[HIGH COURT OF AUSTRALIA.]

PACKETT . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF TASMANIA.

H. C. OF A. 1937.

SYDNEY, *Aug.* 26, 27; *Sept.* 3.

Latham C.J., Starke, Dixon Evatt and McTiernan JJ.

*Criminal Law—Indictment—Two counts of murder—Validity—Murder—Manslaughter Self-defence—Provocation—Criminal Code* (*Tas.*) (14 Geo. V. No. 69), *sec.* 311 (2), (3).

*High Court—Special leave to appeal—Criminal cases—Discretion of court.*

Sec. 311 of the *Criminal Code* (Tas.) provides:—"(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 for any other crime."

*Held*, by *Latham* C.J., *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that under sub-secs. 2 and 3 of sec. 311, although an indictment for murder must be confined to charges of murder, it may properly include several charges of murder if the murders charged are founded on the same facts or are, or form part of, a series of crimes.

*Per Evatt* J.: The fact that, if special leave to appeal were given in a criminal matter, the court is of opinion that the appeal would be allowed is not in itself sufficient to justify the granting of special leave to appeal.

What constitutes a defence to a charge of murder on the ground of self-defence, and what amounts to provocation to reduce the crime to manslaughter, considered.

Special leave to appeal from the Court of Criminal Appeal of Tasmania refused.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of Tasmania.

Donovan Henry Charles Cruttenden Packett was presented before the Supreme Court of Tasmania upon an indictment which charged him in the first count with the murder of one Gordon Charles Francombe at or near Moina, Tasmania, on 26th April 1937, and in the second count with the murder of one Henry Francis Lawson at the same place on the same date. On his arraignment an objection was made to the indictment on the ground that under sec. 311 (3) of the Tasmanian *Criminal Code* the inclusion of more than one charge of murder in the same indictment was forbidden. The objection was overruled by the trial judge. Packett pleaded not guilty to the charges. He admitted that he had shot the two men but pleaded provocation and self-defence. He was convicted on both counts and was sentenced to death. An appeal to the Court of Criminal Appeal, based on the grounds (*a*) that the trial judge misdirected, and omitted to direct, the jury in respect of various matters, and (*b*) that, having regard to the provisions of sec. 311 (3) of the *Criminal Code*, the indictment was irregular, was dismissed.

The prisoner applied to the High Court for special leave to appeal from that decision.

Further facts, the terms of the summing up, and the relevant statutory provisions, appear in the judgments hereunder.

*Solomon*, for the applicant. The question must be determined by a consideration of sec. 311 of the *Criminal Code* (Tas.) as a whole. The word " crime " in sub-sec. 3 of that section refers to a specific crime, an occurrence. The meaning of that sub-section is that where a person is charged with murder the indictment must not contain more than one count, that is, the indictment must refer to one specific murder and to one only. The legislature recognized that a charge of murder is too serious a matter to be complicated by having counts for any other offence, including that of another murder, included in the indictment (*R.* v. *Jones* (1) ). The joining of two charges of murder may prejudice the fair trial of an accused person. The trial judge was wrong in law in directing the jury that, in respect of Francombe, the verdict could only be one of murder

(1) (1918) 1 K.B. 416.

H. C. OF A. 1937. PACKETT v. THE KING.

(*Brown* v. *The King* (1) ). It was competent for the jury to return a verdict of manslaughter (*R.* v. *Grimes* (2) ). The distinction between this case and the converse case is shown in *R.* v. *Watson* (3). It is reasonable to suppose that in the circumstances the applicant would, at the time of the occurrence, have little, if any, control or knowledge of his physical actions. The jury was not adequately directed on the matter of provocation. This case is distinguishable from *Ross* v. *The King* (4). In that case the question of manslaughter was not raised, but here the question was raised, and was discussed by the trial judge, but in such a way as to leave the impression with the jury that a verdict of manslaughter was not open to them. That was a misdirection (*R.* v. *Walker* (5) ) which was tantamount to a finding of fact by the trial judge, a matter which was essentially the function of the jury. That misdirection may have caused a miscarriage of justice. A trial judge may express his opinion on the evidence (See *R.* v. *Porter* (6) ), but it is not his function to rule upon what evidence exists in the case and what does not exist. The trial judge erred in directing the jury that the onus was on the applicant to show justification (*Woolmington* v. *Director of Public Prosecutions* (7) ). The question of criminal intention was never fully appreciated or stated in the summing up, but was largely confused with the question of volition. The attention of the jury should have been drawn to the fact that the onus which was placed upon the applicant was not similar to the onus upon the Crown.

[DIXON J. referred to *R.* v. *Fuzzle Ahmed* (8).]

The statement by the applicant was not a confession and the trial judge erred in directing the jury that it was so. There was substantial evidence upon which the jury was entitled to find that the defence of self-defence had been established. This defence was not put to the jury. The evidence for an accused person should be put to the jury as carefully as the evidence for the prosecution (*R.* v. *Keating* (9) ), no matter how weak may be the evidence for the accused person (*R.* v. *Dinnick* (10) ).

(1) (1913) 17 C.L.R. 570.
(2) (1894) 15 L.R. (N.S.W.) 209 ; 10 W.N. (N.S.W.) 211.
(3) (1906) S.A.L.R. 187.
(4) (1922) 30 C.L.R. 246.
(5) (1915) Q.S.R. 115.
(6) (1933) 55 C.L.R. 182.
(7) (1935) A.C. 462.
(8) (1929) Q.S.R. 222.
(9) (1909) 2 Cr. App. R. 61.
(10) (1909) 26 T.L.R. 74.

*Maughan* K.C. and *Beedham*, for the respondent.

*Maughan* K.C. There are no special circumstances in this case sufficient to justify the granting of special leave to appeal (*Craig* v. *The King* (1) ). The mere fact that there are faults in a summing up, even faults of such a nature that if the appeal was of right the conviction could be set aside, is not a special circumstance. The word " crime " in sec. 311 of the *Criminal Code* (Tas.) means a criminal offence. The natural meaning of the words used in sub-sec. 3 of that section is that no indictment for murder shall contain a charge of any other crime except that of murder. The sub-section does not limit the number of counts for murder which may be contained or joined in the same indictment. Two such counts were contained in the indictment in *Makin* v. *Attorney-General for New South Wales* (2). No limitation is imposed by the common law to the number of counts which may appear in an indictment (*R.* v. *Sara* (3); *Castro* v. *The Queen* (4); *R.* v. *Lockett, Grizzard, Gutwirth and Silverman* (5); see also *Stephen's History of the Criminal Law of England* (1883), vol. 1, p. 514).

[EVATT J. referred to *R.* v. *Matthews* (6).]

