[HIGH COURT OF AUSTRALIA.]

HUGHES . . . . . APPLICANT-APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF QUEENSLAND.

H. C. OF A. 1951.

BRISBANE, *June* 25, 28.

Dixon, McTiernan, Williams, Fullagar and Kitto JJ.

Criminal Law—Murder—Death caused by act done in prosecution of unlawful purpose, which act likely to endanger human life—Violent and repeated assaults causing death—Conviction—Misdirection—Substitution of verdict of manslaughter—The Criminal Code (Q.), *ss.* 302 (1), (2), 576, 668F (2).

Section 302 of *The Criminal Code* provides, *inter alia*, that a person who unlawfully kills another, under any of the following circumstances, is guilty of murder: "(1) If the offender intends to do to the person killed or to some other person some grievous bodily harm; (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life".

Held, that par. (2) relates to an act of such a nature as to be likely to endanger human life when the act is done in the prosecution of a further purpose which is unlawful.

The accused was convicted of murder on evidence which showed that he assaulted the deceased woman by violent and repeated attacks on her following an altercation and that she died as a result of his blows. The trial judge directed the jury that the accused could be found guilty under s. 302 (1) if he intended to do to the deceased grievous bodily harm and had so caused her death and alternatively under s. 302 (2) if he unlawfully assaulted the deceased in such a way as to be likely to endanger her life and her death resulted.

Held that this was a misdirection, in that the evidence did not warrant a conviction for murder within s. 302 (2).

Held further that the jury had not been properly directed as to the intent necessary to constitute murder under s. 302 (1) or as to the distinction between murder and manslaughter. But *held* that, as it was apparent from the verdict

that the jury must have been satisfied of facts which would amount to manslaughter, the power given by s. 668F of the Criminal Code should, in the circumstances, be exercised, and a verdict of manslaughter substituted for the verdict of murder.

Decision of the Court of Criminal Appeal of Queensland: *Hughes* v. *The King*, (1951) Q.S.R. 237, reversed.

APPEAL from the Court of Criminal Appeal of Queensland.

Stanley Hughes and Dorothy May Hughes, his wife, were charged jointly at the Criminal Sittings, Brisbane, upon an indictment that they murdered one Mary Ann Morgan on 29th November 1949.

They pleaded not guilty and after a trial the jury returned a verdict of murder. Against this conviction they appealed to the Court of Criminal Appeal. That court (*Macrossan* C.J., *Philp* and *Townley* JJ.) allowed the appeal of Dorothy May Hughes, quashing her conviction, but dismissed the appeal of Stanley Hughes. *Hughes* v. *The King* (1).

From this decision Stanley Hughes applied to the High Court of Australia for special leave to appeal on the following grounds :—

1. The conviction was contrary to law and wrong in law.
2. The conviction was against the evidence and weight of evidence.
3. The trial judge misdirected and failed to direct the jury.
4. The trial judge failed to put adequately the case for the defence to the jury.

A. R. J. Gilmour, for the applicant. The case for the applicant is based on Nos. 3 and 4 of the grounds of appeal. At the trial the judge wrongly directed the jury on s. 302 (2) of *The Criminal Code*. That sub-section was not applicable to the present case. It alters the common law and is exclusive of s. 302 (1). The act which causes death must be something other than the act which constitutes the unlawful purpose. The test in this case is under s. 302 (1), viz., whether there was an intention of doing grievous bodily harm. It follows that s. 302 (2) does not come into operation where the doing of the act, which causes death, is also the unlawful purpose. It only comes into operation where the act is done in prosecution of a further unlawful purpose.

[FULLAGAR J. : An example would be an assault causing death, committed in the prosecution of a further unlawful purpose, such as rape.]

(1) (1951) Q.S.R. 237.

H. C. OF A. 1951.

HUGHES v. THE KING.

Yes. That illustrates the submission now being made to the court. The direction given to the jury excluded a verdict of manslaughter.

W. E. Ryan, for the Crown. The unlawful purpose mentioned in s. 302 (2) means any unlawful purpose. An unlawful assault is an unlawful purpose. Sub-sections (1) and (2) are not mutually exclusive. The trial judge in effect directed the jury under s. 302 (1) as if no other sub-section was applicable. He directed them that intention was an essential element and made it clear throughout that there must be an intention of doing grievous bodily harm. There was no miscarriage of justice and no special circumstances which would justify leave to appeal.

A. R. J. Gilmour, in reply. There are special circumstances in this case. [He referred to *Kelly* v. *The King* (1).]

Cur. adv. vult.

June 28.

