[HIGH COURT OF AUSTRALIA.]

BURROWS . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 5, 6, 7.

Latham C.J., Dixon and McTiernan JJ.

Criminal Law—Evidence—Admissibility—Cross-examination of accused tending to show commission of prior offence—Direction to jury—Reasonable doubt—"Substantial" doubt—Evidence Act 1906-1930 (*W.A.*) (*No.* 28 *of* 1906—*No.* 34 *of* 1930), *sec.* 8 (1) (*e*).*

The accused was charged with the wilful murder of her husband. In cross-examination of the accused, who gave evidence on her own behalf, counsel for the prosecution, in relation to an occasion three years previously, when a gun had exploded, put questions to her with a view to suggest that she had fired it with intent to murder. Questions were also put concerning her relations with her previous husband, particularly concerning complaints by him as to her extravagance and as to his divorcing her. It was not contended that under either head the questions were relevant to the issue. The accused was convicted.

* Sec. 8 (1) (*e*) of the *Evidence Act* 1906-1930 (W.A.) provides: "A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless:—(i) The proof that he has committed or been convicted of such other offence is admissible in evidence to show that he is guilty of the offence wherewith he is then charged; (ii) he has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence."

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Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ., that the cross-examination in relation to the discharge of the gun contravened sec. 8 (1) (*e*) of the *Evidence Act* 1906-1930 (W.A.), and, by *Dixon* J., that the cross-examination under the second head also contravened the section. The conviction should therefore be quashed and a new trial ordered.

The use by the trial judge of the expression "substantial doubt," instead of "reasonable doubt," in his direction to the jury upon the degree of proof necessary to establish a criminal charge, disapproved.

Decision of the Court of Criminal Appeal of Western Australia reversed.

APPLICATION for special leave to appeal, and APPEAL, from the Court of Criminal Appeal of Western Australia.

Evelyn Florence Burrows was charged, under sec. 278 of the *Criminal Code* (W.A.), with the wilful murder of her husband. The accused had been married to the deceased for thirteen years, but her married life was very unhappy, owing, she asserted, to the meanness of her husband as well as his misconduct. The deceased had always kept her short of money; she was forced to borrow money from money-lenders and had recently got into debt and a judgment had been signed against her. She was very worried and was in a nervous state owing to her financial position, fearing that her furniture would be seized and her home sold up. The conduct of her husband preyed on her mind; she determined to shoot him in the legs when he came home, and took a gun, which was loaded, out on to the back verandah. She waited for him to come round the corner, but when it came to shooting him she could not do it. She declared that she shot the gun off into the cement floor, where a hole was made. Her husband then rushed her; a second shot occurred whilst they were struggling with the gun, and her husband was shot in the thigh. He subsequently died from the wound.

The accused gave evidence on her own behalf. The judge's notes showed that in cross-examination the accused gave the following evidence :—" The trouble between me and my husband didn't arise from my extravagance but my husband's meanness. I was previously married. My previous husband was very mean too. He was sued for accounts I ran up. He only allowed me £1 per week. He divorced me. I became cook at the Peak Hill hotel and was engaged to deceased after being there a month. Differences about money arose practically immediately on marriage. We used to

come to Perth generally but went to Geraldton once. I ran a bill at Elite Stores with his permission. It was about £50. He refused to pay. He always did. He was sued and had to pay. I ran up account at Mulcahy's Store. I say it wasn't £90. I don't know what it was. He allowed me £3 but living was dear. There were only the two of us. I had to keep his friends when they came. Foy's sued me and deceased jointly. He defended and they discontinued. Mr. Curran was our solicitor. Ten days or so before 18th March the bailiff took an inventory of furniture. I didn't get notice to attend on application for leave to sell. Foy's wrote my husband to try and come to an arrangement so as to avoid selling up. My husband refused. He wanted to break up the home, I knew he was tired of paying. He was too mean to pay for a decent home. I didn't want to get his money by his death. I never thought of such a thing. I remember an accident with a gun travelling to Meekatharra once when the gun went off and pierced the hood. We never had a struggle for the gun in our house at Peek Hill."

The accused was convicted, and appealed to the Court of Criminal Appeal of Western Australia, but the appeal was dismissed.

