might possibly find a verdict of manslaughter, would they not be entitled to find it whether it was put by the Crown or not. That is the point. I understand the learned Prosecutor for the King suggests that it is competent for them to find a verdict of manslaughter.' Mr. Macindoe :—'Yes, your Honor.' Mr. Bateman :—'All I can say is that in my opinion it does not appear to me that they can bring in a manslaughter verdict. I cannot argue it any further.' The jury were heard to knock. His Honor :—'Do you suggest, Mr. Prosecutor for the King, that there is evidence upon which they might properly and reasonably find a verdict of manslaughter although it was not put in that aspect?' Mr. Macindoe :—'I think they might in this aspect, your Honor, that they might come to the conclusion that this man knew perfectly well that this woman was very ill, that he neglected to give her any medical attention, and that the lack of that medical attention brought about her death.' His Honor :—'You suggest that would be manslaughter?' Mr. Macindoe :—'Yes, your Honor; I do not think it can be murder.' His Honor :—'It certainly would not, I think. I propose to tell the jury that before asking them whether they have arrived at a verdict.' Mr. Bateman :—'If your Honor does address the jury on that point, I would ask you to mention that evidence has been given for the defence that she refused to see a doctor.' His Honor :—'That is on the question of fact which I presume they have considered, but I think there is no objection to reminding them of that.' The jury returned to Court. His Honor (to jurymen) :—'Before you say anything further, Mr. Foreman, with regard to any conclusion you may have arrived at, I would like to say there has been a little discussion since you retired to your room with regard to the question that you were putting to me, and it is suggested that your question was put from this point of view—that you possibly thought there was evidence which showed neglect on the part of the accused in relation to the dead woman, that is to say, that he did not provide her with proper attention. I do not want to ask you if that is what you mean, but if you did mean that, and if you thought he brought her death about by neglect you might then be entitled to bring in a verdict. You would then be entitled, I think, to bring

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in a verdict of manslaughter; but, in considering that question, of course, you would have regard to the whole of the evidence and including that portion of the evidence where it was stated that the woman herself refused to have medical attendance. One of the witnesses said that she refused to have a doctor or nurse in attendance and so on, although some of the other witnesses suggest that the accused was responsible for her not having proper attendance. If you asked that question in that way as indicating that you thought that he was responsible in that way, and that led to her death—that there was neglect to provide her with proper attendance, medical or otherwise—then you might possibly find a verdict of manslaughter. Perhaps you have already considered it in that light, but if you have not and wish to consider it further, you may do so. If you do not wish to consider it further and wish to say what conclusion you have arrived at now, you may do so. Would you like to consider it further? Consult with your brother jurymen, Mr. Foreman, as to whether or not it is desired to retire to the jury-room again.' The jury retired; and returned with a verdict of not guilty of murder, guilty of manslaughter."

The accused, having been remanded for sentence, appealed on a certificate under the provision of sec. 593 of the *Crimes Act* 1915.

On the hearing of the appeal the Full Court (*Irvine* C.J., *Schutt* and *McArthur* JJ.) assumed that the verdict of manslaughter was based upon a finding that the woman's death was brought about by neglect on the part of the accused. On this assumption they held that there was ample evidence (1) that the accused was under a duty of care towards the deceased; (2) that he neglected such duty, and (3) that such neglect was the cause of death or that, if there had been no such neglect, life would have been prolonged.

The objections that a charge of causing death by neglect was never presented by the Crown and was specifically disclaimed by the Prosecutor for the King during Mr. *Brennan's* final address to the jury were disposed of on the ground that on the hearing of the appeal counsel for the accused admitted that the disclaimer by the Prosecutor made no difference to his conduct of the case. But Mr. *Brennan* has told us that by this he meant no more than that the specific disclaimer at that stage did not alter the course which he had already

adopted because the case throughout had been put as one of murder.

