WALTER GEORGE ROWE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1951

*Apr. 24, 25, 26

*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Murder—Use of revolver subsequent to commission of robbery—Whether accused in flight—No pursuit—Interpretation of s. 260(d) of the Criminal Code as enacted by S. of C. 1947, c. 55, s. 7.

Appellant, with an accomplice, committed an armed robbery at Windsor, and then engaged a taxi driver to drive them to London. The latter became suspicious and went into a service station in Chatham to phone the police, but appellant accompanied him and he was unable to do so. He made another attempt at a service station in London and succeeded in lifting the telephone receiver and asking for the police. Appellant, who had accompanied him, produced a Colt revolver and ordered everyone into the grease-pit at the rear of the station.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock, Estey, Cartwright and Fauteux JJ.

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The taxi driver escaped through a doorway slamming a wooden door behind him. A bullet discharged from appellant's gun passed through the doorway killing a person whose presence was unknown to appellant. It was contended by appellant that the gun was discharged accidentally when he slipped on the floor, and that the trial judge was wrong when he charged that appellant was, after leaving Windsor, fleeing from lawful apprehension since there being no pursuer, it could not be said that he was pursued and, therefore, in flight.

Held (Cartwright J. dissenting), that the appeal should be dismissed as the trial judge was justified in leaving it to the jury to find whether the accused was in flight "upon" (meaning after) the Windsor robbery, even though there was as yet no pursuit. It is sufficient that the pursuit be apprehended and, therefore, the matter of the flight may be subjective so far as the offender is concerned.

APPEAL from the judgment of the Court of Appeal for Ontario affirming appellant's conviction for murder.

W. R. Poole for the appellant.

W. B. Common K.C. and *C. C. Savage K.C.* for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau, Estey and Fauteux JJ. was delivered by

KERWIN J.:—The appellant and one Bechard were jointly indicted and tried on a charge that on November 20, 1950, at London, Ontario, they murdered Clare Galbraith. Bechard was acquitted but Rowe was convicted and his conviction was affirmed unanimously by the Court of Appeal for Ontario. He was given leave to appeal to this Court from that affirmance on two points of law, the first of which is:—

> Did the learned trial judge err in his charge to the jury when he stated that the appellant after leaving Windsor was fleeing from lawful apprehension, thus bringing into operation Section 260(*d*) of the *Criminal Code*?

Rowe testified that a Colt revolver (Exhibit 13) had been taken by him from his boarding house in Detroit, Michigan, with the permission of the landlady's son. On November 20, 1950, Rowe and Bechard, who had boarded at the same place, came to Windsor, Ontario. About 2 p.m. Rowe telephoned a Mrs. Brown in Windsor, the wife of a friend, inquiring if her husband was at home. He was advised that the husband was at work and would not be home until 6 p.m. Rowe knew that Brown had in his possession three automatics and a Colt pistol, and there

was some discussion between Rowe and Bechard as to securing these in order to procure funds. About 2.45 p.m. Bechard, armed with Exhibit 13, forced Mrs. Brown into the basement where he tied and gagged her. She heard another man moving around on the floor above, and in fact Rowe admitted that he and Bechard stole the automatics and pistol with the intention of selling them. After Mrs. Brown had freed herself, she found that the telephone wires to her house had been cut.

About 3.30 p.m., John Jolly, an independent taxi owner stationed at the Prince Edward Hotel in Windsor, about two miles distant from the Brown home, was approached by Bechard and requested to drive Rowe and himself to London. Jolly was told that neither man had funds but he was promised payment upon completion of the trip.