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

Curran and *Walker*, for the applicant. There are special and exceptional circumstances in this case. The learned trial judge misdirected the jury; he used words in his summing up which may have been detrimental to the prisoner in the minds of the jury. He did not adequately convey the doctrine of reasonable doubt to the jury. He did not use the words " reasonable doubt " ; " substantial " doubt has not the same meaning. [Counsel referred to *Sykes* v. *The King* (1); *Wittig* v. *The King* (2); *Woolmington* v. *Director of Public Prosecutions* (3); *Brown* v. *The King* (4); *Best* on *Evidence*, 10th ed. (1906), at p. 81; *Taylor* on *Evidence*, 12th ed. (1931), p. 106; *Stephen, History of the Criminal Law* (1883), vol. 1, p. 438; *R.* v. *Roberts* (5); *Hicks* v. *The King* (6); *R.* v. *White* (7).] The

(1) (1913) 8 Cr. App. R. 233.
(2) (1919) 27 C.L.R. 158.
(3) (1935) A.C. 462, at p. 482.
(4) (1913) 17 C.L.R. 570, at p. 596.
(5) (1910) 10 S.R. (N.S.W.) 612, at p. 615; 27 W.N. (N.S.W.) 148, at p. 149.
(6) (1920) 28 C.L.R. 36, at p. 43.
(7) (1868) 4 F. & F. 383, at p. 387; 176 E.R. 611, at p. 614.

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Court of Criminal Appeal held that if there had been misdirection as to the burden of proof there was no substantial miscarriage of justice; it acted on a wrong principle (*Halsbury's Laws of England*, 2nd ed., vol. 9, p. 275, par. 402; *Lawrence* v. *The King* (1)). A jury when properly directed could on the evidence have reasonable doubt as to the guilt of the accused. [Counsel referred to *R.* v. *Hildich* (2); *R.* v. *Crippen* (3); *R.* v. *Dinnick* (4); *R.* v. *Joyce* (5); *Halsbury*, 2nd ed., vol. 9, pp. 271, 276; *R.* v. *Wann* (6); *Ross* on *The Court of Criminal Appeal* (1911), p. 113; *R.* v. *White* (7); *R.* v. *Weisz* (8); *R.* v. *Perry and Harvey* (9); *R.* v. *Jones* (10); *R.* v. *Sayegh* (11); *Ross* v. *The King* (12); *Craig* v. *The King* (13).]

[DIXON J. drew attention to the cross-examination set out above and asked how it was justified.]

Gibson and *Slattery*, for the Crown. The question as to the previous gun accident was put to rebut the defence of absence of intention.

[DIXON J. referred to *Maxwell* v. *Director of Public Prosecutions* (14); *Martin* v. *Osborne* (15).]

If this court decides to grant special leave and allow the appeal, the case should be sent back for a new trial. As to the word "substantial" which was used by the learned judge, there was no misdirection. The jury would not have been misled as to the degree of doubt. [Counsel referred to *R.* v. *Roberts* (16).]

Curran, in reply.

The following judgments were delivered:—

LATHAM C.J. The accused (appellant), Evelyn Florence Burrows, was convicted on 4th April 1937 of the murder of her husband. She appealed to the Court of Criminal Appeal upon various grounds and her appeal was dismissed. This is an application for special

(1) (1933) A.C. 699.
(2) (1832) 5 C. & P. 299; 172 E.R. 986.
(3) (1911) 1 K.B. 149.
(4) (1909) 74 J.P. 32.
(5) (1908) 72 J.P. 483.
(6) (1912) 107 L.T. 462.
(7) (1865) 4 F. & F. 383; 176 E.R. 611.
(8) (1920) 15 Cr. App. R. 85, at p. 87.
(9) (1909) 2 Cr. App. R. 89.
(10) (1909) 2 Cr. App. R. 88.
(11) (1924) 25 S.R. (N.S.W.) 61, at p. 63; 42 W.N. (N.S.W.) 1, at p. 2.
(12) (1922) 30 C.L.R. 246.
(13) (1933) 49 C.L.R. 429, at p. 439.
(14) (1935) A.C. 309, at p. 317.
(15) (1936) 55 C.L.R. 367.
(16) (1910) 10 S.R. (N.S.W.), at p. 615; 27 W.N. (N.S.W.), at p. 149.

leave to appeal to this court. Many grounds of appeal have been discussed in the argument before us and I agree with the State Full Court that a large number of them are not such as to justify setting the conviction aside. There is, however, one matter which I regard as being of sufficient importance and of sufficient significance—in fact, of great importance and great significance in regard to the general administration of the criminal law—to justify this court in granting special leave to appeal and in allowing the appeal.

