DONALD KEITH CATHRO.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1955

*Oct. 18
*Nov. 23

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Murder—Conspiracy to Rob—Minimum force to be used—Death by strangulation at hands of one assailant—Liability of other—Jury, adequacy of charge—Whether furnishing jury with transcript of part of charge prejudicial to accused—Criminal Code, ss. 69(1), (2), 260(a), (c), 1014(2).

The appellant with three others conspired to rob a storekeeper. It was agreed that no weapons would be used and only the amount of force required to overcome such resistance as might be offered. The appellant seized the storekeeper from behind, placing a hand over his mouth and an arm around his throat and then hit him on the head with a can of meat. The victim was still struggling when the appellant handed him to an accomplice and started searching for money. The only evidence of what then happened was that of the appellant who stated his accomplice told him he had put his knee against the storekeeper's throat. The appellant and the accomplice were both charged with murder and tried separately. The appellant appealed his conviction.

Held by Kerwin C.J., Rand, Estey and Cartwright JJ. (Taschereau, Locke and Fauteux JJ. dissenting): 1. That the giving to the jury of a transcript of only a portion of the trial judge's charge, which emphasized the Crown's case but did not set out the theory of the defence, was in the circumstances such an irregularity as to justify a new trial.

2. That a new trial should also be directed because the judge in summarizing the law as related to the facts omitted to direct the jury that: (*a*) the appellant could only be a party to the offence of murder under s. 69 (1) of the *Criminal Code* if the jury thought that the accomplice had committed the murder and that the appellant had

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aided or abetted him; (*b*) that under s. 69 (2) the appellant would be guilty only if the commission of the murder was known or ought to have been known to him to be a probable consequence of the prosecution of robbery.

Per Taschereau and Locke JJ. (dissenting): The appellant on his own testimony was ready to overcome any fight put up and s. 260(*a*) and (*c*) of the *Code* therefore applied and, as a result of their combined effect and of s. 69 (1), the killing amounted to murder. The appellant was guilty of abetting and procuring the commission of the crime if the strangulation was imputed to his accomplice and by virtue of s. 260 (*c*) if he himself stopped the breath of the victim. The jury was properly charged and directed and permitting it to take a portion of the judge's charge into the jury room could not vitiate the trial. It was open to it to ask for additional oral instructions which would have had the same result and which not only would have been proper but imperative for the judge to furnish.

Per Locke and Fauteux JJ. (dissenting): On the appellant's own testimony, the nature of the agreement and the manner in which it was executed are clear. The violence to be exerted was to be measured by the resistance of the victim. The appellant was the first to resort to violence and the injuries he inflicted, first alone and then with the assistance of his accomplice, amounted to grievous bodily injury as defined under the authorities. At that moment, both parties were then of one mind and there is nothing to suggest that when, in order to search the premises, the appellant handed over the victim to his accomplice, this situation was changed. The appellant left it to his accomplice to overcome their victim, and even if the blows then inflicted by the latter were ill-measured, the appellant is nonetheless a party thereto. The case comes squarely under the law as laid down in ss. 260 and 69 (1) and is a proper one for the application of s. 1014(2). *Beard's* case [1920] A.C. 470, followed, *The King* v. *Hughes* [1924] S.C.R. 517, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming the conviction of the appellant on a charge of murder. O'Halloran and Davey JJ. A., dissented; the former would have substituted a conviction for manslaughter, the latter, a new trial. The appellant was tried separately on a charge of joining with three others in committing murder. In separate trials one of the other three was convicted of murder, one acquitted and the Crown did not proceed against the third.

J. G. Diefenbaker, Q.C. and *F. C. Munroe* for the appellant.

L. H. Jackson and *W. G. Burke-Robertson, Q.C.* for the respondent.

THE CHIEF JUSTICE:—I agree with Mr. Justice Estey.

(1) (1955) 15 W.W.R. 541; 112 Can. C.C. 154.

TASCHEREAU J. (dissenting):—The charge against the appellant is:

THAT at the City of Vancouver, on the Sixth day of January, in the year of our Lord, one thousand nine hundred and fifty-five, he, the said Donald Keith Cathro, together with Eng Git Lee, Chow Bew and Richard Wong, unlawfully did murder Young Gai Wah, otherwise known as Ah Wing, against the form of the Statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.

He was tried by Mr. Justice Manson and a jury, was found guilty and sentenced to death. His appeal was dismissed by the Court of Appeal of British Columbia (1), O'Halloran J.A. and Davey J.A. dissenting. The former would have substituted a verdict of manslaughter, and the latter would have ordered a new trial. No charge was laid against Richard Wong, Eng Git Lee was acquitted, and the present appellant and Chow Bew were found guilty. Mr. Justice Manson granted separate trials.