While en route from Windsor to London, Jolly became suspicious because of the conversation between Rowe and Bechard and stopped at a service station at Chatham with the intention of telephoning police. However, Rowe accompanied him and he was unable to carry out his intention. Upon reaching London, on his own initiative, Jolly stopped at a service station and was again accompanied by Rowe. The latter instructed Jolly to proceed to a certain address, which, however, could not be located. By this time Jolly had become even more alarmed and suspicious and drove into another gasoline station. Rowe and Jolly proceeded into the office where Rowe consulted a telephone directory and stated he had discovered the London address he wanted. Jolly noticed that the telephone directory was opened at "Zurich", a municipality some distance outside of London. Jolly's suspicion that the trip was "not legitimate" was then confirmed and he lifted the telephone receiver and asked the operator to get the police. Upon hearing Jolly's request, Rowe immediately pulled out Exhibit 13, which had been returned to him by Bechard after the Brown robbery, and calling to those present "This is a stick up" or "Everybody in the back", he ordered them into the rear of the service station. Jolly and others were herded into the grease pit room. Rowe ordered Jolly to stop and not go on with the others. Jolly hesitated a moment and then ran through a doorway, through a small connecting room, and through an open doorway into the wash rack room, slamming a

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wooden door behind him. While Rowe was in the grease pit room with Exhibit 13 in his hand, a bullet was discharged from it, passing through the wooden door that Jolly had closed and killing Galbraith, whose presence was unknown to Rowe. Rowe's evidence was that he slipped on the floor, thus causing the bullet to be discharged, but that he had no intention of pulling the trigger. While there is other evidence that Rowe was seen to pull back the hammer of the gun and that two distinct clicks accompanying the movement were heard, the point is unimportant in view of the only problem before us under the first question, which concerns section 260 of the *Criminal Code*, and particularly the opening clause and 260(*d*) as enacted by sections 6 and 7 of chapter 55 of the 1947 Statutes.

Before referring to section 260, it should be added that Rowe's evidence was that he intended to proceed to Toronto to seek a reconciliation with his wife and that Bechard also intended to go to Toronto to commence divorce proceedings against his wife; that he (Rowe) intended to sell the five weapons and from the proceeds give Bechard $75 and pay Jolly $50 for his trip from Windsor to London and return, using any balance to proceed by bus to Toronto; that he spent fifteen minutes in an unsuccessful endeavour to locate a purchaser of the weapons in Windsor; that he proposed to make a sale at any available pool room in London; that he hired a cab, rather than take other means of transportation, in order to arrive in London before the closing of the pool rooms in that city,—although he did not know at what time the pool rooms closed; that he had passed through London previously but had never tarried there.

Section 260 as amended in 1947 reads as follows:—

> 260. In case of treason and the other offences against the King's authority and person mentioned in Part II, piracy and offences deemed to be piracy. escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, indecent assault, 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.
>
> (*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, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(*b*) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; 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.

(*d*) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

One of the offences mentioned in the opening paragraph, "robbery", had been committed by Rowe at the Brown house in Windsor. The contention that he did not use Exhibit 13 at the London service station and that Galbraith's death did not ensue as a consequence of its use cannot be sustained. Section 260(*d*) was enacted as a result of the decision in *Hughes* v. *The King* (1), and its provisions are met in this case by the facts that Rowe not only had the Colt upon his person but pulled it out and held it in his hand. That was a use, under any definition of that very ordinary word, and the death of Galbraith ensued as a consequence.

Part of the Crown's case was that Rowe committed, or attempted to commit, robbery at London, and the jury were charged accordingly, but it was also put to the jury, in accordance with another submission of the Crown, that Rowe was in flight upon the commission of the Windsor robbery and the most serious attack was made upon those portions of the charge to the jury dealing with that matter. In argument before us, circumstances were imagined where it was said that there could be no flight but it is sufficient for this appeal to decide that there was evidence upon which the jury, to whom it was left as a matter of fact, could decide that Rowe was in flight upon (which means after) the Windsor robbery. The time element is of importance. About 2.45 p.m. the robbery took place; fifteen minutes, according to Rowe, were spent in an endeavour to locate a purchaser of the weapons; about 3.30 Jolly was engaged for the trip to London, and he was never left alone by Rowe. Rowe had only passed through London and was not familiar with the city, although

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according to his story he intended to dispose of the weapons at a pool room. It was contended that there was no evidence that the police had ever been notified of the Windsor robbery and that, there being no pursuer, it could not be said that Rowe was pursued and, therefore, in flight. That contention is unsound. The whole matter was subjective so far as Rowe was concerned. He knew that he had committed a robbery at Brown's house; he was anxious to dispose of the weapons taken from that house; he spent only fifteen minutes endeavouring to find a purchaser in Windsor; it was Bechard who made the arrangements with the taxi driver but it was Rowe, who had not been seen by Mrs. Brown, who identified himself to Jolly when the latter was raising a question as to being paid for the trip to London. Rowe never let Jolly out of his sight, and coupled with this are the circumstances under which he pulled out Exhibit 13. The trial judge was correct in leaving it to the jury to find whether Rowe was in flight.