Two or more counts for murder in the one indictment may be undesirable, but a conviction is not thereby invalidated (*R.* v. *Davis* (7) ). If an indictment contains more than one count the trial judge may at the request of the accused person, or of his own volition if in the interests of the accused person, order that the counts be tried separately. Sub-sec. 2 of sec. 311 is the code with regard to crimes other than murder, and sub-sec. 3 is the code with respect to murder. An indictment may contain two or more different charges of murder based on different facts. The trial judge made it sufficiently clear that questions of fact were to be determined by the jury. Where, upon any version, the facts do not amount to manslaughter it is not a misdirection for the trial judge to omit to direct the jury as to manslaughter. There has not been any miscarriage of justice in this case.

(1) (1933) 49 C.L.R. 429.
(2) (1894) A.C. 57.
(3) (1876) 14 S.C.R. (N.S.W.) 347.
(4) (1881) 6 App. Cas. 229, at p. 244.
(5) (1914) 2 K.B. 720.
(6) (1891) 12 L.R. (N.S.W.) 64; 7 W.N. (N.S.W.) 118.
(7) (1937) 3 All E.R. 537.

H. C. OF A. 1937. PACKETT v. THE KING.

*Beedham*. Sub-sec. 2 of sec. 311 is directed against the joinder of generic crimes subject to the exception that if there are a number of crimes founded on the same facts, then the indictment may contain a charge or charges in respect of each generic crime. The prime rule is: one indictment one generic crime. Thus under sub-sec. 3 an indictment for murder may not contain counts for crimes of a different character but may contain a count or counts for other murders. The trial judge was not bound to direct the jury that it was competent for them to find the applicant guilty of manslaughter (*R.* v. *Simpson* (1) ). In that case the court distinguished *Brown* v. *The King* (2). There was no evidence to support a verdict of manslaughter, at all events in the case of Francombe, and such a verdict would, doubtless, have been upset on appeal (*R.* v. *Watson* (3) ). In view of the provisions of the Tasmanian *Criminal Code* it is difficult to see that *Woolmington's Case* (4) has any application.

*Solomon*, in reply. The provocation received, and the apprehension felt, by the applicant, and, also, the fact that he acted in self-defence were very material features of his defence which were not properly and adequately put to the jury by the trial judge (*R.* v. *Griffin* (5) ). In a case of murder the indictment should contain one count only (*R.* v. *Holt* (6) ). The summing up was not a direction of murder or nothing, but of murder only.

*Cur. adv. vult.*

Sept. 3. The following written judgments were delivered :—

LATHAM C.J. This is an application for special leave to appeal from two convictions for murder and consequent death sentence and from the order of the Court of Criminal Appeal of Tasmania dismissing an appeal from the convictions and sentence.

The applicant Packett was charged upon two counts—one for the murder of one Francombe, and the other for the murder of one Lawson. The two charges were founded upon the same facts. It

(1) (1924) 24 S.R. (N.S.W.) 511 ; 41 W.N. (N.S.W.) 159 ; 35 C.L.R. 597.
(2) (1913) 17 C.L.R. 570.
(3) (1906) S.A.L.R. 187.
(4) (1935) A.C. 462.
(5) (1871) 10 S.C.R. (N.S.W.) 91.
(6) (1836) 7 C. & P. 518 ; 173 E.R. 229.

is first objected that the indictment is bad because the *Criminal Code*, sec. 311 (3), provides that "no indictment for murder shall contain a charge of any other crime." This means, it is urged, that an indictment for murder cannot contain any charge other than a single charge of murder. On the other hand, it is contended, the sub-section means that an indictment for murder may contain more than one charge of murder, but that it shall not contain a charge of any crime other than murder.

In order to decide between these opposing contentions it is necessary to consider the provisions of sub-sec. 2 of sec. 311 as well as those of sub-sec. 3. The relevant sub-sections are as follows :— "(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."

Sub-sec. 2 states a general rule which is subject to the exception provided in sub-sec. 3. One indictment is to charge one crime only, but, as a general rule, charges of more than one crime may be joined in the same indictment if they are founded on the same facts, &c. It is important to state precisely the full effect of this provision before considering how sub-sec. 3 can be an exception to it. When the full effect is appreciated, the meaning of the exception will become more clear. Sub-sec. 2 permits (*a*) charges of crimes which are different in description, e.g., larceny and receiving, robbery with violence and assault, as well as (*b*) charges of crimes which are the same in description, e.g., two charges of larceny, to be joined in the same indictment if the condition that they are founded on the same facts, &c., is satisfied. But this rule is subject to the exception provided in sub-sec. 3 which is introduced expressly as an exception by the first words of sub-sec. 2. That exception is: "No indictment for murder shall contain a charge of any other crime." The result is that no charge of a crime other than murder may be joined in an indictment for murder, but charges of more than one murder may be made in the same indictment, if those charges are founded on the same facts, &c. So construed, sub-sec. 3 is a true exception

H. C. OF A. 1937. PACKETT v. THE KING. Latham C.J.

to sub-sec. 2. It makes an exception, to the extent provided in sub-sec. 3, of indictments for murder from the rule permitting several charges in one indictment. The exception takes out of the rule indictments for murder plus any crime other than murder founded on the same facts, &c. Such indictments are prohibited by sub-sec. 3. Subject to this exception, the rule remains that several charges founded on the same facts, &c., may be joined in one indictment. Thus an indictment for murder may properly include several charges of murder if the murders charged are founded on the same facts, &c. Upon the contrary view, the application of the relevant provisions of sub-sec. 2 to any indictment for murder would be completely excluded. Upon that construction, the rule of sub-sec. 2 would not apply in cases of murder subject to an exception; the rule would not apply at all in such cases. If the latter result were intended, it would have been very easy to bring it about by introducing sub-sec. 2 with the words: "Except in the case of indictments for murder." These, or equivalent words, have not been used, and the result of the words actually used is that which I have stated. In the present case the two charges for murder were founded on the same facts and accordingly could properly be joined in the same indictment, and the objection to the indictment therefore fails.

The other grounds of the application and of the desired appeal relate to the summing up of the learned trial judge, to which various objections are taken. It was objected that the judge wrongly directed the jury as to the onus of proof; that he did not impress upon the jury with sufficient clearness and emphasis that the onus of proof of all the elements of the crime was on the Crown; and it is suggested that, when a defence of provocation is raised, it is for the Crown, as part of the case for the prosecution, to establish beyond reasonable doubt that there was no provocation. It was also argued that the Crown must also give evidence establishing beyond reasonable doubt that the accused did not act in self-defence. These latter arguments are based principally upon *Woolmington* v. *Director of Public Prosecutions* (1).