The evidence reveals that on the 6th of January, 1955, the appellant was approached by Bew, whom he did not know. Bew explained to him there was an old Chinese by the name of Ah Wing, owner of the MacDonald Market on MacDonald Street, and that "it would be easy", and in his evidence given on his own behalf, the appellant says that he knew "pretty well what he meant". At nine o'clock that night the appellant met Chow Bew, who was in a parked car with two friends in it, namely, Eng Git Lee who was driving the car, and Richard Wong sitting in front next to him. On the way to the restaurant, they discussed how to enter the premises, and the appellant was told that the Chinese had $5,000 in his store. They were familiar with the place where the money was, because two of them had been there previously to change a large bill, and Ah Wing had gone to the back of the store to make the change for them. The appellant was also told that the Chinese was an elderly man and "that there would be no trouble about it". He was informed "that there would be no violence" and that none of his companions "had any weapons or any club or anything of that kind". He nevertheless said that if the Chinaman "put up a fight", "he was going to do just what he did", and "that whatever fight the old man would put up he was ready to overcome it".

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When they arrived at the restaurant, they parked their automobile across the street, waiting for the shop to close. They then moved the car around the corner and the appellant went in first. Several customers came in and left, and the appellant bought a "coke" and some other minor articles. The appellant helped Ah Wing to find a dentist's address and, as planned, when Bew came in, he asked the deceased for a can of meat, and when the Chinaman went to the back of the store to get the meat, the appellant put his arm around him and "took him into the backroom". Chow Bew unlocked the backdoor and put out the lights. A struggle ensued and the appellant told him that if he did not keep quiet he would hurt him. The deceased kept making a noise, so the appellant hit him on the head with a can of meat, and Wing started to yell putting up a good fight.

The appellant told Bew to get a flashlight and Chow Bew hit Wing with it. Bew tried to "wad" a cloth in the deceased's mouth so to stop him from yelling, but without success. The appellant then told Bew to hold the Chinese while he would look around for the money. The Chinaman was lying on the floor. They took a few bills from his pockets and when they heard somebody coming at the front door, they ran out through the back door to the waiting car.

The medical evidence reveals that the deceased had a minor cut over the right eye, scratch on the lips, a cut on the right side of the tongue from which there had been some bleeding. The skin of the chin and upper neck had a rubbed appearance, as though a rough cloth had been rubbed across the skin and there were several abrasions on the right side of the neck. The examination of the throat showed hemorrhage or bruising into the muscles of the neck. There was a fracture of the voice box with hemorrhage. There was obviously strangulation, and the pressure applied to the neck must have been very severe in order to fracture the voice box.

In his evidence given on his own behalf, the appellant swears that the deceased was alive when Bew "took charge of him". Very soon after, the four companions were arrested down town by the police, after the deceased had been found dead in his shop. They were in possession of

an old cigar box, that belonged to the deceased, in which there was a small amount of money. The appellant admits that he agreed with Bew, Lee and Wong *to join in the robbery of the grocery store* operated by Wing.

The appellant now appeals to this Court alleging that the judgment of the Court of Appeal for British Columbia, in dismissing the appeal is erroneous and ought to be set aside on the following grounds:—

1. In not holding that the learned trial judge failed to present the defence to the jury fairly, fully and adequately, in a way that would have brought out its full force and effect, and particularly in failing to fully and properly direct the jury as to a possible verdict of manslaughter.

2. The learned trial judge permitted the jury during their deliberations to take with them into the jury-room a transcript of a portion of his charge, said transcript containing a powerful exposition of the Crown's case, and including misdirection upon the law to which the defence counsel had objected, and remarks which directed the jury's attention to weaknesses in the defence, and not containing that part of the charge in which the learned trial judge explained the case for the defence to the jury.

3. The learned trial judge told the jury that a verdict of guilty, by the exercise of executive clemency, may not result in the carrying out of the death sentence.

4. The learned trial judge misdirected the jury on evaluating credibility and on determining the weight of evidence, particularly by repeated reference to the interest of the appellant in the verdict.

5. The learned trial judge erred in curtailing cross-examination of the Crown witness Det. Sgt. McCullough.

6. The learned trial judge instructed the jury that their verdict "must be unanimous" and "must be arrived at" without also saying "if you can agree upon a verdict".

For the purpose of the determination of this case, it will be necessary to deal only with grounds 1, 2 and 4, as there has been no dissent in the Court of Appeal on grounds 3, 5 and 6, and no special leave to appeal has been granted on these points.

It is clear as revealed by appellant's own evidence that he, with the others, joined a conspiracy with a common intention to commit *robbery,* and that although the appellant was told that there would be no violence, he was ready to overcome any fight that the Chinaman would put, *and that he was also prepared to do just what he has done.* It is also in evidence that when the robbery was planned between the appellant and the others, the fear of trouble from neighbours was discussed, and in his statement to the Police of January 10, 1955, he said he knew

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that the beauty-parlor next door, "was run by two women", and that they would "give no trouble". This, to my mind, is a clear indication of what the intention of the appellant and the others was.

The law on the matter is clear, and s-ss.(*a*) and (*c*) of s. 260 of the *Criminal Code* find here their application. These section and sub-sections are to the effect that in case of treason, piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender *means or not death to ensue,* or *knows or not that death is likely to ensue, if the offender meant to inflict grievous bodily injury* for the purpose of facilitating the commission of any of the above mentioned offences, *or if by any means he wilfully stops the breath of any person for either of the purposes above mentioned,* and death ensues.