The second point upon which leave to appeal was given is this:—

> Did the learned trial judge err in allowing the admission of Exhibit 23 as evidence in the case, and in allowing also all other evidence in connection with the crime committed in Windsor?

At the trial, a very short extract from a statement previously made by Bechard was put in evidence as against him by the Crown in order to show his connection with Exhibit 13. Later, at the instigation of Bechard's counsel, the whole of the statement was admitted as Exhibit 23 but it was made clear to the jury that the extract and the entire statement were evidence only against Bechard and not as against Rowe. The trial judge having ruled that Bechard's statement was voluntary and having permitted Crown counsel to put in as evidence the short extract referred to, it was quite proper that the judge should later permit the whole of the statement to be admitted at the request of counsel for Bechard. The latter was one of the accused and was entitled to have the whole of the statement go in so that the jury might have before it everything that had been said by him. This is not a case where an accused seeks to put in evidence in chief a statement made

by him on some previous occasion, whether to a police officer or not, and the decisions cited in connection with that class of case are inapplicable.

The appeal must be dismissed.

KELLOCK J.:—Put shortly, the question with respect to which leave to appeal was granted and which remains undisposed of, is whether or not there was any evidence of flight with respect to the robbery in Windsor so as to render applicable s. 260(*d*) of the *Code*.

The section provides that, in the case of certain offences including 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,

> (*d*) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

On behalf of the Crown it was argued that the length of time between the commission of the crime in respect of which the flight occurs, and the death, is immaterial if the offender in the interim is evading arrest. On the other hand, the appellant contended that before there can be any flight within the meaning of the paragraph, there must, at the least, be an attempt to apprehend. In other words, it is said that flight involves pursuit, and if there be no pursuit in fact, there can be no flight within the meaning of this legislation.

In my opinion, neither of these contentions ought to be accepted. As to the Crown's contention, I think it is too wide. On the other hand, it has been often pointed out that "the wicked flee when no man pursueth." One of the ordinary meanings of the word "flight" is the "action of running away from danger," and I think the danger (in such a case as the present, danger of loss of liberty) may be apprehended as well as present and actual. In other words, the subjective element in any case may be sufficient.

In *The Queen* v. *Humphery* (1), Tindal C.J. said, with relation to the use of the word "upon" in statutes, at p. 370, that it

(1) (1839) 10 Ad. & E. 335.

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may undoubtedly either mean before the act done to which it relates, or simultaneous with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context, and subject matter of the enactment.

The Oxford Dictionary gives as one of the meanings of the word, "following upon" as well as "immediately after." The French text of the statute here in question reads

. . . ou au cours ou au moment de la fuite du délinquant après la perpétration . . .

In the present instance, "upon" cannot be given the meaning of either before or simultaneously with the commission of the offence, and as the word "immediately" is not used in the statute, I think "upon" should be interpreted in the sense of "following." The question as to whether or not in a given case flight exists is, of course, a question of fact.

In the case at bar, I think the circumstances, which I do not repeat, are sufficient to have enabled the jury, if they saw fit, to find that the appellant, at the time the fatal shot was fired, was in flight upon the commission of the Windsor robbery within the meaning of the statute. The fact that the jury might also have concluded that he and his companion had a new venture in mind involving the sale of the guns or their use in another way to obtain money, did not preclude the jury from taking such a view.

In these circumstances, I would dismiss the appeal. I should like to add that, in my view, we are indebted to Mr. Poole for his argument in this case, and the way in which all difficulties were frankly faced.

CARTWRIGHT J. (dissenting):—This is an appeal, pursuant to leave granted by my brother Taschereau, from a unanimous judgment of the Court of Appeal for Ontario pronounced on February 22, 1951, affirming the conviction of the appellant on a charge of murdering one Clare Galbraith.