(1) (1935) A.C. 462.

I am of opinion that the judge did affirmatively say everything that he could be required to say about the onus of proof. He said: —"The onus is on the Crown to prove the charges that they lay. If they fail in doing that, your verdict would be Not Guilty. . . . 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—you must feel such certainty of his guilt that would leave a reasonable man without a doubt." This statement appears to me to be unexceptionable and complete, so far as the general question of onus of proof in criminal proceedings is concerned. It is not to be presumed that the jury forgot this introduction to the summing up when they came to consider the facts.

Later in the summing up, when dealing with the cause of death the judge emphasized what he had already said. The fact that the accused shot at the two men Francombe and Lawson and killed them was admitted by him, both in and out of court. But even in dealing with this fact the judge said:—"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 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." Thus, in relation to a fact as to which there was really no room for doubt, the judge told the jury that it was their duty, and not his, to determine what the fact was.

The arguments founded on *Woolmington's Case* (1) are prima facie met by the fact that the judge in his charge said:—"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

(1) (1935) A.C. 462.

H. C. OF A. 1937. PACKETT v. THE KING. Latham C.J.

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 is not accepted, the prisoner is entitled to be acquitted." Evidently there has been some misreporting of the first sentence in this statement. The words should read: "it was held that in a trial for murder the Crown must prove" &c. The statement of the judge is plainly taken from the headnote in *Woolmington's Case* (1). Thus the judge charged the jury in the very words which express the *ratio decidendi* of *Woolmington's Case* (1). I do not regard *Woolmington's Case* (1) as deciding that, upon a trial for murder at common law, the Crown must establish absence of provocation and must negative self-defence. It is true that *Sankey* L.C. says that the Crown "may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional, and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted" (2). These words should not be interpreted so as to produce the revolutionary change in the law which is suggested by the argument submitted upon this appeal. The Lord Chancellor states that, when evidence of death and malice (express or implied, as it readily may be implied, from the circumstances) has been given, "the accused is entitled to show" provocation. These words would be quite inapt if the Crown were bound to show absence of provocation, before there was a case for the accused to answer.

In this case the *Criminal Code* provides definitions of culpable homicide and of murder. Sec. 156 provides that homicide is

(1) (1935) A.C. 462.

(2) (1935) A.C., at p. 482.

culpable when it is caused by (*inter alia*) any unlawful act. Evidence that a rifle (as in this case) is fired at a human being is evidence of an unlawful act. Then sec. 157 provides that culpable homicide is murder if (*inter alia*) it is committed "with an intention to cause to any person . . . harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death." In this case the evidence showed that the accused deliberately fired a rifle at the two men whom he killed. Thus the Crown made a case which called for an answer by the accused. Even if, contrary to my opinion as to *Woolmington's Case* (1), the common law now places upon the Crown the onus of disproving provocation and self-defence, it appears to me to be clear that, when the Crown has made out a case under the provisions of the Code to which I have referred, it is for the accused to satisfy the jury that his act of killing was justified by provocation or excused as in self-defence. The judge told the jury that it was for the accused so to satisfy them, and, in my opinion, the judge was right in so doing.

Another objection was that the judge did not tell the jury that they were at liberty (under sec. 333 of the Code) to find the accused guilty of manslaughter. The accused did rely upon provocation as reducing the crime to that of manslaughter. The defence was fully put and left to the jury though the judge showed that in his opinion it could not be supported. It cannot be said that in all cases of all charges the judge must in his summing up, in addition to dealing with the defences actually relied upon, inform the jury that they are at liberty, by virtue of a statutory provision, to find the prisoner guilty of a lesser offence than that charged. *Brown* v. *The King* (2) is not inconsistent with this statement. In that case the judge wrongly told the jury that they were not at liberty to bring in a verdict of manslaughter. Such a misdirection was not given in this case.

It is true that the judge did clearly show in his summing up that in his opinion the case was one of murder. But a great deal of the summing up is directed to the defences of provocation and self-defence, and this fact cannot be reconciled with the contention that he did not leave it open to the jury to bring in a verdict based upon

(1) (1935) A.C. 462.

(2) (1913) 17 C.L.R. 570.

H. C. OF A. 1937. PACKETT v. THE KING. Latham C.J.

either of them. On provocation the judge said: "I think I will have to take the burden of telling you that in the case of Francombe there was not any wrongful act or insult of such a nature as would be sufficient to deprive an ordinary person of his power of self-control. I tell you that because Francombe 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." The judge so ruled under the authority conferred upon him and the duty imposed upon him by sec. 160 (3) of the Code as amended, which provides that: "the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law." Provocation was only raised, and, on the facts, could only be raised, in relation to Francombe, and there was no evidence at all of "heat of passion caused by sudden provocation" as required by sec. 160 (1).

As to self-defence, which was relied upon in relation to the deaths of both Francombe and Lawson, the judge read sec. 46 of the Code which is as follows:—"46. Self-defence against unprovoked assault —(1) A person unlawfully assaulted, not having provoked such assault, is justified in repelling force by force if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence. (2) A person so assaulted as aforesaid is justified in causing death or grievous bodily harm to his assailant if, from the violence with which the assault was originally made, or with which the assailant pursues his purpose, he acts under a reasonable apprehension that his assailant will cause death or grievous bodily harm to him, and if he believes on reasonable grounds that he cannot otherwise preserve himself therefrom." He said that there was no evidence of an actual as distinct from a threatened assault, and this was true. He then examined in detail the question whether there was any "reasonable probability," "reasonable inference," or "reasonable apprehension" that either Francombe or Lawson was going to assault the accused. He stated his own opinion that the defence was not supported by the evidence, but he said to the jury: "you will have to say whether there was

any reasonable probability that he (Francombe) was going to assault the accused." He asked the jury: "Do you think that it is a reasonable inference that Francombe might have turned away to get a weapon of some kind?" The evidence relating to Lawson was read to the jury and explained in relation to the plea of self-defence, and the judge ended this part of his charge by saying: "Unless you can say he had a reasonable apprehension he is not justified in causing death or grievous bodily harm," and "Unless you can say he had reasonable apprehension he has not the right of shooting him." The question of self-defence was plainly put to the jury and was left to the jury for them to decide.

The other objections may be summed up in the allegation that the judge really decided the facts for himself and left nothing to be decided by the jury. He did plainly indicate and express his view that the jury really had no option on the evidence but to find the accused guilty of murder. But this statement was accompanied by the very definite statements (some of which I have quoted) that the jury were "the sole judges" as to all questions of fact, and that they were not bound to follow him on anything he might suggest as to the facts.

