[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPLICANT;

AND

MULLEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF QUEENSLAND.

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MELBOURNE, *Mar.* 10, 11, 18.

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

Criminal Law—Evidence—Onus of proof—Murder—Wilful murder—Accident—Crown to prove intention and disprove accident—Criminal Code (*Q.*) (63 *Vict. No.* 9), *secs.* 23, 291, 301*.

On a charge under sec. 301 of the *Criminal Code* (Q.) of wilful murder the burden is not on the accused to satisfy the jury on the issue of accident: it is for the Crown to establish a killing with the intention required by the section, and, therefore, one which was not accidental.

Woolmington v. *Director of Public Prosecutions*, (1935) A.C. 462, discussed and applied.

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

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

Henry Thomas Mullen was charged under sec. 301 of the *Criminal Code* (Q.) with the wilful murder of Ernest Henry Brown. He pleaded not guilty, and his defence was that Brown was shot accidentally in

* The *Criminal Code* (Q.) provides: —Sec. 23: "Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident." Sec. 291: "It is unlawful to kill any person unless such killing is authorized or justified or excused by law." Sec. 301: "Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder."

the course of a struggle. He was convicted and appealed to the Court of Criminal Appeal of Queensland, which ordered a new trial.

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

Henchman (Solicitor-General for Queensland) and *T. W. Smith*, for the applicant. The Court of Criminal Appeal should not have ordered a new trial. The direction of the trial judge complied with the requirements of *Woolmington* v. *Director of Public Prosecutions* (1). The effect of that case is that, if a defence is put forward by the accused, it is incumbent on the Crown to bring evidence to rebut it, but the defence must appear before the onus falls on the Crown to clear it away. All that the Crown has to do is to establish every ingredient of the offence alleged. It is entirely for the jury to say whether they believe the prisoner's evidence, but the jury must be told that the onus is always on the Crown to satisfy them that the prisoner is guilty of the offence charged. The trial judge sufficiently directed the jury that the onus was on the Crown to prove the prisoner's guilt (*Criminal Code* (Q)), secs. 22, 31, 291, 293, 300, 301-303). The trial judge explained to the jury that accident was a defence, and that it was for them to decide whether they accepted the evidence as to accident, the burden of proof still being on the Crown. Accident is always in issue in crimes in which intent or negligence is a factor, and the Crown having proved sufficient facts from which the jury may conclude that intent was there, the defence of accident must thereupon vanish unless the prisoner brings forward further evidence to support the plea of accident. Provided the summing up covers the essentials of the case, a long dissertation on the question of the burden of proof is unnecessary (*R.* v. *Fuzzle Ahmed* (2); *Packett* v. *The King* (3); *Madadeo* v. *The King* (4)). If the prisoner has raised a reasonable doubt in the minds of the jury, he is to get the benefit of it. If only the killing is proved, it will not support a verdict of wilful murder. There must be some further evidence to justify such a verdict. *Woolmington's Case* (5) does not apply in face of the *Criminal Code*, secs. 24, 271, 272, 301, 303, 304.

(1) (1935) A.C. 462, at p. 480.
(2) (1929) Q.S.R. 222, at p. 232.
(3) (1937) 58 C.L.R. 190.
(4) (1936) W.N. 203.
(5) (1935) A.C. 462.