The relevant facts are stated, and section 260 of the *Criminal Code* is set out, in the judgment of my brother Kerwin and it is not necessary to repeat them.

I find it necessary to consider only the first point upon which leave to appeal was granted which was as follows:—

First, did the learned trial judge err in his charge to the jury when he stated that the appellant after leaving Windsor was fleeing from lawful apprehension, thus bringing into operation section 260(*d*) of the *Criminal Code*?

On the evidence it was open to the jury to find (i) that the discharge of the revolver which killed Galbraith was accidental, in the sense that it was not discharged by any act of Rowe's done with the intention of discharging it but resulted from his slipping on the floor of the grease-pit room, and (ii) that in the service station at London, where Galbraith was shot, Rowe was neither committing nor attempting to commit any of the offences mentioned in section 260 of the Criminal Code. If the jury did find the facts to be as set out in (i) and (ii) then what moved them to convict Rowe of murder instead of manslaughter must, I think, have been a finding that he was using the revolver during or at the time of his flight upon the commission of the robbery in which he had taken part in Windsor.

On a careful reading of the whole charge I think it clear that the learned trial judge instructed the jury that it was open to them to find that at the moment of the discharge of the revolver the appellant was in flight from the commission of the robbery in Windsor and that if they did so find then as a matter of law, even if they concluded that the discharge of the revolver was accidental in the sense above mentioned, it was their duty to convict the appellant of murder rather than manslaughter. I refer particularly to the following passages in the charge of the learned trial judge:

Now, does that indicate to you that these men were still in flight from Windsor, that they were getting away from the police following that robbery in Windsor? It is for you to say, gentlemen of the jury, whether they were in flight or not, because if they were in flight from the robbery, if their flight had not been discontinued, if there had not been a termination of it, then they come right within that amendment of the Code which I gave to you a few minutes ago.

* * *

You have to look at it this way, that in the case of manslaughter the unlawful act must not be such as the offender knew or ought to have known was likely to cause death. It must not be any of the acts I have described as murder. Therefore, if you find that Rowe did not mean to cause death, or if you have a reasonable doubt about it, or if you

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find he did not mean to cause to the person killed bodily injury which he knew was likely to cause death and that he was reckless as to whether death ensued or not, and if you find he did not mean to cause death or bodily injury to Jolly or knew that he was likely to cause death to Jolly, and *in addition to that, if you find there was no flight,* and if you find there was no attempted robbery, or if you have a reasonable doubt about these things, and you merely find he was pointing that gun and while he was pointing the gun it went off by accident, you would be justified in bringing in a verdict against Rowe of manslaughter, but you have to eliminate all these things that are murder. If you merely find he was not robbing or fleeing from lawful apprehension, that he was merely pointing a gun and the gun went off by accident, as he says, then he would be only guilty of manslaughter. If he has even raised a reasonable doubt in your mind about these items of murder, you would be entitled to make such a finding.

* * *

I say, as I told you this afternoon, *if you say that they were not, when they got to London, escaping from lawful apprehension,* if you can say they were not attempting a robbery, if you can say that he shot at Jolly without intending to cause any fatal harm, then you get down to where he was committing an offence, and did not intend to cause death, then you are in the realm of manslaughter. *But before you are in the realm of manslaughter you must be able to get rid of the crime of flight* and of robbery in London, and the attempt to cause bodily injury to Jolly, which was likely to cause death.

* * *

All I want to emphasize to you, gentlemen of the jury, is that before you get to manslaughter at all in this case you have to eliminate all those items which would be murder.

There is no evidence in the record that at the time of the discharge of the revolver the police in Windsor or anywhere else, or indeed anyone other than Rowe and his accomplice Bechard, knew that the appellant had taken part in the robbery in Windsor. Mrs. Brown, the victim of the robbery, had not seen Rowe and there is no evidence that she had any idea of the identity of Bechard. She had seen Bechard during the robbery and was able to identify him some days later in a police line-up but prior to the robbery he was a stranger to her. There is no evidence that any pursuit of Rowe and Bechard as a result of the robbery at Windsor ever commenced.