I have no hesitation in reaching the conclusion that as a result of the combined effect of s. 260 (*a*), (*c*) Cr. C. and of s. 69 (1) Cr. C. the killing of the Chinaman amounts to murder. As stated above, it is in evidence that death was due to strangulation. It is also my opinion that the jury could not reasonably find, in view of the evidence, that the two assailants were not prepared to inflict grievous bodily injury, for the purpose of facilitating the commission of the offence of robbery. In such a case, it is immaterial that they meant or not death to ensue, or knew or not that death would likely ensue.

It necessarily follows that by virtue of s. 69 (1) Cr. C., the appellant is guilty of the offence for abetting and procuring the commission of the crime, if the strangulation is imputed to Bew, and by virtue of s. 260 (*c*) if he himself stopped the breath of the victim. In my opinion, there was no room for a verdict of manslaughter, and it was unnecessary for the trial judge in his charge to the jury to deal with this feature of the case. It is, therefore, quite irrelevant if his instructions on this point were inadequate. It was not necessary for the judge, as stated in *Manchuk* v. *The King* (1), to tell them that if as a result of the evidence as a whole, they were in reasonable doubt

(1) [1938] S.C.R. 341.

whether the crime was murder or manslaughter, they should convict of manslaughter. Nothing in the evidence would justify a verdict of manslaughter.

The case of *Rex* v. *Hughes* (1) has no application. In that case, the learned trial judge told the jurors that the only possible verdict could be murder or acquittal, and completely eliminated the possible verdict of manslaughter. There were evidence however to show that the shot that killed Hughes went off accidentally, and it was found by this Court that it could not be said as a matter of law that this was an act of violence done by the accused in furtherance of, or in the course of the crime of robbery as held by the House of Lords in *Director of Public Prosecutions* v. *Beard* (2) and in *Rex* v. *Elnick* (3). Moreover, the law as it stood at the time of the Hughes decision given in 1942, was not the same as it is now, as s. 260 was amended in 1947 (Statutes of Canada, c. 55, articles 6 and 7) to cover the Hughes case, and paragraph (*d*) was added to the section.

I believe that the jury were properly charged, in view of ss. 260 (*a*) (*c*) and 69 (1) Cr. C. It has been argued that the jury should have been instructed that the act done was the probable consequence of the common purpose, and that it was known, or ought to have been known to the appellant that such consequence was probable. Sections 260 (*a*) (*c*) and 69 (1) Cr. C. negative these propositions, and I do not think they can prevail. They have their foundation on ss. 69 (*d*) and 69 (2) of the Criminal Code, but they totally ignore s. 260 (*a*) and (*c*), which clearly hold one or the other liable although he did not mean death to ensue, and also s. 69 (1). A party to an offence is a person who not only counsels, but *abets* or *procures* another to commit a crime. Such is the present case, and it is immaterial therefore that the appellant knew or ought to have known that the death of Ah Wing by strangulation, was a probable consequence of the prosecution of the common purpose.

If the opposite view should prevail, and if a new trial were ordered, I cannot imagine how the trial judge could logically instruct the jury. He would of course have to

(1) [1942] S.C.R. 517. (2) [1920] A.C. 479.
(3) (1920) 30 Man. R. 415.

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tell them that under s. 260 (*c*) Cr. C., in case of *robbery,* culpable homicide is murder *whether the offender means or not death to ensue,* if he wilfully stops the breath of the deceased. He would also have to instruct them, by virtue of s. 69 (2), that if the accused *knew or ought to have known* that the killing of the victim was a probable consequence of the common purpose, he was guilty of murder. That, to my mind, would constitute a flagrant contradiction. Section 69 (2), I think, contemplates an entirely different case. It would apply, for instance, if two persons formed the common intention of committing the crime of forgery, and one of the offenders killed a police officer with a hidden weapon, the possession of which was unknown to the other. In such a case, it could surely be said as an excuse, that he did not know or ought not to have known that the killing was a probable consequence of the common purpose of forgery.

I also believe that the fourth ground of error raised by the appellant is unfounded. It is my view that the learned trial judge properly directed the jury in evaluating credibility, and in determining the weight of evidence.

The last ground of appeal raised, and on which there was a dissent, is that the learned trial judge allowed the jury during their deliberations, to take with them into the jury-room a transcript of a portion of his charge. I do not think that this can vitiate in any way the trial. It is open to the jury to ask for whatever information they desire, and instead of being furnished with a part of the written address, they could have asked the trial judge for additional oral instructions which would have had the same result, and it would have been not only proper, but imperative upon the judge to furnish all this information. That the additional instructions were written instead of verbal, does not appear to me to have the effect of invalidating the verdict.

I would dismiss the appeal.

RAND J.:—The ground of dissent in which O'Halloran and Davey JJ.A. concurred was this. At the request of the jury, a transcript of a portion of the charge was furnished them which they retained during their deliberation;

it consisted in large measure of a forceful statement of the Crown's case and, in the opinion of these justices, it so overshadowed the defence as to obscure it.