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Mack, for the respondent. Special leave to appeal should be refused. In this case the trial judge told the jury that the onus of proving accident was on the prisoner, and this is inconsistent with *Woolmington's Case* (1). The mere fact that there may have been evidence of intent in this case does not excuse the trial judge from directing the jury that the onus of proof was on the Crown. *Woolmington's Case* (1) decides that in every case of murder the onus of proof remains on the Crown except in the case of any statutory exceptions and in the case of insanity. If only a killing is proved, it is not presumed to be murder, and the onus is on the Crown to prove malice aforethought. There is no onus on the prisoner in respect of accident, and that is the main question in this case. The main defence was accident, and the trial judge told the jury that the onus of proving accident was on the prisoner. This was contrary to the rule in *Woolmington's Case* (1). The onus is on the Crown to satisfy the jury beyond reasonable doubt that the prisoner killed the deceased and that it was not an accident. There is an onus on the Crown to prove that the act was not accidental. If the Crown proves facts from which the jury may infer intent, it is sufficient to negative accident, but the Crown must negative accident. The trial judge gave an improper direction as to manslaughter. The Crown did not prove a killing in this case and did not prove that the death was due to the voluntary act of the prisoner. The trial judge should not have told the jury that killing by the prisoner was proved beyond all reasonable doubt (*Peacock* v. *The King* (2)). The Court of Criminal Appeal should have quashed the conviction. There was no evidence on which the accused could properly have been convicted. The evidence is just as consistent with an innocent act as it is with a felonious killing. The trial judge failed to direct the jury that provocation would reduce the killing from murder to manslaughter (*Mutual Life Insurance Co. of New York* v. *Moss* (3); *Jackman* v. *The King* (4)). The trial judge also failed to direct the jury on the question of circumstantial evidence (*Peacock* v. *The King* (5)).

(1) (1935) A.C. 462.
(2) (1911) 13 C.L.R. 619, at p. 628.
(3) (1906) 4 C.L.R. 311.
(4) (1914) 16 W.A.L.R. 8, at p. 11.
(5) (1911) 13 C.L.R., at p. 636.

Henchman, in reply. There was ample evidence from which the jury might infer wilful murder, murder or manslaughter. The trial judge dealt sufficiently with provocation and with motive and with circumstantial evidence.

Cur. adv. vult.

May 18.

The following written judgments were delivered :—

LATHAM C.J. This is an application for special leave to appeal from a judgment of the Court of Criminal Appeal in Queensland by which a new trial was ordered. Henry Thomas Mullen was charged with the wilful murder of one Ernest Henry Brown. Mullen pleaded not guilty, and his defence was that Brown was shot accidentally in the course of a struggle. He was convicted and appealed to the Court of Criminal Appeal, with the result already stated.

Before a jury can properly convict a person upon any charge the Crown must satisfy the jury beyond reasonable doubt of the existence of every element of the offence charged. In the case of wilful murder sec. 301 of the *Criminal Code* of Queensland (see *Criminal Code Act* 1899) provides as follows : " Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder."

Thus, a particular intention is expressly made an essential element of the crime, and the Crown accordingly must prove the existence of such an intention. It is therefore a necessary part of the Crown case in a prosecution for wilful murder that the accused intended to cause death, that is, that the act was not accidental.

In the present case the element of intention in the offence was obviously very important, because the defence was that the killing was accidental. The law is not properly stated if it is said that in the case of wilful murder the absence of intention is either a justification of or an excuse for an act which would otherwise be a criminal offence. Sec. 23 of the *Code* provides that, " subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which

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occurs by accident." In some cases this section may operate so as to provide an excuse for an act which would otherwise be criminal, but it is unnecessary to have any recourse to the section in the case of wilful murder, where, by the statutory definition itself, intention is expressly made a necessary element in the offence.

The mental element in the crime of wilful murder is expressed in Queensland by the reference to intention which has been quoted (sec. 301). In the law of England the mental element in murder is expressed by the words "malice aforethought." The same principle must be applied to the proof of the intention required by the law of Queensland as to the proof of malice aforethought required by the law of England. In *Woolmington* v. *Director of Public Prosecutions* (1) the House of Lords considered a case where a defence of accident was relied upon in answer to a charge of murder. Their Lordships approved the law as laid down in the Court of Criminal Appeal in *R.* v. *Davies* (2) "that where intention is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental." The principle of this decision is plainly applicable in a case where, on a charge of wilful murder in Queensland, the defence which is raised is a defence of accident. It is unnecessary on the present occasion to consider whether other statements in *Woolmington's Case* (1), if regarded as other than dicta, require the Crown, in the case of a charge for murder, subject to any applicable statutory exception, to negative all possible defences except the defence of insanity—and to negative such defences beyond reasonable doubt (See *Woolmington's Case* (3)). Statements in *Woolmington's Case* (1) may possibly be thought also to raise the question whether the same principle should not be applied in the case of any criminal charge whatever.