As to the remaining ground of appeal, namely, that the jury was not directed or not adequately directed on the law as to causing death by neglect or on the facts (if any) bearing on such offence, it was held that the prosecution had established to the satisfaction of the Court that no substantial miscarriage of justice had actually occurred, and the appeal was accordingly dismissed. The accused, having been sentenced to imprisonment with hard labour for ten years, applied to this Court on notice to the Crown for special leave to appeal from the order of the Full Court dismissing his appeal. The Crown being represented on the hearing of the application, the Court heard argument on the whole matter as if special leave had been granted, and at the conclusion of the argument judgment was reserved.

For the reasons about to be given, the Court is unanimously of opinion that the Full Court was wrong in dismissing the appeal, and that the conviction cannot be allowed to stand. The charge of the learned Judge on the subject of manslaughter was not, in our opinion, such as the circumstances required. He confined his observations to the question of wilful neglect, though that may not have been the default contemplated by the jury when the question was asked, and with respect to that neglect he omitted to instruct the jury as to matters relevant to the determination of the question whether the accused was under a duty of care towards the deceased, nor did he point out that unless such a duty existed no question of neglect could arise. He failed to specify the degree of negligence required to constitute neglect involving criminal responsibility. He told the jury that, if they thought the accused brought about the woman's death by neglect, they would then, he thought, be entitled to bring in a verdict of manslaughter, and his words were certainly capable of being understood by the jury as meaning that, if they thought the accused ought to have provided the deceased with proper attendance, medical or otherwise, and neglected to do so, they might find a verdict of manslaughter.

It will be remembered that when the jury first came back into Court the foreman asked this question: "Supposing that her death was caused by the accused and his action was not wilful, would

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that be a verdict against him ? " And he then stated that by this he meant if the accused caused her death " accidentally and not intentionally or deliberately." This question having been asked, we think there should have been a further direction from the learned Judge, because if the jury were of opinion that the accused had caused the death they might have found him guilty of manslaughter if he had killed the deceased unlawfully and feloniously though not intentionally or deliberately. Moreover, it is clear that in the circumstances the accused was afforded no proper opportunity of defending himself against a charge of manslaughter. The prosecution was conducted throughout, until the jury were brought into Court after six hours' retirement, on the footing that the offence with which the accused was charged was murder and that alone. The charge of manslaughter was sprung on the accused in the absence, through illness, of his counsel, at a time when he had no opportunity of putting before the jury any defence he might have had to that charge as distinct from the charge of murder on which he was presented. In these circumstances it is impossible for us to hold that the Crown has established that no miscarriage of justice has actually occurred, and it is our duty to allow the appeal and to quash the conviction. In this aspect of the case it is unnecessary to consider whether the Full Court was right in deciding that there was evidence (1) that the accused was under a duty of care towards the deceased, (2) that he neglected that duty, and (3) that such neglect was the cause of her death or that, if there had been no such neglect, life would have been prolonged ; and, having regard to the order about to be made, we all agree in thinking that it is undesirable that we should examine in detail the evidence given at the trial. But the fact that we refrain from doing so must not be taken as indicating any opinion whether there was or was not evidence fit to go to the jury on any or all of these issues.

The conviction being quashed, it remains to consider what further order should be made. It was suggested by counsel for the accused that the only order should be that the conviction be quashed. For the Crown it was contended that if the conviction were quashed a new trial should be ordered on the presentment for murder. We are all of opinion that this Court has jurisdiction to order a new trial

on a charge of manslaughter only, and that the accused, having been found by the jury not guilty of murder, should not be again presented or tried on that charge.

The question whether the appellant in this case shall be again put upon his trial is one in which the interest of the community is involved as well as that of the individual. In the opinion of a majority of the Court the public interest will be best served by ordering a new trial on the charge of manslaughter only, which may be had on the existing presentment to which the accused has already pleaded or, at the option of the Crown, on a new presentment for manslaughter. The jury will then have to consider whether the accused brought about the death of Mrs. Overall in any manner that constitutes manslaughter.

Special leave to appeal granted returnable instanter. Appeal allowed, conviction quashed, and new trial ordered on a charge of manslaughter only.

Solicitor for the appellant, *F. Ernest Bateman.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.