The judge did not refer in the summing up to evidence of good character called for the accused. But this evidence really only showed that the witnesses considered that the accused was not the sort of man who would do what in fact he did do beyond doubt. The killing by the accused was admitted.

Any summing up must be considered in relation to the facts of the actual case in question. This rule is, I think, particularly important in the present case, where there is undoubtedly much room for criticism of the summing up if it is regarded as laying down general legal propositions. For example the judge said to the jury by way of further direction:—"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.

H. C. OF A. 1937. PACKETT v. THE KING. Latham C.J.

I have put it to the jury that if the Crown has not proved its case they must acquit." (This statement is evidently not a verbatim report, but counsel agree that it represents the substance of what was said). The statement, " 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," is a statement which, taken absolutely, is erroneous. If made in a case where the defence was that the act of shooting was completely unintentional, or that, though the act was intentional, the accused did not know that any human being was in the line of fire or likely to be injured, such a statement would be a grave misdirection. But there was no such defence in the present case. It was admitted by the accused that he intentionally fired the rifle at the two men, though, as already stated, it was sought to justify his act by reason of provocation and to excuse it on the ground of self defence. In these circumstances, the direction as to intention being taken, not absolutely, but relatively to the particular facts of the case, no injustice was done to the accused by what the learned judge said on this subject.

In the case of both Francombe and Lawson one shot was a disabling shot and the other shot a killing shot. If the disabling shots were first in either case, the killing shot was a deliberate shot not to be excused on the ground of self-defence. If the killing shots were first in either case, the disabling shots were unnecessary from any point of view and merely wanton. The rifle was a .22 Winchester, single loading. The accused fired at Francombe, ejected, reloaded and fired again. He fired two or possibly three more shots at the men, ejecting and reloading as required. His actions were evidently most deliberate. The accused himself was not injured in any way. The defence of self-defence was most shadowy, but all the facts were stated to the jury, and it was left to the jury. The defence of provocation was also shadowy, but all the facts were stated to the jury and it also was left to the jury. I repeat that there was no evidence of passion as required by sec. 160 of the Code.

Thus, upon a full consideration of the facts and the relevant law, I reach the conclusion that the only objection to the trial is that the judge told the jury, to put it in the simplest form, that, as far as he was concerned, he thought it was a plain case of murder. But

as he warned the jury most emphatically that they were not bound in any way to accept or to follow his opinion, this is not a sufficient objection to the summing up to raise any doubt as to the justice of the conviction. In my opinion special leave to appeal should be refused.

STARKE J. Motion on behalf of Donovan Henry Charles Cruttenden Packett, a prisoner under sentence of death for the murder of Gordon Charles Francombe and Henry Francis Lawson, for special leave to appeal against his conviction in the Supreme Court of Tasmania in its criminal jurisdiction. The prisoner gave evidence on his own behalf and a summary of his evidence sufficiently describes the circumstances of the cases. He said that he went along a road towards Lawson's sliprails and when he came nearly abreast of them he noticed the top of a motor lorry and then Lawson and Francombe. He proceeded to take down the slip panels and Francombe said to him: "Come on here, I want to see you." He went to where Francombe and Lawson were standing and Francombe, who appeared angry, said: "Did you say I lit that fire at Townshend's?" He replied he would not tell him whether he did or not, and would please himself what he said. Francombe said: "No you won't." Francombe was standing with his back towards the right hand door of the lorry and Lawson was to his right and more to the centre of the road. Lawson said nothing. Francombe turned round sharp as if he were going to get something from the lorry and Lawson got to the back of the prisoner. Further the prisoner deposed that he could not say what Francombe was doing, but he was thoroughly alarmed at his action and that of Lawson. He said that he thought Francombe was going to get a weapon of some kind and had heard that a man named Kenny had bought a revolver for him, or that he had given him money to buy it. The prisoner admitted that he had a small .22 bore Winchester rifle in his hand. He did not remember putting the rifle to his shoulder, but the medical evidence established that he fired two bullets into Francombe, one striking him on the left side of the neck at the back, the other on the left side of the head between the corner of the left eye and the corner of the left ear and that he killed him. The prisoner

H. C. OF A. 1937.

PACKETT v. THE KING.

Starke J.

also deposed that he then turned to go to the slip panel and that Lawson rushed at him. He struck at him with the rifle and Lawson stepped back a pace or two but would not let him pass and rushed at him again. He fired at Lawson and the medical evidence established that he fired three shots, one of which made a flesh wound under the lower right eyelid, another on the left side of the neck close behind the ear and the third about one and a half inches above the temple region and killed him.

Evidence was also given on behalf of the prisoner that everybody in the district seemed to fear Francombe and that Lawson was closely associated with Francombe, and that the prisoner was a man of good reputation.

The jury found the prisoner guilty of the murder of both men and the evidence which I have summarized establishes, if accepted, the crime of murder. But it has been contended on behalf of the prisoner that the *Criminal Code* of Tasmania prevented the joinder of two counts for murder, one of Francombe and the other of Lawson, in one and the same indictment. The objection would be untenable in England (See *Indictments Act* 1915 (5 & 6 Geo. V. ch. 90, sec. 4); *R.* v. *Jones* (1); *R.* v. *Davis* (2)). But it is recognized as a matter of practice that the joinder of several counts for murder in one indictment is undesirable owing to the serious nature of the charge. But we have to consider the provisions of the *Criminal Code* of Tasmania on the subject which are as follows :—Sec. 311 :—" (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."

Now the general rule of this section is that an indictment shall charge one crime only, but 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. The opening words of the provision, " except as provided in sub-section 3 hereof," exclude however the case mentioned

(1) (1918) 1 K.B. 416.

(2) (1937) 3 All E.R. 537.

in sub-sec. 3 from the provision of sub-sec. 2 relating to charges founded on the same facts, and sub-sec. 3 itself prescribes that no indictment for murder shall contain a charge of any other crime, and therefore the joinder of more than one count for murder in one indictment is not authorized (compare the Queensland *Criminal Code*, sec. 567). If the offences charged consist of one single act they might be made the subject of a single count (see *Archbold* on *Indictments* (1916), p. 51) but in the indictment before us the offences charged are treated as several acts and different offences though arising almost contemporaneously. In my opinion therefore the counts were wrongly joined in the one indictment, but this does not appear to me to render the indictment bad. The conviction of the prisoner on both counts works no injustice to the prisoner, for the evidence adduced at the trial was admissible on either count and the judgment in respect of the offence charged in each count is the same, namely, death (see Code, sec. 158).

The decision in *O'Connell* v. *The Queen* (1) has therefore no application. The learned judge at the trial ought to have quashed one count, so ought the Court of Criminal Appeal on appeal to it, so might this court if it thought fit to give special leave to appeal, but I see no reason for granting special leave on this ground when quashing one of the counts could serve no public purpose nor be of any benefit to the prisoner.