No issue arises in this case which makes it necessary to consider these questions. It is sufficient to ask what rule should be applied when a defence of accident is raised to a charge of murder. A defence of accident in a murder case is really a contention that the Crown has not proved the essential element of intention in the crime charged. It is not a defence which, admitting a killing with a prohibited

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

(2) (1913) 8 Cr. App. R. 211; 29 T.L.R. 350.

(3) (1935) A.C., at p. 481.

intention, excuses it on the ground of self-defence or seeks to reduce it to manslaughter on the ground of provocation. These latter defences should come before a jury for consideration only if the Crown has first adduced evidence of an intentional killing. The actual *ratio decidendi* in *Woolmington's Case* (1) established that the onus is on the Crown to prove an intentional killing. It is another question whether the *ratio decidendi* also involves the conclusion that the disproof in advance of possible defences is a necessary element in the Crown case, and, as such, an element which must be established by the Crown beyond reasonable doubt.

In the present case the learned trial judge in his charge to the jury read sec. 291 of the *Criminal Code* of Queensland, which is in the following terms : " It is unlawful to kill any person unless such killing is authorized or justified or excused by law." He stated that, if the killing was accidental, " it would be excused, undoubtedly." He referred to the decision of the Court of Criminal Appeal in Queensland in the case of *R.* v. *Fuzzle Ahmed* (2), and quoted the following words from the judgment in that case :—

" The proper direction to give to a jury in such a case " (wilful murder), " in our opinion, should be based on our *Criminal Code*, which starts off in section 291 by declaring that : ' It is unlawful to kill any person unless such killing is authorized or justified or excused by law.' The jury should then be told that the burden of proving authority, justification or excuse rests in each case on the person alleging the existence of such authority, justification, or excuse. He should tell the jury that, as between the three degrees of unlawful homicide, no presumption that the killing constitutes one or other of them arises, but that it will be for them, under the proved circumstances of the case, if they do not consider that any defence or authority, justification, or excuse is established to their reasonable satisfaction, to draw such inferences as they consider that the facts establish as to the presence of such an intention to kill as is necessary to constitute murder."

The result therefore is that the jury were told that the burden rested upon the accused of establishing to the satisfaction of the jury any excuse for the killing of Brown, and that the defence of

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

(2) (1929) Q.S.R., at p. 232.

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accident was a defence which fell under the heading of "excuse." Thus, according to this direction, the accused could not properly be acquitted on the ground of accident unless he satisfied the jury that the killing was accidental. For the reasons already stated, such a direction appears to me to be wrong in law. It was for the Crown to establish to the satisfaction of the jury beyond reasonable doubt by direct or circumstantial evidence that the accused intended to cause the death of Brown. Therefore it was an essential part of the Crown case to negative accidental killing.

In other parts of the charge the learned judge stated in clear language that the burden rested upon the Crown of proving every element essential to the offence, and that the intention specified in sec. 301 was such an element. But the parts of the charge dealing with the subjects of accident and excuse to which I have referred may well have confused the jury. The Court of Criminal Appeal exercised its discretion by ordering a new trial. If it had exercised its discretion in the opposite direction I would not have been disposed, upon an application to this court to exercise its discretion by granting special leave to appeal, to interfere with such a decision. Equally I am not disposed, as a matter of discretion, to set aside the exercise of the discretion of the Court of Criminal Appeal in ordering a new trial. In my opinion the application for special leave to appeal should be refused upon the ground stated.

I repeat, for the purpose of avoiding possible misunderstanding, that this judgment (so far as *Woolmington's Case* (1) is concerned) deals only with the defence of accident, which I regard as really consisting in a denial of an essential element in the crime here charged. It does not deal with any other possible defences.