The essence of the latter was that the death had been caused by an offence which was not "a probable consequence" in the prosecution of the robbery as required by s. 69 (2) of the *Criminal Code*, a requirement which seems to differentiate our law in respect of joint wrongdoers from that of England. The accused took the stand and gave evidence to the effect that the death could only have been caused while he was searching the premises for the money and the deceased was in the hands of the accomplice Bew. In the light of the violence of the force applied as indicated by its effects on the larynx, its mode of application was suggested by an alleged remark of Bew to the accused that he had put his knee on the victim's throat. It was also asserted by the accused that it had been expressly agreed that no force would be used beyond preventing the outcry of a small man of 65 years who was considered, apparently, to be unable to put up much resistance. Admittedly there were no weapons, although the accused, who for the first minute or so had tried to smother the noise by putting his right arm around the neck of the deceased and his left hand over his mouth, had struck the latter on the head with a can picked up in the shop, a blow which could have been found to have played no part in inflicting the "grievous bodily harm" or in the death. The truth of the whole or any part of this account, which is the only evidence of what actually took place in the shop, was for the jury. It was likewise for them, in the event of their believing it and in the light of the evidence as a whole, uninfluenced by overemphasis on any feature of it, to say whether the infliction of the grievous bodily harm or the strangulation by Bew was a "probable consequence" of the prosecution of the robbery. I am unable to say that the jury could not have found that it was not. They might equally have entertained a reasonable doubt that it was. They could, on the other hand, have come to the conclusion that the act either of that harm or strangulation was such a probability, but that determination was for them.

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I cannot agree, however, with O'Halloran J.A. that in this aspect we can substitute a verdict of manslaughter. S. 69 (2) means, in my opinion, this: the offence, here the culpable homicide under either paras. (*a*) or (*c*) of s. 260, which must be a "probable consequence" of carrying out the criminal plan of several persons, in this case robbery, must be such as severs the connection of the person not otherwise associated with it than by the original scheme. The accused and his companion, Bew, undoubtedly intended force to be applied to their victim; but was there such an excess in mode or degree as converted it into an act and an offence so outrageous or so unforeseeable as to be beyond the scope of probable consequence? On that question—which, by the charge, had been placed in doubtful adequacy before the jury—the transcript could easily have been the decisive factor.

I agree, therefore, with the dissenting justices and would order a new trial.

ESTEY J.:—The appellant's conviction for murder was affirmed by a majority of the learned judges in the Appellate Court of British Columbia. Mr. Justice O'Halloran, dissenting, would have substituted a verdict of manslaughter, while Mr. Justice Davey, also dissenting, would have awarded a new trial.

The appellant, in giving evidence on his own behalf, admitted that he, Chow Bew and two others, in the afternoon of January 6, 1955, had agreed to rob the deceased Ah Wing that night at his store in Vancouver. About 9:30 that evening the four proceeded in an automobile and parked at a place near the store of the deceased. Ah Wing was a Chinaman about sixty-five years of age whom they referred to as an old man who would not offer much resistance. Though they were without weapons, they were prepared to exercise physical strength in order to overcome such resistance as the deceased might offer. Only two of the four entered the store and, while in the course of their intent to rob, such force was applied to the person of the deceased, by the appellant and Chow Bew or one of them, as to cause his death.

The appellant admitted that, as arranged, he entered the store first and in a matter of minutes Chow Bew

entered. When there were no customers present the appellant asked the deceased for a can of meat which he knew would be toward the back of the store. In order to obtain this can the deceased turned his back upon the appellant, who thereupon put his hand over his mouth and an arm around his neck. At the same time Chow Bew put out the lights, locked the front and opened the back door. They were in the store approximately ten minutes and at some point appellant handed the deceased over to Chow Bew. At that time, the appellant deposed, the deceased was struggling and endeavouring to make a noise and was doing the same when later, while Chow Bew was still holding him, the appellant searched his person for money. The appellant further stated that when Chow Bew took over the deceased he searched the premises for money and, as the store was in darkness, he did not know what Chow Bew was doing to the deceased and, because of their understanding that they would not cause serious bodily harm to the deceased, he neither knew nor ought to have known that the infliction of grievous bodily harm upon, or the wilful stopping of the breath of Ah Wing was a probable consequence of what Chow Bew did to the deceased.

Under s. 260 of the *Criminal Code,* so far as its provisions are relevant to the facts in this case, one in the course of committing a robbery will be guilty of murder, whether he knew or ought to have known that death was likely to ensue, if he means to inflict grievous bodily injury for the purpose of facilitating the commission of the robbery and death ensues, or if he, by any means, wilfully stops the breath of a person in order to facilitate the commission of the offence and death ensues from such stoppage. Under this section it was open to the jury to find that the appellant's participation was such that he was guilty of murder.

However, the main contentions advanced on behalf of the appellant were that Chow Bew had inflicted the fatal injury (although based on what the appellant alleged had been told him by Bew) and that he was not a party to the murder as a participant under s. 260, nor was he made so by virtue of the provisions of s-ss. (1) and (2) of s. 69. Under s-s. (1) (s. 69), if the appellant did or omitted

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some act for the purpose of aiding Chow Bew to commit the offence of murder, or abetted Chow Bew in the commission of that offence, the jury might find the appellant guilty of murder. It was, however, the contention on behalf of the appellant that, however much he may have aided and abetted in the commission of the robbery, he never did aid or abet, or in any way assist Chow Bew in the commission of the murder within the meaning of s. 69 (1).