It has long been established that it is not proper to attempt to show "that the accused has been guilty of criminal acts, other than those covered by the indictment, for the purpose of leading to the conclusion that the prisoner is a person likely from his criminal character or conduct to have committed the offence with which he is charged." This passage, taken from the judgment in *Makin* v. *Attorney-General for New South Wales* (1), was quoted in *Maxwell* v. *Director of Public Prosecutions* (2) as a statement of "one of the most deeply rooted and jealously guarded principles of our criminal law." When an accused person was made a competent witness on his own behalf, provision was made which, subject to stringently stated conditions, relaxed this general principle in the case of certain questions put to the accused. In the *Evidence Act* of Western Australia, which is legislation reproduced from English models and in force in various States of Australia, sec. 8 (1) (*e*) is as follows: "A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless:— (i) The proof that he has committed or been convicted of such other offence is admissible in evidence to show that he is guilty of the offence wherewith he is then charged; (ii) he has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of

(1) (1894) A.C. 57, at p. 65.
(2) (1935) A.C. 309, at p. 317.

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the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence."

It is not suggested that any one of these three conditions was satisfied in the present case. Therefore, the general rule applies that the accused should not have been asked, and, if asked, should not have been required to answer, any question tending to show that she had committed any offence other than the offence with which she was then charged. She was asked a question which fell within this prohibition. The Crown Prosecutor asked, and the witness answered, a question directed to show that, on a previous occasion, some three years or thereabouts before the date of the alleged offence for which she was being tried, she attempted to murder her husband.

The important element in her defence at the trial was a contention that, during a struggle, a gun held by her went off accidentally and inflicted a wound from which her husband died. The accused was asked if, on another occasion, she had not had an accident with a gun while with her husband. This question followed upon questions to which her replies were :—" I didn't want to get his money by his death. I never thought of such a thing." Then follows the answer which I regard as being of the utmost significance : " I remember an accident with a gun travelling to Meekatharra once when the gun went off and pierced the hood."

It is admitted by Mr. *Gibson*, with commendable candour, that he asked the question to show that she had tried to shoot her husband with intent to kill on a previous occasion. But the intention of counsel is not the important matter; it is the tendency of the question which is important. In *R.* v. *Ellis* (1) the Court of Criminal Appeal, consisting of five judges, referred to the statutory provision in the following words :—" The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to

(1) (1910) 2 K.B. 746, at p. 757.

show that the prisoner had committed that other offence. It does not in the least depend on the object of [the counsel] putting the question. The words of the Act are not 'with a view to show' they are 'tending to show.' Moreover, if they do so tend, it is quite immaterial whether the evidence would be admissible or the question admissible on other grounds. As we read the statute, when a prisoner is charged with offence A, questions tending to prove offence B are not to be asked unless the proof of offence B is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side-wind. This disposes also of the proposition that the questions were admissible as going to the general credit of the witness." It is plain that the evidence which was given in reply to the question was not relevant to the charge on which she was being tried. In view of the time separating the two events it cannot be suggested that the evidence was admissible as indicating a system or as rebutting the defence of an accident. Such evidence, in my opinion, was plainly inadmissible. The question should not have been asked, and if asked should not have been allowed to be answered. The provisions of the section of the Act were infringed, and the asking and answering of the question might obviously have been gravely prejudicial to the accused. With such a defence, it is not possible to say that there was not a real risk of a substantial miscarriage of justice. It is true that the witness, in reply to the question, said that on the previous occasion, what had happened was an accident, and it might be that the jury, if fully warned by an appropriate direction would have been so safeguarded from error as to prevent the asking and answering of the question being accepted as a ground for setting aside the conviction or, at least, for granting special leave to appeal to this court. No such direction was given to the jury and, accordingly, in my opinion, the application for special leave to appeal should be granted, the appeal allowed, the conviction quashed, and a new trial ordered.

I desire also to refer to the summing up of the trial judge on the subject of the onus of proof resting upon the Crown in a criminal prosecution. The learned judge did not, in any part of his summing up state that the Crown must prove the charge beyond reasonable

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doubt. He used other language which, in my opinion, was such as to make it probable that the jury would be confused in the exercise of their functions.