The next contention on behalf of the prisoner was that the learned judge who presided at the trial directed the jury that it had no option but to find the prisoner guilty on both counts, and it was suggested that there was evidence from which the jury might have inferred that the prisoner killed Francombe and Lawson in self-defence or in the heat of passion caused by sudden provocation. The provisions of the Code as to self-defence may be found in secs. 46-49 and as to provocation in sec. 160. An examination of the charge to the jury has satisfied me that the learned judge did not direct the jury as a matter of law to find the prisoner guilty upon the two counts for murder, though he expressed his opinion that the evidence was quite insufficient to warrant the conclusion that the two men were killed by the prisoner in self-defence or in the heat of passion

(1) (1844) 11 Cl. & Fin. 155; 8 E.R. 1061.

H. C. OF A. 1937. PACKETT v. THE KING. Starke J.

caused by sudden provocation. The facts of the case, as I have summarized them, clearly justify the learned judge's observation upon these matters. No reasonable man ought to conclude upon the evidence adduced that the prisoner was under reasonable apprehension that the deceased men would kill or do him grievous bodily harm, or that he believed on reasonable grounds that he could not otherwise preserve himself therefrom, or that the prisoner acted in the heat of passion caused by sudden provocation. The Code itself, it may be observed, provides that the question whether any matter alleged is or is not capable of constituting provocation is a matter of law and therefore for the decision of the judge, but I do not think the learned judge gave any direction in point of law but that he left the case to the jury to determine it upon the facts with a legitimate statement of his own opinion.

Lastly, it was contended for the prisoner that the judge should have directed the jury that they were entitled upon the indictment for murder to convict the prisoner for manslaughter (see Code, sec. 333). This section, of course, only states the verdicts which may be given upon an indictment for murder provided that the facts proved constitute such an offence. In my opinion it is no duty of the judge to direct a jury that they may find a verdict contrary to the evidence or according to their own caprice. It is, of course, his duty to submit for their consideration facts upon which a finding of self-defence or provocation might be based and the killing justified or reduced to the offence of manslaughter. It would be wholly destructive of the administration of criminal justice if it were thought that a judge was bound to direct a jury that it could act without regard to the law and the facts proved before them. Special leave to appeal should be refused.

DIXON J. The decision of this difficult case appears to me to depend upon the nature of this court's duty in exercising its jurisdiction to give special leave to appeal from an order of the Supreme Court. The matter is an application by a prisoner convicted of murder for special leave to appeal from a decision of the Supreme Court of Tasmania which by a majority (*Crisp* J. and *Hall* A.J., *Clark* J. dissenting) dismissed an appeal from his conviction.

The case falls into two parts. The prisoner complains of the summing up of the learned judge who presided at the trial. He attacks the verdict on the ground of misdirection both in law and in fact. The consideration of these objections, which are of a substantial nature, forms one part of the case. The other part is concerned with an objection on behalf of the prisoner to the form of indictment upon which he was arraigned. It was an indictment for murder containing two counts. The counts alleged the murder of different persons on the same occasion. He was convicted on both counts. On his arraignment an objection was made to the indictment on the ground that under sec. 311 (3) of the Tasmanian *Criminal Code* counts for different homicides cannot be included in one indictment. It is convenient to deal at once with the validity of the objection. It depends upon the effect of sub-secs. 2 and 3 of sec. 311. The sub-sections are as follows:—"(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."

It is evident that the words of sub-sec. 3 are equivocal. On the one hand, "a charge of any other crime" may mean a count alleging some description of crime other than murder. If so, sub-sec. 3 would not forbid the inclusion in one indictment of two or more counts charging separate murders. On the other hand, the words may mean that in an indictment charging a murder the commission of no other criminal acts shall be charged even if they be murder.

In my opinion the former is the true meaning of sub-sec. 3. Sub-sec. 2 lays down the general rule which is qualified in the case of murder by sub-sec. 3. The general rule is that an indictment shall charge one crime only unless the charges are founded upon the same facts, or are, or form part of a series of crimes of the same or a similar character. The word "series" is somewhat vague, but it connotes some connection between the crimes. The expression with which sub-sec. 2 opens, "except as provided in sub-section (3) hereof," does not except murder altogether from sub-sec. 2. It

H. C. OF A. 1937. PACKETT v. THE KING. Dixon J.

does not mean "except murder." It means "subject to the provision contained in sub-sec. 3," or "except in so far as is otherwise provided by sub-sec. 3." It is, therefore, natural to expect in sub-sec. 3 not a complete negative to the liberty conferred by sub-sec. 2 to join charges of connected criminal acts, but an abridgment or qualification. That qualification is, I think, that in the case of murder the crimes joined must be all murder. Thus an indictment of murder must be confined to charges of murder, but may join more than one charge of murder if the charges are founded on the same facts or are or form part of a series of crimes. It follows that the prisoner's objection to the indictment was ill founded and was properly overruled.

The difficulty of the case arises from the judge's charge to the jury which contains much that cannot be supported and, as a whole, must have left upon the jury the impression that they could hardly do otherwise than find the prisoner guilty of murder. No other witness of what happened when the victims were killed exists except the prisoner, but his statements to the police and his testimony at his trial contain the material which led the learned judge to sum up to the jury in such a manner.

The two men who were killed were named respectively Francombe and Lawson. Lawson is described as a middle-aged man well preserved and active. Francombe appears to have been a smaller man but younger. They lived at Moina in Tasmania where, among other things, they did some rabbit trapping. Francombe owned a motor truck. About half-past eleven on the morning of 26th April 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. Francombe 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 Francombe'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. Francombe 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 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. Francombe 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 Lawson, who was a friend and companion of Francombe, 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 Francombe and Lawson as his authority "if they came at him." The two men, particularly Francombe, had bad reputations and many people feared the former. He had recently endeavoured to buy

H. C. OF A. 1937. PACKETT v. THE KING. Dixon J.

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 contractor named Townshend. Townshend suspected that Francombe was responsible for the fire and the prisoner had supported this view. On the morning in question, the latter had gone down to Townshend'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 Francombe and Lawson standing near it. He dismounted and let down the panels, holding his loaded rifle probably in his left hand. Francombe called: "Come here, I want to see you." The prisoner went over and was getting out the letter given him by Godwin when Francombe, 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. Francombe 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 on him. When the prisoner answered that he would please himself what he said, Francombe 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 Francombe 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 Francombe'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 Francombe was about to attack him with a weapon, he fired at him "without stopping to think." He says he thinks Francombe 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 Francombe 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 Francombe and they testified that the prisoner bore a good character and was well regarded. There is nothing to show that the prisoner was prepared for the encounter with the two men, or that, on his side, it was anything but a chance meeting.