Under s-s. (2) (s. 69), if, as here, the appellant and Chow Bew had formed a common intention to rob Ah Wing and, while assisting each other in the prosecution of that robbery, Chow Bew murdered Ah Wing, the appellant would be a party to the offence of murder if the commission thereof was, or ought to have been known by him to be a probable consequence of the prosecution of such robbery. I agree with the appellant that these subsections ought to have been explained in such a manner that the jury would understand the difference between the two and the respective effects thereof in relation to the facts as adduced in evidence.

There was evidence in support of issues under the foregoing sections which counsel for both parties apparently discussed and certainly were dealt with by the learned trial judge in the course of his charge. The learned trial judge, at the outset of his charge, explained the functions of the jury, presumption of innocence, reasonable doubt and other matters, and then devoted approximately twelve pages to a discussion of the relevant statute law, including the foregoing ss. 260 and 69. In the course thereof he selected the relevant portions of the sections and, in illustrating their general effect, referred to parts of the evidence. Thereafter in about eighteen pages, he discussed the evidence as given by the respective witnesses. At the end thereof, and before discussing the evidence and the issues raised on behalf of the appellant, the learned judge deemed it advisable to summarize the law that he had explained in the earlier part of his charge.

I am in agreement with the learned trial judge that where, as here, he had discussed the law, with some reference to the facts, followed by a rather lengthly review of the evidence, the law should be restated and summarized

in relation to the facts in a manner to enable the jury to appreciate the issues upon which they had to decide. That the law should be so related to the facts has often been a matter of discussion in the decided cases, not only in this, but in other courts, and more recently in this Court in *Azoulay* v. *The Queen* (1). It may be added that this can seldom be accomplished by first a discussion of the law followed by a review of the evidence, unless there is some restatement, or summary, that will relate the law and the facts, as contemplated under the authorities. It would seem, and with great respect to the learned trial judge, that in his summary these two sub-sections of s. 69 were not sufficiently distinguished in relation to the facts. In particular, the summary did not include a statement to the effect that the appellant could only be a party to the offence of murder under s-s (1) of s. 69 if the jury thought Chow Bew had committed the murder and the appellant had aided or abetted Chow Bew in the commission of the murder, and that under s-s. (2) of s. 69 the appellant would be guilty only if the commission of the murder was known or ought to have been known by him to be a probable consequence of the prosecution of the robbery. These omissions were upon matters so vital in this prosecution as to largely nullify the purpose of the summary. Indeed the remarks of my Lord the Chief Justice (then Kerwin J.) are particularly appropriate:

> However, while the general statement of the law of conspiracy made by the trial Judge may be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to Carson's activities was concerned. *Forsythe* v. *The King* (2).

It would, therefore, seem that because of these omissions the law was not related to the facts in respect of these vital issues, as required by the authorities. Moreover, from the appellant's point of view, these omissions prevented his case being fully presented to the jury. It, therefore, follows that a new trial must be directed. There were a number of other points raised with respect to the charge, but, inasmuch as there must be a new trial in which many of these may never arise, it seems unnecessary that they should be here discussed.

(1) [1952] 2 S.C.R. 495.

(2) [1943] S.C.R. 98 at 102.

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I am also in agreement with Mr. Justice Davey that giving to the jury a portion of the learned trial judge's charge constituted, in the circumstances, such an irregularity as to justify a new trial. At the conclusion of the learned trial judge's address the jury retired and were recalled when the learned judge supplemented the instructions he had already given. At the conclusion thereof the foreman of the jury requested a copy of the remarks made by his Lordship with respect to the law prior to the hearing of any of the witnesses. When his Lordship intimated that such would have to be considered in the light of his further instructions, the foreman stated: "Maybe we could have the section you read this morning." The word "section" had reference to that portion of the learned judge's charge dealing more particularly with the law. While counsel for the Crown concurred, counsel for the defence at once pointed out that this section contained a direction which the learned judge had supplemented in his further instructions and, notwithstanding that his Lordship stated that he would repeat the additional remarks in handing this portion to the jury, counsel for the appellant said he could not consent to this portion of the charge being handed to the jury. His Lordship felt that he should accede to the request of the jury and accordingly that portion of his charge dealing with the law, with such reference to the evidence as he deemed appropriate to explain and illustrate the respective sections, was extended and placed in the hands of the jury, together with the comment repeated by the learned trial judge as above mentioned.

At the conclusion of the portion so extended his Lordship dealt at length with the evidence and made some further observations with respect to the law. This latter part constituted a larger portion of the charge than that handed to the jury. It is well established that a charge must be considered as a whole. With this in mind, it seems impossible to conclude otherwise than that the jury, in the course of their deliberations, would inevitably give more weight to the portion transcribed than to that part which they had heard but verbally expressed in the court room. Moreover, in this particular case there was that portion which counsel for the defence had discussed at the

end of the learned trial judge's charge and upon which the learned judge made further comment, which he repeated to the jury as he handed them the typewritten portion. It would, therefore, seem, as a matter of principle, that a part of a charge should not be handed to the jury.