The Court delivered the following written judgment :—

This is an application for special leave to appeal from an order of the Supreme Court of Queensland sitting as a Court of Criminal Appeal. The order dismissed an application for leave to appeal from a conviction of murder. The applicant Stanley Hughes and a woman called Dorothy May Hughes were indicted for the murder of one Mary Ann Morgan on 26th November 1949 at Brisbane.

The male prisoner was convicted of murder and, in accordance with s. 305 of *The Criminal Code* (Q.) as amended, he was sentenced to imprisonment for life. The female prisoner was found guilty of manslaughter but her conviction was quashed by the Court of Criminal Appeal.

The ground upon which the male prisoner now applies to this Court for special leave to appeal from the order confirming his conviction is that the learned judge misdirected the jury as to the elements of the crime of murder appropriate to the facts of the case. Murder, as distinguished from wilful murder, is defined by s. 302 of *The Criminal Code*. The section gives five cases in which a person who unlawfully kills another is guilty of murder. For the purposes of our decision it is necessary to deal with two only of them. So much of the provision as is thus relevant states that, except as the Code afterwards sets forth, a person who unlawfully kills another under any of the following circumstances,

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

that is to say (1) if the offender intends to do to the person killed or to some other person some grievous bodily harm; (2) if death is caused by means of an act done in the prosecution of an unlawful purpose which act is of such a nature as to be likely to endanger human life . . . is guilty of murder. The provision goes on to say that in the first of these cases it is immaterial that the offender did not intend to hurt the particular person who is killed and in the second that it is immaterial that the offender did not intend to hurt any person.

The learned judge in his charge to the jury treated the case as one in which it was open to them to find the prisoner guilty either as coming within the first or within the second of these two cases or paragraphs. He left it to them to say whether the prisoner had intended to do the woman Mary Ann Morgan grievous bodily harm and had so caused her death. As an alternative his Honour left it to them to say whether the prisoner had caused her death by an act done in the prosecution of an unlawful purpose the act being one of such a nature as to be likely to endanger human life.

For the prisoner it is objected that the direction was erroneous because the circumstances of the case would not support a finding that the acts causing the woman's death were done by the prisoner in the prosecution of an unlawful purpose. It is not denied and on the facts it could not be denied that it was open to the jury to find the prisoner guilty on the ground that he intended to cause grievous bodily harm and caused death. But the contention is that the jury may have found a verdict of guilty not on that ground but on the alternative ground which was not open on the facts. The evidence which it may be assumed that the jury accepted discloses a violent attack by the prisoner upon the deceased woman. The verdict means that in this manner he killed her. It would follow that, without a finding that he possessed the specific intent of doing grievous bodily harm, he would be at least guilty of manslaughter.

The possibility, therefore, that owing to the judge's direction, the jury did not find such an intent is one which concerns the distinction between murder and manslaughter.

The evidence shows that the male and female accused lived together at the same lodging house as the deceased woman. The latter lived there with a man named Worrall as his wife. On the night of 29th November 1949, at about 11 o'clock, Worrall not then being in the house, an altercation arose between the two women which led to an exchange of blows. The prisoner then

H. C. OF A. 1951.

HUGHES v. THE KING.

Dixon J. McTiernan J. Williams J. Fullagar J. Kitto J.

proceeded to punch the woman Mary Ann Morgan. She retreated to her room, but the prisoner followed her, threw her on the bed and continued to punch her. He was urged to leave her alone by his female companion and the lodging-house-keeper and desisted, but the woman Morgan followed him out of the room, the altercation broke out afresh and he renewed his attack upon her. He punched her and appears again to have thrown her on the bed and punched her as she lay there. She staggered out and collapsed. Next morning she was taken to hospital, where she died.

Upon a post-mortem examination it was found that there had been bleeding upon the surface of the brain and that upon the right hemisphere a clot of blood had accumulated which appeared to be the cause of death. There was bleeding in the region of the spleen and the attachments of the spleen had apparently been torn. This must have been caused by a blow upon the back, which was bruised, and it was possibly sustained when she was thrown on the bed. There was bruising of the face, scalp and legs.

To the police the prisoner admitted a great deal of what was alleged against him and added " I will admit I done my block ". At the trial he made a statement the effect of which was that he had intervened in the scuffle between the female accused and Mary Ann Morgan only to push the latter back into her room, where she fell upon the bed. She had come out of the room a second time and he had again put her on her bed where this time he held her. He suggested that her injuries were caused a day or two before by the violence of Worrall when he and she were engaged in a drinking bout.