If the jury thought proper to do so, it was clearly open to them to accept the view that, owing to the tone, demeanour and actions of the deceased, the prisoner was thrown into a state of great excitement and trepidation and under those emotions fired upon Francombe without any premeditated design, believing that he was the object of an intended attack, and that he completely lost control of himself when Lawson attempted to grapple with him and killed both of them. Such an account of the prisoner's conduct was not presented to the jury in the judge's charge. On the contrary, his Honour said, among other things, that there was no question of the prisoner's having been assaulted, because no one had touched him; nor on the evidence did anyone intend to touch him.

Self-defence does not appear to have been relied upon, at all events expressly, by counsel for the prisoner in his address to the jury. But counsel for the prosecution discussed the matter in his reply and the learned judge devoted to the topic a great part of his charge to the jury. In the course of dealing with self-defence, he spoke of the second shot fired at Francombe and said that if he was stunned or unconscious then, there could not have been any need for it, the accused could not have been under any apprehension of assault from him. "The question of self-defence fades away and there could be nothing but murder." This, of course, excludes manslaughter. A little later his Honour repeated the same direction on the view that it was the first shot that entered Francombe's neck

H. C. OF A. 1937. PACKETT v. THE KING. Dixon J.

and made him "more or less unconscious" and the second that 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 facts or evidence stated above, the justification of self-defence has no sufficient foundation. No actual force had been applied to the prisoner. No weapon had been produced. However great his apprehension of violence may have been, the legal basis of the justification must fail. The deceased men had not set about an attack upon him which would warrant his then killing them or firing upon them so as to injure them in order to preserve himself. But it is another matter to tell the jury that the second shot meant murder.

The result of the provisions of the Tasmanian *Criminal Code* is that if the prisoner fired intending to cause the death of his victims or either of them or to cause them bodily harm which he knew or ought to have known would be likely to cause death, he would be guilty of murder unless the homicide were reduced to manslaughter by provocation. The code provides 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. What amounts to provocation is defined as follows: "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." Whether these conditions are or are not present in a particular case is a question of fact, but the question whether any matter alleged is or is not capable of constituting provocation is a matter of law (sec. 160 as amended). The code does not deal expressly with questions of burden or degree of proof, but there appears to be no reason why the decision of the House of Lords in *Woolmington's Case* (1) should not apply. Lord *Sankey* says: "If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner

(1) (1935) A.C. 462.

is entitled to be acquitted" (1). I take this to refer to acquittal from murder and to assume in the case of provocation conviction of manslaughter. His Lordship can hardly have supposed that provocation amounts to a defence entitling a prisoner to a complete acquittal.

If the judge presiding at the trial of an indictment of murder is of opinion that the evidence discloses no matter capable of forming provocation, or that the matter alleged by the prisoner as provocation is not capable of doing so, it is, of course, proper for him to direct the jury to that effect. But, under the code as at common law, it remains within the power of the jury to find a verdict of manslaughter, even although it means disregarding the direction. To tell the jury that they have not such a power is to state what is not correct in law and a prisoner is entitled to complain in a Court of Criminal Appeal of such a direction. There is all the difference between such a direction and a direction that the evidence given upon a trial for murder does not support a verdict of manslaughter. If a judge is of opinion that because such a verdict implies findings of fact that are not reasonably open the jury ought not to return it, he may so direct them without necessarily usurping the functions of the jury, and, if his opinion is correct in law, the verdict may stand. Lawyers have no difficulty in apprehending the distinction between, on the one hand, the impropriety of finding without evidence facts amounting to manslaughter, and, on the other hand, the existence of a right to return a verdict of manslaughter although it be a wrong verdict. But it is easy to believe that a jury would not make the distinction and would treat a direction that they ought not to find manslaughter as meaning that they had not power to do so, unless it was very clearly expressed. Yet the jury must not be led to understand that to find a verdict of manslaughter is actually beyond their power. Further, upon the question whether a finding of manslaughter on the ground of provocation would in a given case be unreasonable, the ruling of the House of Lords in *Woolmington's Case* (2) has, of course, an important bearing. For it may be open to entertain a reasonable doubt of provocation although it would be unreasonable to find affirmatively that provocation existed and

(1) (1935) A.C., at p. 482.

(2) (1935) A.C. 462.

H. C. OF A. 1937. PACKETT v. THE KING. Dixon J.

was sufficient. These are all considerations showing the need of caution before a judge undertakes to direct a jury against finding manslaughter.

The difficulties in the present case have for the most part been occasioned by the failure of the learned judge to accompany the very strong direction he gave in favour of a verdict of murder by a clear statement that nevertheless it was within the power of the jury to find a verdict of manslaughter. In relation to the killing of Francombe, his Honour directed the jury that there was no wrongful act or insult of such a nature as would be sufficient to deprive an ordinary person of his power of self-control. His Honour then said :—" 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."

In relation to the killing of Lawson, the learned judge did leave provocation to the jury. But he left it with a direction that if, after Francombe had been fired at, Lawson in " jumping at " the prisoner acted with the intention of disarming him, there could be no provocation, but if Lawson did it " with an evil intention to do some ' hurt ' to the prisoner, it might form provocation according to the amount of hurt." Upon the facts of the case appearing from the prisoner's story, it is not easy to follow this view of the matter. But however that may be, the result was that provocation was not withdrawn upon the count of murdering Lawson. As a result of objections made by counsel, his Honour gave the jury some further directions and, in the course of giving them, he said :—" 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 to the contrary he is taken to intend the natural effect. It is for the accused to show. I have put it to the jury that if the Crown has not proved its case they must acquit." This direction affects the intention to kill rather than provocation, but it is a misdirection.

In the view I take of our duty, it is unnecessary to discuss the summing up further. In his dissenting judgment, *Clark* J. has carefully examined the charge and I agree in the observations upon it which his judgment contains. It is enough to repeat two

summaries which *Clark* J. makes. The first relates to the effect of the part of the redirection I have mentioned. His Honour says: "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 Francombe 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." The second summary states the effect of the whole charge as the jury may well have understood it. The general effect, his Honour says, is 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 Francombe 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."