The learned judge said :—" If you have any substantial doubt, then she is entitled to the benefit of that doubt. I say if you have a substantial doubt. You should not be worried by a mere shadow of doubt or scintilla of doubt. Nothing in this world is absolutely certain." That statement was made to the jury after they had been addressed in the ordinary way by counsel urging an acquittal unless they were satisfied beyond all reasonable doubt. His Honour used the word " substantial." This word is the contrary and not the contradictory of insubstantial. When applied to the noun " doubt " it cannot be said beyond controversy that it is equivalent to the words " genuine " or " real " as distinct from " not genuine " or " unreal." It may readily have been understood by the jury to mean a very considerable degree of doubt indeed. Under such a direction, the jury might think they could properly convict unless they had a grave degree of doubt. The law does not require an accused person to raise this degree of doubt. It is sufficient if he can show reasonable doubt—a doubt such as would be entertained by reasonable men, recognizing their responsibility to the accused and to the law. It is undesirable not to give an accused person the full benefit of the well-established formula. It is unsafe to use terms which tend to deprive the prisoner of the benefit to which he is entitled under the long-established rule that the Crown must prove its case beyond reasonable doubt.

The accused has been acquitted of wilful murder. The new trial should be upon the charge of murder (*Criminal Code* 1913, secs. 278, 279 ; *Kelly* v. *The King* (1)).

DIXON J. In questions which may be put in cross-examination there is a well-understood distinction between matters relevant to the issue and matters going only to show that a witness is unworthy of belief or ought not to be relied upon. An ordinary witness may be asked under the latter head questions the object of which is to disclose his character and propensities. But, when the legislature

(1) (1923) 32 C.L.R. 509.

allowed accused persons to give evidence on their own behalf, it placed a strict limitation upon their liability to cross-examination upon matters of this kind not relevant to the issue. It enacted that, subject to exceptions not material to this case, a person charged with an offence and called as a witness shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been charged with any offence other than that with which he is charged, or that he is of bad character. It is the duty of the court before which a prisoner is tried to enforce this prohibition and to see that it is not infringed. No doubt it casts upon the court a task sometimes difficult; for the harm may be done before the judge can stop it.

In the present case questions were asked which are now conceded to have been inadmissible. They clearly fall under the prohibition of the section. For myself, I should be inclined to think that the cross-examination of the prisoner as to her relations with her first husband and as to his divorcing her was an infringement of the section. The cross-examination on those subjects preceded that with reference to the discharge of the gun at Meekatharra. Both sets of questions were highly prejudicial to the prisoner and, I think, it is hopeless to contend that they occasioned no substantial miscarriage of justice. The fact that afterwards neither counsel nor the judge mentioned them to the jury does not appear to me to show that these matters could not have influenced the jury. When questions of such a description are asked and the prisoner gives answers denying the suggestions they contain, unless the judge thinks proper to make some positive attempt to remove the prejudice, there is little else to be done by him and by counsel than to leave the subject alone. In a case like the present, where everything depends upon the malicious intention of the prisoner, it is impossible to say that the jury's verdict could not have been affected by the inadmissible cross-examination containing such highly prejudicial suggestions. On these grounds, I am of opinion that the conviction cannot stand.

The objection to the learned judge's direction as to the degree of proof required to justify a conviction depends upon the real effect which that direction was likely to produce in the circumstances of

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the trial. I do not think that we should draw fine distinctions between various expressions used to convey to a jury that the proof must establish guilt beyond all reasonable doubt. But, in the present case, it is said that the very purpose of the judge in employing the phrase "substantial doubt" and in speaking of shadows of doubt and scintilla of doubt was to provide a contrast to what had been said by counsel. However this may be, I share the regret of the Chief Justice that the learned judge did not see fit to use the time-honoured formula which is designed to give the prisoner the full benefit of the high degree of proof which must be reached before he is to be found guilty. I do not think that this court should sanction any attempt to impair the benefit to which a prisoner is entitled by proof beyond reasonable doubt. But, at the same time, the ground on which I put my decision is that the provisions of the *Evidence Act* were infringed by the cross-examination.

I agree that special leave to appeal should be granted, the appeal allowed and a new trial ordered.

McTIERNAN J. I agree. In my opinion there was a plain infringement of the *Evidence Act*, which was enacted for the protection of an accused person giving evidence at his trial. It is impossible to say that a miscarriage of justice could not have resulted from this infringment.

Special leave to appeal granted. Appeal allowed. Conviction for murder quashed. Order new trial on charge of murder.

Solicitor for the appellant, *F. Curran.*

Solicitor for the Crown, *A. A. Wolff* K.C., Crown Solicitor for Western Australia.