Counsel for the prisoner contended that the order for a new trial was wrong and that the conviction should have been quashed on the ground that there was not sufficient evidence to establish a charge of wilful murder. Such an argument does not strictly arise upon this application by the Crown for special leave to appeal from the order actually made, where the accused is necessarily supporting that order. But the argument would be open to the accused if special leave to appeal were granted to him. As it is the practice

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

of the court to hear full argument upon both sides in applications for special leave to appeal in criminal matters, counsel was heard upon this contention.

Counsel for the prisoner contended that the order for a new trial was wrong, and that the conviction should have been quashed on the ground that there was not sufficient evidence to establish a charge of wilful murder. The accused did not give evidence, but statements made by him were put in evidence by the Crown. I have carefully considered the evidence, remembering that the jury are entitled, according to their reasonable judgment, to accept as true only part of the statements made by the accused, and to consider those statements in the light of what they find to be the proved or admitted conduct of the accused before, at the time of, and after the event of Brown's death, as well as in the light of other evidence.

I am of opinion that there was evidence upon which a jury could properly find the accused guilty of wilful murder. As I am of this opinion, but, for the reason already stated, am of opinion that there should be a new trial, I deliberately abstain from analysing the evidence and showing in detail what are the elements in the evidence which lead me to this conclusion. Any such analysis, and any argument based upon it, might prejudice the accused upon the new trial.

It was contended for the accused that there should be a new trial upon various grounds other than that to which I have already referred. It is not necessary to support the conclusion which I have already reached by introducing further reasons for it. Without saying that I regard the objections as well founded, I point out that all the objections raised can readily be met upon the new trial. If the contentions raised in defence make it relevant, the learned trial judge can read and explain to the jury sec. 304 of the *Code* (dealing with manslaughter). He can also read and explain if necessary some statements of principle made in authorities as to the degree of significance and importance to be attached to evidence of motive in a criminal case (e.g., *Mutual Life Insurance Co. of New York* v. *Moss* (1)), the standard to be applied in considering circumstantial evidence (e.g., *Peacock* v. *The King* (2)), and the

(1) (1906) 4 C.L.R., at p. 317.

(2) (1911) 13 C.L.R., at pp. 651, 661.

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possibility of an innocent explanation for the fabrication or suppression of evidence by an accused person (e.g., *Peacock* v. *The King* (1)). I think that it is more consistent with fairness both to the accused and to the prosecution simply to state that the objections taken to the summing up upon the last trial can readily be prevented from arising again than to endeavour to set forth, in advance of the new trial (and necessarily without knowledge of the precise evidence and the defences raised), what the summing up should be.

For the reasons which I have stated, the application for special leave to appeal should, in my opinion, be refused.

RICH J. The Supreme Court of Queensland as a Court of Criminal Appeal considered that the learned trial judge's summing up in this case was contrary to the rule laid down in *Woolmington* v. *Director of Public Prosecutions* (2) and that the *Criminal Code Act* 1899, Queensland, did not exclude that rule. A passage in the summing up does appear to me to be at variance with that rule, which, in my opinion, is applicable to the *Code*. What effect the summing up would produce as a whole is a question primarily for the Supreme Court, and we should not, I think, interfere with the discretion thus exercised by that court.

Special leave should be refused.

STARKE J. The prisoner, Harold Thomas Mullen, was indicted before the Supreme Court of Queensland for that on 19th May 1937 he wilfully murdered one Ernest Henry Brown. He was convicted and sentenced to be imprisoned and kept to hard labour for life.

The prisoner appealed to the Court of Criminal Appeal in Queensland, which set aside the conviction and ordered a new trial on the ground that the jury were misdirected at the trial. The Crown now moves this court for special leave to appeal from the order of the Court of Criminal Appeal.

It appears from the transcript that the learned judge who presided at the trial more than once directed the jury that the charge of wilful murder could only be sustained if the Crown satisfied them beyond reasonable doubt that Brown was dead, that the prisoner

(1) (1911) 13 C.L.R., at p. 636.