In giving his reasons for holding that, because of the direction, the verdict should be set aside, *Clark* J. uses the expression that the verdict must be that of the jury in fact and not merely in form. His Honour, no doubt, did not intend to imply that the jury's verdict was returned formally under direction. In fact at the beginning of the summing up the jury were told, in effect, that they were the sole judges of fact and were not obliged to follow the judge on any suggestion he made as to the facts and this after a clear statement of the burden upon the Crown of establishing guilt beyond all reasonable doubt. But though the jury were thus left with the responsibility of finding the verdict, it is no less true that the effect of the direction thus received is justly summarized by *Clark* J. and such a direction cannot be supported. It is, I think, necessary to state this opinion because I think it should be made quite clear that, so far as I am concerned, my decision upon this application for special leave to appeal is not based upon the correctness and regularity of the proceedings at the trial. It is based upon the legal insufficiency of the prisoner's answer to the charge and the nature of the jurisdiction exercised by this court. In cases of a description within which the present falls it

H. C. OF A. 1937. PACKETT v. THE KING. Dixon J.

is the duty of this court to give leave to appeal only when the case possesses some special features warranting that course. It is both difficult and unsafe to formulate general rules governing the exercise of such a discretionary jurisdiction. But I do not think we should give special leave to appeal if the undisputed facts are such that as a matter of law the prisoner's acts amount to the crime charged.

In the present case I think the prisoner had no legal defence once it was found that, when the prisoner fired at each of the two deceased men, he did so with one or other of the three intentions or states of mind following namely, either an intention to cause death, or an intention to cause bodily harm which he knew was likely to cause death, or a knowledge that his unlawful act of shooting would be likely to cause death.

It is unfortunate that a misdirection occurred as to the burden of proof upon the issue whether the requisite intention existed. But a refusal on the part of a jury to find that one or other of these states of mind existed would, in my opinion, be quite unreasonable, and, although in a Court of Criminal Appeal it might not be possible to say that the misdirection could not have affected the result so that it occasioned no substantial miscarriage, our duty is somewhat different. It is possible that if the direction complained of had not been given the jury might have refused to find the requisite state of mind in the prisoner although the facts so clearly establish it. But I think that we should take the responsibility of refusing to regard such a possibility as a ground for giving special leave to appeal. It is only fair to the prisoner to say that he did not deny that he understood the effect of shooting at the men. What he said was that he fired the first shot without thinking. His substantial answer to the charge lay in the circumstances I have stated, the menacing attitude of the deceased men, the great fear of immediate and serious violence and the loss of control that his evidence suggests rather than expressly describes. Unfortunately for the prisoner, the facts which he sets up do not disclose an answer good in law to the charge of murder or a ground good in law for reducing what otherwise would be murder to manslaughter. In effect, I have already said that self-defence cannot be made out. For the law does not allow a justification for causing death or grievous bodily harm

to an assailant unless from the violence with which the latter pursues his purpose the person causing death or bodily harm acts under reasonable apprehension that his own death will be caused or that he will suffer grievous bodily harm and unless he believes on reasonable grounds that he cannot otherwise preserve himself therefrom (Tasmanian *Criminal Code*, sec. 46). By no interpretation of the prisoner's narrative and by no inference from the circumstances can this necessarily high standard of justification be satisfied. The question whether his offence was or might be reduced to manslaughter depends on different considerations. Self-defence is a ground of justification based upon the necessity of repelling force with force. Provocation is concerned with the measure of guilt involved in unpremeditated, if intentional, homicide when attributable to overpowering emotions of resentment or other loss of self-control. But while the considerations or elements affecting the two things differ, it is a mistake to treat them as in opposition. A wrongful act or insult is indispensable to provocation as defined by the Code. But an assault from which a man may defend himself may constitute the wrongful act. Fear and apprehension too may be elements entering into his loss of self-control. The reason why, in my opinion, there is not enough in the prisoner's narrative to amount to provocation is that there was no wrongful act or insult which could be found to be of such a nature as to deprive an ordinary person of the power of self-control.

It may be conceded in the prisoner's favour that his account of how the two deceased men behaved might have received at the hands of a jury an interpretation amounting to the wrongful act of detaining him under tacit or implied threat of force. Perhaps it may also be conceded that a jury might infer that he acted under the influence of emotions of fear and resentment amounting in his case to a loss of self-control and that he did so on a sudden. But the reason why the question whether any matter alleged is capable of constituting provocation is made a matter of law lies in the main in the necessity of applying an overriding or controlling standard for the mitigation allowed by law. At common law the test of provocation is not whether the occurrence is sufficient to deprive the particular individual in question of his self-control, having regard

H. C. OF A. 1937.

PACKETT v. THE KING.

Dixon J.

to his nature and idiosyncrasies, but whether it would suffice to deprive a reasonable man in his situation of self-control (*R.* v. *Lesbini* (1) ). This standard is embodied in the language of the code and the court is entrusted with the duty of ruling whether the matter relied upon is capable of depriving an ordinary man of his self-control.

It is impossible to hold that, upon any interpretation of the prisoner's story which a jury might reasonably adopt, such a situation could be considered to have arisen as was capable of depriving an ordinary man of his power of self-control. In these circumstances I think that we ought to exercise our discretion against the granting special leave to appeal. We ought so to exercise our discretion on the ground that the facts upon which the prisoner relies disclose nothing which the law can recognize as a sufficient ground for reducing the crime to manslaughter, or as affording a defence.

In my opinion special leave to appeal should be refused.

EVATT J. After this court grants special leave to appeal in criminal cases, the functions of the court are assimilated precisely to those of the Supreme Court exercising the jurisdiction of the Court of Criminal Appeal (*Craig* v. *The King* (2) ). But, before leave is granted, the court must be satisfied that the case is " special " in character (3). In determining that as a preliminary question, all the circumstances of the case including the character of the questions of law involved must be considered. The fact that the charge is for a capital offence cannot be excluded from consideration. The accepted practice of requiring the Crown to be represented on the application for special leave, which application is treated as though it were a full appeal, is calculated at times to create the false impression that, if special leave is refused, it is because the court would, if special leave were granted, dismiss the appeal. The fact that, if special leave were granted, the appeal would be allowed does not necessarily mean that special leave should be granted.

I make the above observations because, although I am in almost entire agreement with the judgment of *Clark* J. in the Supreme Court

(1) (1914) 3 K.B. 1116.
(2) (1933) 49 C.L.R. 429.
(3) (1933) 49 C.L.R., at pp. 443, 444.

of Tasmania, I do not think that special leave should be granted. The only question of law of general importance which was raised is as to the construction of sec. 311 (2) and (3) of the *Criminal Code* of Tasmania. The point is whether the indictment upon which the applicant was convicted was vitiated because it contained two separate charges of murder. Sec. 311 (3) provides that no indictment for murder "shall contain a charge of any other crime," and the argument for the applicant is that the provision means that one charge of murder, and no other charge whatever, can lawfully be included in the same indictment. In my opinion this contention is erroneous. Sec. 311 (2) commences by incorporating the provision of sec. 311 (3) to be read with, but as an exception to, the first provision in sec. 311 (2). If sec. 311 (3) is so incorporated, its meaning becomes apparent. Three rules are laid down, viz.: (i) charges of more than one crime may be joined in the same indictment if the charges are founded on the same facts or form part of a series of crimes of a similar character; (ii) as an exception to such rule, an indictment containing charges of murder cannot contain charges of any crime except murder; (iii) in cases not covered by (i) or (ii), the indictment shall charge one crime and one crime only.