It seems to me that the question which we have to decide is whether, in this state of the evidence, as a matter of law on a proper construction of section 260 of the *Criminal Code* it was open to the jury to find that the discharge of the revolver occurred during or at the time of the flight

of Rowe upon the commission of the robbery in Windsor, within the meaning of those words as used in clause (*d*) of the section.

It is, I think, of assistance to consider the state of the law immediately prior to the amendment. The common law is, I think, correctly stated in the following passage in Archbold's Criminal Pleading, 32nd Edition (1949) page 910:—

> If a person, while in the act of committing a felony involving violence, e.g., rape, kills another without having the intention of so doing, the killing is murder. A person who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those measures result, even inadvertently, in the death of the victim. For this purpose, the use of a loaded firearm in order to frighten the victim into submission is a violent measure. If the act is unlawful but does not amount to felony, the killing, generally speaking, is manslaughter.

The common law in this regard was carried in a somewhat modified form into section 260 of the *Criminal Code* as it read prior to the 1947 amendment. For felonies involving violence Parliament substituted the offences enumerated in the opening words of the section and, where the offender neither meant death to ensue nor knew that it was likely to ensue as a result of his conduct, required as a condition of his conviction of murder proof either of the intention to inflict grievous bodily harm or of the administration of a stupefying or overpowering thing or of the stopping of the breath of a person, for the purpose, in each case, of facilitating the commission of one of the specified offences or the flight of the offender upon the commission or attempted commission thereof.

In this state of the law *The King* v. *Hughes* (1) was decided, the unanimous judgment of this court being delivered by Sir Lyman Duff, C.J.C. We are, of course, bound by that judgment except in so far as its effect may have been abrogated or modified by the amendment referred to. It appears to me to have decided that when an accused, who is in the course of committing a robbery accompanied by violence, is using a pistol and such pistol is discharged during a struggle and the death of another person is caused thereby and there is some evidence that such discharge was accidental, the trial judge must instruct the jury that

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if they reach the conclusion that the pistol went off by accident—in the sense that it was not discharged by any act of the accused done with the intention of discharging it—(or are not satisfied that it did not go off in that manner) they should find a verdict of manslaughter unless they are satisfied that the conduct of the accused was such that he knew or ought to have known it to be likely to induce such a struggle as occurred and that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle.

By the 1947 amendment the following further alternative condition was added to section 260:—

> (*d*) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

I find myself in respectful agreement with the argument of Mr. Common that the amendment does make a change in the law as laid down in *The King* v. *Hughes*, with the result that now if an offender during or at the time of the commission of one of the offences mentioned or during or at the time of his flight upon the commission or attempted commission thereof is using a revolver and death ensues as a consequence of its use this will be murder even although the actual discharge of such revolver was accidental in the sense above mentioned. It remains to consider the meaning of the words "flight upon the commission of the offence." Counsel were not able to refer us to any reported case dealing with the interpretation of these words.

Mr. Common, while submitting that in the case at bar he does not need to press his argument so far, contends that the flight of the offender, within the meaning of the section continues so long as he is apprehensive of and seeking to evade arrest. The difficulty in accepting this is that to do so would bring about the result that once a person had committeed one of the offences mentioned in section 260 he would, within the meaning of clause (*d*) of that section continue to be in flight until he was apprehended and would therefore be guilty of murder if anyone was killed by the accidental discharge of a pistol which he was using for any purpose.

Mr. Poole contends that the word "flight", as used in the section, pre-supposes the existence not only of a person who is fleeing but also of a pursuer and that a "flight upon the commission of an offence" cannot still be in progress hours after such commission when there has been no pursuit at all.