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

killed him and that his act was intentional. That direction is in accord with the definition of wilful murder in the *Criminal Code* of Queensland, secs. 23 and 301, and, if the learned judge had said no more, the verdict must be taken as a finding of every essential element of that crime (See *Ross* v. *The King* (1)). But the learned judge also referred to a case known as the *Fuzzle Ahmed Case* (2), which, he said, laid down the basis of a charge to the jury in cases of homicide. He read certain passages from the report which laid down that the proper direction to a jury in cases of homicide should be based upon sec. 291 of the *Criminal Code*, which enacted that " it is unlawful to kill any person unless such killing is authorized or justified or excused by law." He had previously explained that an accidental killing constituted an excuse. He continued reading from the report of the *Ahmed Case* (3) as follows :—" The jury should then be told that the burden of proving authority, justification or excuse rests in each case on the person alleging the existence of such authority, justification, or excuse. In the event of any defence based on authority to kill or on justification or excuse for killing having been raised for the accused, or if it appears to him " (the judge) " that any such defence is suggested or might possibly have been raised on the evidence, whether for the Crown or for the accused, the judge should then proceed to explain to the jury the provisions of the *Code* relevant to such defence or possible defence." These further observations from the *Ahmed Case* (2) were also brought to the attention of the jury: If the jury " do not consider that any defence of authority, justification or excuse is established to their reasonable satisfaction," then it would be for them " to draw such inferences as they consider that the facts establish as to the presence of such an intention to kill as is necessary to constitute wilful murder." It is this part of the charge that the Court of Criminal Appeal held, upon the authority of *Woolmington* v. *Director of Public Prosecutions* (4), amounted to a misdirection. The principle of *Woolmington's Case* (4) that upon a charge of wilful murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner is as applicable to the crime of wilful murder

(1) (1922) 30 C.L.R. 246, at p. 254.
(2) (1929) Q.S.R. 222.
(3) (1929) Q.S.R., at p. 232.
(4) (1935) A.C. 462.

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as defined by the Queensland *Code* as to the crime of wilful murder under the law of England. But, if the Court of Criminal Appeal held that *Woolmington's Case* (1) requires that the Crown must affirmatively satisfy the jury beyond reasonable doubt that the killing was not authorized or justified or excused by law, then I think it goes beyond anything decided in that case. The burden is in the beginning and always upon the Crown in the case of a charge of wilful murder to satisfy the jury beyond reasonable doubt that the killing was the voluntary act of the prisoner and with the intention required by sec. 301 of the *Code*. But it need prove no more.

Various facts or circumstances, however, may appear from the evidence which leave the jury in reasonable doubt whether the charge has been established. They may appear in the Crown case or from evidence adduced on behalf of the prisoner. But, whatever the facts or circumstances, authority, justification or excuse (Cf., see *Criminal Code*, secs. 31 and 304), if the jury are left in reasonable doubt upon the whole evidence whether the charge of wilful murder has been established, then the prisoner is entitled to acquittal on that charge.

The burden is not on the prisoner to prove all or any of these facts or circumstances but, in the course of a trial, evidence or circumstances adduced by the Crown may make it necessary or advisable for the prisoner to go forward with the evidence if he desires exculpatory or explanatory circumstances brought to the attention of the jury. But this in no wise casts the burden of proof of any allegation upon the prisoner (Cf. *Davis* v. *Bunn* (2)).

Insanity rests, as was said in *Woolmington's Case* (1), upon exceptional grounds (See *Criminal Code*, sec. 26). The *Criminal Code*, sec. 576, however, provides that upon an indictment charging a person with the crime of wilful murder he may be convicted of the crime of murder (*Code*, sec. 302) or of the crime of manslaughter (sec. 303), if either of those crimes is established by the evidence. In my opinion it is not incumbent upon the court to so charge a jury unless there be evidence fit to be submitted to the jury that one or other of these crimes has been committed (See *Packett* v. *The King* (3) ; *Ross* v. *The King* (4)). It is not the whole law of homicide

(1) (1935) A.C. 462.
(2) (1936) 56 C.L.R. 246, at pp. 254, 255.
(3) (1937) 58 C.L.R. 190, at p. 206.
(4) (1922) 30 C.L.R., at pp. 253, 254