Before the jury some attempt seems to have been made on behalf of the prisoner to set up self defence or provocation, but self defence and provocation alike are out of the question. It is unnecessary to examine the summing up in detail. It is enough to say that as a second ground for convicting the prisoner of murder it was put to the jury distinctly and with some emphasis that murder is committed if death is caused by means of an act done in the prosecution of an unlawful purpose which act is of such a nature as to be likely to endanger human life. The jury were directed that if the accused or either of them did unlawfully assault the deceased woman in such a way as to be likely to endanger her life and her death resulted it was within the definition of murder.

In our opinion the second case or paragraph of s. 302 had no application to the facts of the present case and the direction was erroneous. The paragraph relates to an act of such a nature as

to be likely to endanger human life when the act is done in the prosecution of a further purpose which is unlawful. The direction appears to be founded on the view that the assault on the deceased woman constituted at once the unlawful purpose and the dangerous act.

In our opinion the evidence did not warrant a conviction for murder within s. 302 (2). If the case did not come within s. 302 (1), it was not a case of murder. Section 302 (2) ought not to have been mentioned at all. The importance of this lies in the fact that s. 302 (1) requires a specific intent, whereas the nature of the act done and the purpose in the prosecution of which it is done, are the critical things for the purposes of s. 302 (2).

The learned judge, after referring to s. 302 (2), did not again refer to intent. On the contrary, he gave the direction that if the prisoner unlawfully assaulted the deceased woman, in such a way as to be likely to endanger her life and her death resulted, it amounted to murder. This we regard as a serious misdirection because of the absence of any reference to intent.

The most vital thing in this case was to distinguish correctly between murder and manslaughter. This was not a case in which the jury merely had the privilege of returning a merciful verdict of manslaughter : a verdict of manslaughter was clearly open on the evidence. It was essential to tell the jury that, in the absence of the intent required by s. 302 (1), the crime was manslaughter.

We think that the misdirection was quite serious enough to require the intervention of this Court. There was a failure in an essential respect in the presentation of the issue upon which the prisoner's guilt of murder depended. In the absence of a proper direction as to the essential element upon which the question depended whether the verdict should be murder or manslaughter, it is impossible to say that the trial did not miscarry. The jury must, however, have been satisfied that the blows were struck, as described, and that they caused death. In other words, they must have been satisfied of facts which would amount to manslaughter and that is a matter not affected by the misdirection. Guilt of manslaughter at least is clear.

The assault was a brutal one and we have no doubt that upon a proper direction a verdict of murder might have been sustained. For it was open to the jury to infer the requisite specific intent from the violence used and the repetition of the attack. But as the direction was not a proper one we do not think the conviction of murder can stand. Two courses are open to us. One is to order a new trial. The other is to exercise the power conferred

H. C. OF A. 1951.

HUGHES v. THE KING.

Dixon J. McTiernan J. Williams J. Fullagar J. Kitto J.

upon the Court of Criminal Appeal by sub-s. (2) of s. 668F of *The Criminal Code*. That provision enables the Court of Criminal Appeal in a case like the present to substitute for the verdict found by the jury a verdict of guilty of the other offence of which, upon their verdict the jury must have been satisfied: see *R.* v. *Grasso* (1) and s. 576 of *The Criminal Code*. The Court may then pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence. On the whole we are of opinion that the better course to follow is to exercise the power of substituting a verdict of manslaughter. We think that it is desirable that the substituted sentence should be passed by the Court of Criminal Appeal and not by this Court.

We therefore make the following order.

Special leave granted to appeal from the order of the Supreme Court sitting as the Court of Criminal Appeal whereby the application of the appellant Hughes to appeal from his conviction for murder was dismissed. Order that the appeal be deemed duly instituted and dealt with instanter, and that the appeal be allowed. Discharge said order of the Supreme Court. In lieu thereof order that the application of the appellant for leave to appeal to the Supreme Court as the Court of Criminal Appeal be allowed and that for the verdict of guilty of murder there be substituted a verdict of guilty of manslaughter. Order that the cause be remitted to the Supreme Court sitting as the Court of Criminal Appeal for the purpose of passing such proper sentence in substitution for the sentence passed at the trial as may be warranted in law for the offence of manslaughter and that the appellant Stanley Hughes be accordingly remanded for sentence by the Supreme Court sitting as the Court of Criminal Appeal.

Special leave to appeal granted. Appeal allowed. Verdict guilty of manslaughter substituted for guilty of murder.

Solicitors for the appellant: *Cyril Murphy & Murphy.*
Solicitor for the Crown: *H. T. O'Driscoll*, Crown Solicitor.

B. J. J.

(1) (1950) V.L.R. 21.