No case was cited in support of such a portion being handed to the jury. There are jurisdictions in the United States where the practice of delivering a copy of the judge's charge to the jury is recognized by statute. In other jurisdictions it seems to be permissible, even without a statute, and in that country there is authority for the giving of a copy of a penal section of the law to the jury, but there does not seem to be any decision which would support the view that a substantial portion of the charge could be delivered to the jury.

It may be that a section of the *Code,* or even a small passage of a learned trial judge's charge, with the consent of counsel concerned, may be handed to the jury, but even then the question must remain whether, in the circumstances, there has been prejudice or miscarriage of justice. Where, however, as here, the transcribed part of the charge contains important references to the evidence and contentions made on behalf of the Crown, and but slight reference to the evidence and none to the contentions on behalf of the defence, there can be no doubt but that the giving of such a portion to the jury ought not to be permitted.

The learned trial judge, discussing the duty of the jury to arrive at a fair and just conclusion, warned them that sympathy ought not to be a factor in their deliberations and went on to call their attention to the fact that sympathy might have a place in a consideration of executive clemency. At the conclusion of his charge counsel for the defence took the position that from his Lordship's remarks with respect to executive clemency the jury might conclude that he was of the opinion that this was a case in which a conviction should be found and executive clemency exercised. The learned trial judge, as a result of this comment, dealt further with it in his supplementary instructions to the jury and stated that he was not in any way suggesting what their verdict should be, or any view on his part that an "occasion might arise for an application for such clemency." Sir Lyman Duff, in commenting upon a reference

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to executive clemency in the course of a charge to the jury, described such as "unfortunate" and concluded his remarks as follows:

> Such a reference could not assist the jury in performing their duty to decide the issue of fact before them, and there is always some risk that a suggestion that the verdict is to be reviewed may result in some abatement of the deep sense of responsibility with which a jury ought to be brought to regard their duty in passing upon any criminal charge, and, preeminently, when the offence charged is murder, to which the law attaches the capital penalty. *McLean* v. *The King* (1).

In this case the Court concluded that no substantial harm or miscarriage resulted and, in view of the fact that here a new trial is directed, it is unnecessary to do more than to repeat the warning expressed by Sir Lyman Duff.

The appeal should be allowed, the conviction quashed and a new trial directed.

LOCKE J. (dissenting):—I agree with my brothers Taschereau and Fauteux and would dismiss this appeal.

CARTWRIGHT J.:—For the reasons given by my brothers Rand and Estey I would allow the appeal, quash the conviction and direct a new trial.

FAUTEUX J. (dissenting):—On the 6th of January, 1955, at the city of Vancouver, Ah Wing, a grocer of about sixty-five years of age, was murdered in his store while resisting the commission of a robbery perpetrated actually by both the appellant and one Chow Bew, pending which their accomplices stood ready, outside of the store, for the flight in an automobile; intending thereafter to share amongst themselves five thousand dollars of savings anticipated by them to be found in possession of their victim.

Cathro and Bew each had a separate trial and were found guilty of murder. These verdicts were upheld by majority judgments of the Court of Appeal. We are only concerned here with the case of Cathro.

The substance of the principal grounds of appeal, upon which there was a dissent, is related to the instructions of the trial Judge.

(1) [1933] S.C.R. 688 at 693.

I agree with Robertson and Bird JJ.A., that a verdict of manslaughter was not open to the jury in this case. Furthermore and—assuming the presence of certain illegalities—on a careful consideration of the evidence, and particularly of the testimony falling from the very lips of the appellant, who was the only one of the group to testify, I also agree with these two members of the Court of Appeal of British Columbia that this is a proper case, if any, for the application of section 1014(2).

In *Beard's* case (1), it was proved that there was a violent struggle in which the accused overpowered a child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death. In this country, as stated at page 524, by the then Chief Justice of this Court, Sir Lyman Duff, who delivered the uananimous judgment for the Court, in *The King* v. *Hughes et al.* (2), "a charge arising out of circumstances such as those considered in the *Beard's* case, would be disposed of under the law laid down in s. 260 of the *Criminal Code.*" The parts of this section relevant to the present case read:—

> 260. In case of . . . robbery . . . culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue.
>
> (*a*) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, . . . and death ensues from such injury; or
>
> * * *
>
> (*c*) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

Were there, in this case, but a single offender implicated in the robbery and the material facts leading to the death of Ah Wing, a verdict of murder could be the only proper one which a reasonable jury, properly instructed and acting judicially, could render; for the proof of the constituent elements of the substantive offence created under s. 260 is beyond doubt; death did ensue from grievous bodily injury meant and inflicted for the purpose of facilitating the commission of robbery.

(1) [1920] A.C. 479. (2) [1942] S.C.R. 517.

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However, because there is, in the present case, a plurality of offenders, and though both Cathro and Bew, acting individually as well as together, had a hand in the infliction of violence to advance their criminal and common purpose, the following submission is made, in the present appeal, on behalf of Cathro. The original agreement, it is contended, was that there would be no violence; strangulation, which was the cause of death, might, on one view of the medical evidence, have resulted from the acts of violence which Cathro—through evidence of doubtful admissibility—attempts to ascribe to Bew, rather than from the acts of violence which he admitted having committed; the acts of Bew would then be beyond the scope of the agreement; with the consequence that Cathro, having had, directly or by complicity, no part in the infliction of the fatal injury, could not be held guilty under s. 260.