" which requires exposition in every case but only that part of it which is essential to a clear understanding of the issue which the jury has to determine " (*Swadling* v. *Cooper* (1)). But it may be that, if the charge of wilful murder be not sustained, still there is evidence fit to be submitted to the jury that the prisoner has killed another in one or other of the circumstances essential to the crime of murder as defined in sec. 302 of the *Code*. If so, the judge will charge the jury accordingly. But the Crown must in this case, as in the case of wilful murder, prove beyond reasonable doubt death under one or other of the circumstances mentioned in the section. And here again, if the evidence adduced in the Crown case or on the part of the prisoner leaves the jury in reasonable doubt whether the crime of murder has been committed, the prisoner is entitled to be acquitted of that crime. So likewise in the case of manslaughter.

In the present case I doubt whether any substantial injustice was caused to the prisoner by the reference to *Ahmed's Case* (2), but I am clear that this court should not interfere with the discretion of the Court of Criminal Appeal in ordering a new trial. Several other arguments were adduced to this court on behalf of the prisoner. One, that there was no evidence fit to be submitted to the jury that the prisoner had committed wilful murder. As there is to be a new trial I content myself with saying that the argument is untenable. The other arguments in support of the order for a new trial criticized a long and elaborate charge and suggested that the jury should have been further directed on various points. But, apart from the reference to *Ahmed's Case* (2), the charge taken as a whole rightly instructed the jury and involves no substantial or any miscarriage of justice.

Special leave to appeal to this court from the order of the Court of Criminal Appeal ordering a new trial of the prisoner should be refused.

DIXON J. In my opinion this application on the part of the Crown for special leave to appeal ought not to be granted.

The order from which the Crown seeks to appeal sets aside a conviction for wilful murder and directs a new trial. The ground upon which the Supreme Court of Queensland made the order was,

(1) (1931) A.C. 1, at p. 10.

(2) (1929) Q.S.R. 222.

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in substance, that the summing up of the learned judge who presided at the trial included a direction which placed upon the prisoner the burden of reasonably satisfying the jury of a defence of accident. At one place in his summing up, the learned judge gave accident as an example of excuse for occasioning death. At another place, reading from the reasons for judgment in *R.* v. *Fuzzle Ahmed* (1), he instructed the jury that the burden of proving authority, justification or excuse rests in each case upon the person alleging the existence of such authority, justification or excuse. No doubt these two statements, if placed side by side, would mean that, once the jury are satisfied beyond reasonable doubt that the prisoner brought about the deceased's death, then that he did so accidentally is a defence or " excuse " which must be made out to their reasonable satisfaction. The decision of the House of Lords in *Woolmington* v. *Director of Public Prosecutions* (2) declares that at common law such a rule or principle no longer exists.

Whatever may be the effect of that decision when a defence available at common law to a criminal charge is strictly and properly by way of confession and avoidance, I think that we should accept it as fully establishing that in cases of homicide the common-law rule is that a verdict of murder ought not to be returned if the jury are left in reasonable doubt whether the act by which the prisoner caused the deceased's death was unaccompanied by the requisite intention or was done under the influence of such provocation as would deprive a reasonable man of his self-control and make the offence manslaughter.

The *Criminal Code* of Queensland does not, in my opinion, contain any sufficient expression of intention to exclude the application of the rule thus established. It is true that in its text there may be traced a belief on the part of the framers that the rule of law was otherwise, a belief which was very generally held. But the *Code* does not appear to me either to formulate or necessarily to imply a principle that upon an indictment of murder the prisoner must satisfy the jury either on the issue of accident or of provocation.

Although the summing up contains the two statements which when read together amount to a direction placing upon the prisoner

(1) (1929) Q.S.R. 222.