So read, the provisions allow the Crown to join a number of charges in the same indictment although they constitute different species of crime so long as the charges are connected in the way specified in sec. 311 (2). But for sec. 311 (3) the fact that one of the crimes charged is murder would not prevent another charge, e.g., robbery or burglary, from being added to the same indictment. Then sec. 311 (3) steps in to secure that, if a charge of murder is contained in an indictment, other connected charges may be added to it so long as all the charges are charges of murder. Upon this view the inclusion of the two connected charges of murder in the indictment of the applicant was justified.

With this question out of the way, the only point of substance remaining is whether there was sufficient evidence of provocation requiring the trial judge to leave that issue to the jury, and whether the summing up was fair to the accused. I quite agree with *Clark* J. that the summing up told very heavily, indeed too heavily, against the accused. I am also inclined to agree with the observation of

H. C. OF A. 1937. PACKETT v. THE KING. Evatt J.

*Hall* A.J. that the whole truth of the dreadful affray did not emerge at the trial. I differ from *Clark* J. merely on the particular question of law—made a question of law by a specific amendment to the *Criminal Code*—whether there was sufficient material to warrant leaving to the jury the issue of provocation. I am not satisfied that there was evidence of any wrongful act on the part of Francombe or Lawson which could be said to amount to a wrongful act of such a nature as to be sufficient to deprive an ordinary person of the power of self-control (sec. 160 (2) ).

The prisoner was armed with a deadly weapon but the two men killed were not armed at all. Assuming that the prisoner entertained some fear for his own safety and that the menacing attitude alleged to have been adopted by the two men amounted to a "wrongful act," I do not think that their acts were such as could be regarded as sufficient to deprive an ordinary person of the power of self control. I quite agree that the character of the wrongful act is almost invariably a question for the jury and that a judge who takes the issue away from the jury assumes the very gravest responsibility. But I cannot hold that, in the present case, the trial judge erred in any matter of law.

As to whether the summing up gave a fair presentation of the prisoner's defence, I am not disposed to dissent from *Clark* J.'s conclusion that it was too one-sided. But ordinarily such matters should be remedied by the Supreme Court sitting as the Criminal Appeal Court. In criminal appeals the responsibilities and duties of the Supreme Court are even greater and more onerous than in the case of ordinary civil matters; and it will be an evil thing if the administration of appellate criminal justice ever comes to be regarded as of relatively minor importance. While this court must reserve to itself an unfettered discretion to intervene in any given case which it regards as "special," on the whole, I think that this is not such a case.

The application for special leave should be dismissed.

McTIERNAN J. The two grounds upon which this application for special leave to appeal against the order of the Supreme Court of Tasmania dismissing the appeal which the appellant made to that court against his conviction are, first, that it was contrary to sec. 311 (3) of the Tasmanian *Criminal Code* to include two counts for murder in one indictment, and, secondly, that the summing up

of the learned judge who presided at the trial was substantially defective.

If the words " any other crime " in sec. 311 (3) mean " any crime other than murder," the objection to the indictment must fail. If these words mean that an indictment containing a charge of murder must not contain any other charge of any other crime including murder, the objection must be sustained. In order to decide between these contentions sec. 311 must be read as a whole. The second and third sub-sections may be conveniently read together by using the accurate paraphrase adopted by *Clark* J. : " 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." From this paraphrase it is clear as that learned judge said, that " the only limitation which sub-sec. 3 imposes on the provisions of sub-sec. 2 is that it prohibits the joinder with a charge of murder of any charge of a crime other than murder." When this limitation is applied to sub-sec. 2 the result is that the sub-section allows two or more charges of murder to be joined in the one indictment if they are founded on the same facts or form part of a series of crimes of murder. The two charges of murder which were joined in the indictment upon which the applicant was convicted were founded on the same facts. I agree that the first of the grounds upon which the applicant asks for special leave to appeal is not tenable.

The second ground has the support of a criticism by *Clark* J. of the summing up. I agree with his Honour's statement 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 Francombe or Lawson the accused must be taken to have intended to kill him and 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." The general character of the summing up would have amply justified the Supreme Court sitting as a Court of Criminal Appeal in ordering a new trial. But the present application is to the discretion of this court to grant special leave to appeal. Rules cannot be laid down in advance governing the exercise of the discretion in every case. But leave which the court is empowered

H. C. OF A. 1937. PACKETT v. THE KING. McTiernan J.

to grant being "special," it is necessary that a case in which such leave is granted should be characterized by circumstances which are special. While the summing up has the substantial defects which have been mentioned we are called upon to exercise this discretion in a case in which the evidence upon which the applicant was convicted "is what it is." *Clark* J. used that phrase to state how much he was pressed by the evidence against the accused, notwithstanding the plain defects in the summing up, in arriving at the conclusion that a new trial should be ordered. It is unnecessary to recapitulate the evidence again. A possible defence which it suggests was provocation. But if the onus had rested upon the applicant to prove affirmatively the existence of matters amounting in law to provocation before the jury could have returned a verdict of manslaughter, the evidence would not have enabled him to sustain that onus. It was open nevertheless to the jury to have brought in a verdict of manslaughter if the evidence raised a reasonable doubt in their minds whether the applicant did shoot under provocation although the evidence did not affirmatively prove that issue to their satisfaction. If upon all the evidence the jury had such a reasonable doubt the Crown would have failed to discharge the onus of proving that the applicant was guilty of murder (*Woolmington* v. *Director of Public Prosecutions* (1) ). But in the present application, which is made to the discretion of the court, we are asked to say that, although the conviction is supported by a preponderating weight of evidence and there is no evidence of any matter amounting in law either to provocation or self-defence, the case is one in which special leave to appeal should be granted because there is evidence which might have influenced the jury in the exercise of their undoubted discretion to return a verdict of manslaughter, or as it would also seem a verdict of acquittal.

I cannot agree that the case is one in which special leave to appeal should be granted.

*Special leave to appeal refused.*

Solicitor for the applicant, *H. J. Solomon*, Launceston.

Solicitor for the respondent, *A. Banks-Smith*, Crown Solicitor for Tasmania, by *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1935) A.C. 462.