The effect of the amendment is, in circumstances to which it is applicable, to render a person guilty of murder who would not otherwise have been guilty of that crime and any doubt as to its meaning which remains after the application of the rules of construction must be resolved *in favorem vitae.*

In construing the section, I think it should be borne in mind that a person who has committed a crime is usually apprehended, if apprehended at all, in one of two ways; either (*a*) at or near the scene of the crime or as the result of a pursuit, long or short, commencing as he leaves the scene of the crime or (*b*) having escaped from the scene of the crime, being neither interrupted during its commission nor freshly pursued after its commission, he is later apprehended as the result of police investigation and detective work. It seems to me that the words "the flight of the offender upon the commission" as used in clause (*d*) are apt to describe the situation suggested in (*a*) above, to the exclusion of that suggested in (*b*). I can find no logical stopping place between so holding and accepting the argument of counsel for the Crown which is put in the following way in his factum:—

> It is further submitted that in the circumstances of this case having regard to the nature of the armed robbery at Windsor that "flight of the offender" continued during the freedom of the offender while evading arrest and terminated upon his apprehension. The length of time between the crime and apprehension is immaterial if the offender is evading arrest thus escaping from lawful apprehension. To this extent evading arrest, and escaping lawful apprehension are synonymous.

I do not think that the words—"during or at the time of . . . the flight of the offender upon the commission of an offence"—are synonymous with the words—"so long as an offender is a fugitive from justice"; nor do I think that flight within the meaning of the section continues so long as fear of apprehension lingers in the mind of the offender.

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I do not think it necessary to decide whether the existence of a pursuit is in all cases a necessary condition of the existence of a flight; but for an offender's conduct to fall within the meaning of that word as used in clause (*d*) after he has got well away from the scene of the crime I think it necessary that there be in progress a pursuit continuing from such scene. A flight from a pursuit commenced later as a result of the offender being traced or identified by detective work would not, in my opinion, be a flight upon the commission of the offence but rather a flight from such fresh pursuit or the danger thereof. Among the meanings given to the word "upon" in the Oxford Dictionary are "following upon", "immediately after." It is in this sense that I think the word is used in section 260(*d*).

I have reached the conclusion that there was no evidence in the case at bar on which it could be held that at the time of the fatal discharge of the revolver the appellant was in flight upon the commission of the robbery in which he had taken part in Windsor. No pursuit of the appellant was in progress. None had commenced. He was separated by more than 100 miles in distance and by some hours in time from the scene and moment of the Windsor robbery. He and his accomplice had made good their escape from the vicinity of the scene of the crime. Thereafter they had spent a short time in Windsor endeavouring to dispose of the proceeds of the robbery and, failing in this, they had negotiated with the taxi driver, Jolly, to drive them as far as London where they hoped to dispose of such proceeds for enough money to enable them to pay the taxi fare and to continue their journey to Toronto where for varying reasons each of them wished to visit his wife. If my opinion as to the proper construction of the section, set out above, is correct, it is clear that under these circumstances the appellant in the service station at London was not in flight upon the commission of the robbery at Windsor. Indeed if I understand the theory of the Crown, in so far as it relates to flight from Windsor rather than to attempted robbery at London, it is that the appellant drew his revolver in the London service station not because he had any thought that a pursuit from Windsor was in progress but rather because he feared that if the police came in answer to Jolly's summons they would find him in possession of

stolen goods. Had the appellant turned to flee at the moment of Jolly's call to the police he could not in my opinion be said to be fleeing upon the commission of the robbery in Windsor but only from the London police because he feared that they would find evidence which would ultimately lead to his apprehension for that crime.

If it is suggested that the construction, which I have indicated above to be, in my opinion, the correct one, brings about too lenient a result, it must be remembered that we are concerned with arriving at the intention of Parliament in a case where *ex hypothesi* the appellant not only had no intention of harming anyone but had no intention of discharging the revolver at all and that the question is not whether he ought on such hypothesis to be acquitted but whether he must as a matter of law be convicted of murder to the exclusion of manslaughter.

For the above reasons it is my respectful opinion that the learned trial judge erred in law in directing the jury that there was evidence on which they could find that the revolver was discharged during the appellant's flight upon the commission of the robbery in Windsor, within the meaning of section 260(*d*) of the *Criminal Code* and that if they so found they must convict him of murder. I think it impossible to say that but for this direction the jury must necessarily have found the same verdict.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed.

Solicitors for the appellant: *Wright and Poole.*

Solicitor for the respondent: *A.G. for Ontario.*