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

the necessity of satisfactorily making out a defence of accident, yet the summing up as a whole may well have left the jury with an impression quite in accordance with the law laid down by the House of Lords. For the learned judge emphasized at a number of points the obligation of the Crown to satisfy the jury beyond reasonable doubt of the facts constituting wilful murder, including the existence of an intention to kill, an intention with which, of course, accident would be inconsistent. But the question whether a charge to a jury containing a passage which strictly is a misdirection nevertheless as a whole would not be likely to produce a mistaken impression of the law is a matter of no general importance and, when a new trial has been ordered by the Supreme Court, an application by the Crown for special leave to appeal on such a ground ought not to be granted unless the decision of the Supreme Court is clearly erroneous and other reasons exist for the interference of this court.

The prisoner's counsel in supporting the order of the Supreme Court relied upon some further matters, including other objections to the summing up. He contended, too, that the evidence was insufficient to support a conviction of wilful murder. As there is to be a new trial, I think it is proper to say that, in my opinion, this last contention ought to be overruled.

The further objections to the summing up do not go so much to specific misdirection as to the sufficiency of the presentation both of the prisoner's case and of other views favourable to the prisoner which might be considered to arise out of observations made upon that case by the learned judge. It is unnecessary to say more upon these matters than that they may properly be taken into account in exercising our discretion to grant or refuse special leave to appeal.

In my opinion we should exercise our discretion by refusing it.

McTIERNAN J. In my opinion this application for special leave to appeal should be refused.

The substantial ground of the application, which is made on behalf of the Crown, is that the Court of Criminal Appeal was in error in deciding that *Macrossan* J., then Acting Chief Justice, misdirected the jury with respect to the onus of proof. The

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indictment was for the crime of wilful murder, and the respondent's plea was not guilty. The only defence which he raised at the trial was accident. The jury were unmistakably directed that the onus was on the respondent of establishing the defence of accident to their satisfaction. The Court of Criminal Appeal held that this direction was fundamentally unsound, and, as they were unable to say that if the jury had been properly directed they would have returned a verdict of wilful murder, the court set aside the conviction under sec. 668E of the *Criminal Code* and ordered a new trial under sec. 668F of the *Code*. However, an examination of the summing up shows that, apart from this passage, the learned Acting Chief Justice directed the jury that they should not convict the respondent of wilful murder, or murder, or manslaughter, these being the three classes of unlawful homicide known to the law of Queensland, unless they were satisfied beyond reasonable doubt that the respondent unlawfully killed the deceased man. There is some force in the argument that the general tenor of the summing up should have left no doubt in the mind of the jury that the onus of proof rested upon the Crown from the beginning to the end of the case. But all the judges of the Court of Criminal Appeal thought otherwise. What weight the jury gave to the various parts of the summing up is a matter of speculation. In my opinion special leave to appeal should not be given to the Crown to raise the question whether the Court of Criminal Appeal gave undue emphasis to the specific part of the summing up which they regarded as erroneous, as a factor contributing to the jury's verdict. It follows that there is no substance in the Crown's application unless it is shown that the Court of Criminal Appeal was wrong in deciding that, when the defence of accident is raised at the trial in Queensland for wilful murder, or murder, or manslaughter, it is a misdirection for the judge to tell the jury that the onus of establishing the defence of accident rests upon the accused. The direction that the respondent had the onus of establishing to the satisfaction of the jury that the shooting was an accident is in terms opposed to the express decision in the House of Lords in *Woolmington* v. *Director of Public Prosecutions* (1). That case defines the principles of the common law with

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

respect to the burden of proof in criminal cases, and, unless the *Criminal Code* otherwise provides, those principles apply to a trial in Queensland for unlawful homicide. It is sufficient in this case to say that the *Criminal Code* does not make a different provision with respect to the onus of proof where the defence of accident is raised, so as to place upon the accused the burden of proving to the satisfaction of the jury that a killing charged as unlawful was accidental, and require him to discharge that onus in order to obtain an acquittal. It follows that the application should not be granted.

Special leave to appeal refused.

Solicitor for the applicant, *W. G. Hamilton*, Acting Crown Solicitor for Queensland.

Solicitor for the respondent, *W. E. Ryan.*

H. D. W.