The agreement. Of the agreement there is no other evidence than (i) what Cathro said it was and (ii) what, from the subsequent conduct of the parties in the store, as related by Cathro, is to be deduced.

(i) There was, of course, a clear agreement to rob the store owner of the five thousand dollars of savings he was estimated by them to possess. As to the means to be used to achieve this end, Cathro, in his examination in chief, says:—

> On the way to the store, they more or less discussed the situation, told me what it was all about, the other surrounding buildings, they said he was an old man and there wouldn't be no trouble, there was no necessity of any violence.

And later he repeats:—

> A Yes, I asked them if they had any weapon, anything to hit him with, or anything, and they said: No, there wasn't, there was no need of it.
>
> Q And no such thing was carried?
>
> A We understood before we went out there, that there would be no violence.

Whether this is tantamount to a restrictive agreement as to the means or rather to a simple understanding as to the anticipated measure of means to be used in the circumstances, it rested on an alleged expectancy that there would be no trouble, no necessity for violence. However, at no time, during the preparation of the plan,—or its actual execution, as will be seen later—was an abandonment of

the plan followed by an immediate withdrawal from the premises, even thought of as being the conduct to adopt in the event of resistance and necessity for violence arising and developing, as indeed it did to culminate into death. On the contrary, on Cathro's own evidence, notwithstanding his declaration that he had no intention to hurt, what was then to be done, failing the materialization of the expectancy, was not left in doubt. Pressed, in cross-examination, Cathro admitted the expectation of a fight and, on his understanding of the plan, the degree of violence to be then used upon Ah Wing was to be measured by the degree of resistance opposed by their victim to the fulfilment of their common aim:—

Q Well now, it is perfectly plain that if you had put up a fight for six hundred dollars (the biggest amount Cathro said he once had), the old Chinaman was to put up a fight for five thousand dollars?

A Yes.

Q Well, what were you going to do if he did?

A Hold him.

Q And you were to apply whatever force was necessary to silence him?

A Not necessarily.

* * *

Q And if he had put up a fight, you would have to put up a fight also?

A Well to a certain extent.

* * *

Q Well, just answer the question now. Wasn't that the situation, whatever fight that old man put up, you were there to overcome it?

A Yes, sir.

Q And that is what you did, isn't it?

A Yes, sir.

This evidence does not exclude grievous bodily injury, if needed in the judgment of either of the parties to the agreement.

(ii) The subsequent conduct of the parties. At closing hours, the appellant went in the store first to be followed thereafter by Bew. Each in turn bought soft drinks. The last customer having departed, Cathro went to the back of the store and asked the owner for a can of meat. The latter turned his back in order to fetch this object; Cathro grabbed him from behind, put an arm around his neck and the hand of the other on his mouth. Meanwhile Bew locked

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the front door, opened the back door and put out the lights. Examined in chief, he then, in a rather dimmed recital of the facts, proceeds to say:—

I then—the Chinaman was making quite a bit of noise, trying to struggle. I told him to keep quiet or I would have to hurt him, more or less as a threat. He kept making noise, so I hit him with the can, not intending to hurt him at all, more or less to scare him. He made more noise than ever.

Q Where did you hit him? A High on the head.

Q How many times did you hit him? A Once.

Q Then what happened? A Well, I had seen a flashlight before the lights had gone out. Billy, who had been looking around, I told him to get the flashlight so he could see better. Instead of putting the flashlight on, he hit the man with it, which I told him to stop and get something to put in his mouth. I heard some cloth tearing. He tried to put something in his mouth and it didn't seem to work, it was much too thick, he was still making noise.

Q Go on.

A I then asked Chow Bew to hold him while I looked around.

Cathro then went to the bedroom where he found rolls of coins underneath the bed, then to the till which he emptied and returned to the back room. At the request of Bew, who was with Ah Wing then lying down on the floor, he searched the pockets of the victim and obtained a few bills. Asked by Bew how much money he had, Cathro answered, "Very little". At the suggestion of Bew, he then went for further searches in the back room in which he was when somebody knocked at the door, whereupon both fled immediately. In cross-examination, Cathro testifies:—

Q Well, how could you stuff this cloth in his throat, or how could you expect to stuff this cloth in his throat if you took your hand off his mouth, even for an instant, without him making such an outcry that the whole neighborhood would hear?

A Just what I was saying, I was holding him, I had my arm around him and his head back, at the same time he was putting the cloth in his mouth.

Q At that time you had your hand off his mouth, didn't you?

A When the cloth was trying to be forced in.

Q How were you silencing him then?

A He did yell then, that is why I say it didn't work.

Q Well nobody next door heard it through this partition?

A It doesn't appear that way.

Q Why did you let him yell?

A Trying to put that cloth in his mouth.

Q I didn't ask that, I asked why did you let him yell?

A What else was I going to do when he tried to put something in his mouth.

Q You could just put the pressure on his throat with your good right arm, couldn't you?
A I guess so.
Q And that is what you did, didn't you?
A I might have put some pressure on his throat.
Q If the man didn't yell you would have to?
A The man was yelling after that.

* * *

Q Well, I'm suggesting that you would have to render him unconscious before you transferred him over to Chow Bew? Now, what do you say about that?
A The man was not unconscious.
Q Or practically so?
A No, he was yelling, putting up a fairly good fight, yet fairly active.

Cathro is referred to the small cut over the right eyebrow, scrapes of the lips, cut on the tongue from which there had been some bleeding in the mouth, the rubbed appearance of the skin of the chin and of the neck and abrasions on the right side of the neck of the victim, and asked:—

Q Actually you didn't know how much pressure you used on that man's neck, do you?
A I never used very much pressure.
Q Well, you don't know what you did in the excitement there, do you?
A Not in complete detail, no.

And as to the moment at which the victim went on the floor, the evidence of Cathro is:—

Q At what stage did the old fellow get down on the floor?
A When I was turning him over to Chow Bew, I guess.

* * *

Later:—

Q At what stage did you get the old man down on the floor?
A I don't know exactly.
Q Wasn't it a fact that he just fell down?
A No, he didn't fall down.
THE COURT: Q He didn't fall down?
A Not that I know of.
Q Well, he got there ultimately, didn't he?
A He was on the floor when I went through his left front pocket, the one I could get at.
Q And unconscious then too, wasn't he?
A Not to my knowledge.
Q Well, did he struggle when you were rifling his pockets?
A He might have, but the other man was holding him.
Q He was not gagged though?
A Not to my knowledge, no.

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On Cathro's own story:—he was the first to resort to violence in the manner planned for; he grabbed his victim from behind, he held him in a manner, known to him to permit strangulation; he hit him on the head with a meat can; both he and Bew, notwithstanding their combined strength, unsuccessfully attempted gagging. And it is then that Cathro turned Ah Wing over to Bew, with the implied request to take responsibility for the means to be adopted in order to permit him to search the premises, and later their victim, for the money.

As to the law. If death, whether intended, anticipated or not, ensues as a consequence of grievous bodily injury, meant and inflicted for the purpose of facilitating the commission of a robbery, the offence, under s. 260 standing alone, is murder. Under s. 69 (1) of the *Criminal Code,* every one is party to such offence who actually commits it, or whose conduct, in relation to its commission by another, comes within the description of either one of sub-paragraphs (*b*), (*c*) or (*d*) of paragraph 1 of section 69 reading:—

> 69 (1). Every one is a party to and guilty of an offence who
> (*a*) actually commits it;
> (*b*) does or omits an act for the purpose of aiding any person to commit the offence;
> (*c*) abets any person in commission of the offence; or
> (*d*) counsels or procures any person to commit the offence.

The fatal injury, in this case, was inflicted either by the appellant or by Bew. On the first hypothesis, Cathro is guilty of murder. On the second, Cathro is a party to murder under section 69 (1). For, on the two hypotheses, the evidence does not permit doubting either that the fatal injury was meant and inflicted for the purpose of facilitating the commission of the robbery in which both were engaged, or that, on Cathro's own evidence, both were at one mind as to the purpose and the means of their common plan, as made and as executed. In such circumstances, this case comes squarely under the law laid down in s. 260 and s. 69 (1) of the *Criminal Code.* As defined, "bodily harm becomes grievous whenever it seriously interferes with health or even comfort. It is not necessary that its effects should be dangerous or that they should be permanent." (Roscoe's *Criminal Evidence* 16th ed. p. 631; Russell

On Crime, 10th ed. Vol. 1, p. 690; Archbold's *Criminal Pleading, Evidence and Practice,* 32nd ed. p. 968; Harris and Wilshere's *Criminal Law,* 17th ed. p. 282; *Rex* v. *Cox* (1); *Rex* v. *Ashman* (2). Before he transferred him over to Bew, the violence which Cathro himself, first alone and then with the assistance of Bew, exerted upon Ah Wing, comes within that definition; hence Cathro and Bew were then at one mind as to inflicting grievous bodily injury. And there is nothing to suggest that, from the moment of transfer—when, in Cathro's own words, Ah Wing was still "yelling, putting up a fairly good fight, yet, fairly active yet", there was a modification in the mind of either party with respect to the flexible rule by which the degree of violence had to be measured. From then on, Cathro relied on Bew to overcome the resistance or yelling of Ah Wing. The evidence does not show that Bew did more than was necessary for that purpose; even if the fatal blow was ill-measured, Cathro, under s. 69 (1), is none the less party thereto.

Assuming that the grounds of appeal, upon the consideration of which we have jurisdiction to enter, might be decided in favour of the appellant, no substantial wrong or miscarriage of justice has actually occurred.

The appeal should be dismissed.

Appeal allowed, conviction quashed and new trial directed.

Solicitor for the accused (appellant): *F. C. Munroe.*

Solicitor for the Crown (respondent): *L. H. Jackson.*

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(1) (1818) Russ. & R. 362; 168 E.R. 846.

(2) (1858) 1 Fost. & Fin. 88.