ROBERT ALFRED BRADLEY .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1956

*May 29
*Jun. 27

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Murder—Plea of self-defence and drunkenness—Fist fight—Criminal Code, s. 201(a)(i) and (ii).

The appellant was convicted of murder. His main defences had been self-defence, drunkenness and lack of intention to kill.

The evidence was that the appellant and the victim had, in a deserted lane at about 2 a.m. on a very cold night, engaged in a drunken fist fight; that the victim fell to the ground and was kicked by the appellant; that while the victim was lying bleeding and unconscious, in below zero weather, the appellant removed the victim's coat, placed a leather belt around his head, running it through the mouth and knotting it tightly behind the left ear, and then abandoned him. The autopsy revealed numerous cuts on the head and a depressed fracture of the skull. The lungs contained an abnormal amount of blood.

The conviction was affirmed by the Court of Appeal, without written reasons.

Held (Rand, Cartwright and Nolan JJ. dissenting), the appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Fauteux JJ.: On the uncontradicted evidence of medical and law enforcement officials and the admittedly free and voluntary statements made by the appellant, the conclusion is irresistible that, failing any defence that could arise from the evidence, the appellant's conduct throughout the entire transaction could only manifest an intention either to cause the death of the victim or to cause the victim bodily injury known to him to be likely to cause or accelerate death and being reckless whether death ensued

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Nolan JJ.

1956

BRADLEY v. THE QUEEN

or not. It is impossible to say with any degree of certainty to which one of the various injuries death could ultimately be attributed. Whether the fracture of the skull was caused by the appellant, intentionally or accidentally, what he did, once his victim had become unconscious, on the medical evidence, accelerated death and there is no place for any speculation as to what his intentions then were if they are to be measured by his actions. Therefore, subject to the consideration of possible defences and assuming particularly that the appellant was sane and sober, as the law presumes, there could be no doubt that what he then did is only reasonably consistent with either an intention to kill or to cause such bodily injury known to him to be likely, in the circumstances, to cause or accelerate death, being reckless whether death ensued or not. Subject to the consideration of possible defences, whether such a killing by acceleration amounts to murder or manslaughter depends whether, on the evidence, the case is one within s. 201(*a*)(i) or (ii) of the *Code*.

The trial judge charged the jury as to insanity, provocation, self-defence and drunkenness. These directions are unimpeached by the appellant. Obviously, the jury reached the view that none of the defences was made out. Having particularly failed to find that the appellant was drunk to the extent required to support a defence of drunkenness, which was the main defence here, there was no other verdict possible but the one rendered. There was no substantial wrong or miscarriage of justice.

Per Locke J.: All the acts of the appellant must be considered together and the matter cannot be limited to the blows which presumably felled the victim.

There is no substance to the objection that the trial judge made a finding in law that the appellant's participation in the fight was an unlawful act and a crime when the facts were in dispute. The facts were not in dispute and assaulting another person is a criminal offence subject to the exceptions explained in the charge.

Reading the charge as a whole, there was no misdirection for the trial judge to say that the appellant was presumed to intend all the consequences which might flow from the fight, even though he may not have known that the victim received a fractured skull, and that he was thus presumed to be guilty of murder, subject to possible defences. The necessity for proof of the intent required by s. 201(*a*) of the *Code* was impressed on the jury.

The contention that the trial judge should have instructed the jury that if the victim fell during the fight and fractured his skull on some object it could amount to no more than manslaughter, cannot be entertained. If the appellant struck the victim with his fists intending to kill him or cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not, it would be murder and not manslaughter.

The reading by the trial judge of s. 196 of the *Code*, coupled with the reference to the condition in which the victim was left and the instructions in the charge as a whole, was sufficient to dispose of the ground that the trial judge failed to tell the jury under what circumstances it would have been manslaughter under that section.

The objection that the trial judge failed to instruct the jury, that if they found that the appellant accelerated the death, under what circumstances it would amount to manslaughter, ignores the instructions as to whether the appellant had caused the death and as to his intent in assaulting and leaving the victim gagged and unconscious in the snow.

The jury, finding that the appellant was capable of forming the intent necessary to constitute the offence of murder, has by its verdict found that he had formed that intent. No other finding was open to them upon the evidence. No substantial wrong or miscarriage of justice occurred.

Per Rand J. (dissenting): The brain contusion was the vital physical fact and therefore the question of actual intent was of the first importance. The charge confused the question of causing a homicide with that of attributing to the appellant an intent or state of mind. If the appellant knew nothing of the skull fracture or existing conditions that coupled with a knockdown could cause it, it is impossible to see how anything flowing from it could be considered to be within any legal presumption of intention related to consequences, natural or unnatural. It was fatal to the charge to omit the vital link of knowledge actual or imputed that could produce such a natural consequence, as well as the intent to bring such an injury about.

As to the supplementary cause of tying the belt and abandoning the victim, which it was contended accelerated the death, the general verdict makes it impossible to say whether the jury proceeded upon the one cause or the other; and any finding by a court of appeal that the jury must have found guilt on the one or the other might be based on the one that the jury rejected. Furthermore, it cannot be seriously contested that the jury could have found in favour of the appellant that this supplementary conduct had not been carried out with the intent of s. 259 of the old *Code* and that the passion of the fight had not cooled. Nothing of this was contained in the charge and no Court can usurp the function of the jury and make such a finding under s. 1014(2) of the old *Code*.

Per Cartwright J. (dissenting): It was misdirection, fatal to the conviction, to tell the jury not that they might but that they must find that the appellant had the intent required by s. 201(*a*)(i) or (ii) of the *Code* unless they found that he was through drunkenness incapable of forming the intent to cause death or to cause bodily injury that he knew was likely to cause death and was reckless whether death ensued or not. It was for the jury, giving due weight to the rebuttable presumption which imputes to a man an intention to produce those consequences which are the natural result of his acts, to decide as a fact whether the appellant had the guilty intent necessary to make him guilty of murder; and, in particular, it was for them to say whether the fracture of the skull was a natural consequence of any blow struck by the appellant.

n the circumstances of this case, it is impossible to say that a jury properly instructed and acting reasonably must necessarily have convicted the appellant of murder. It was open to them on the evidence to find a verdict of manslaughter. On the other hand, it is not possible to say that there was no evidence on which the jury might find a verdict of murder, and, therefore, there should be a new trial.

1956

BRADLEY
v.
THE QUEEN

Per Nolan J. (dissenting): It was a fatal defect in the charge of the trial judge to instruct the jury, as he did, that the appellant was presumed to have intended the consequences which flowed from the fight, even though he might not have known that the victim suffered a fractured skull, and that an intent, as required by s. 201(*a*)(i) or (ii) of the *Code*, must be attributed to him. It was for the jury to say whether the intent of s. 201 was to be attributed to the appellant so as to justify a verdict of murder; also to say whether the fracture of the skull was caused by a blow of the appellant or by the victim falling on a pile of scrap iron nearby.

It was for the jury to determine whether, on the facts, manslaughter or murder was the appropriate verdict and there is a doubt, which must be resolved in favour of the appellant, that the verdict would necessarily have been the same had no irregularity occurred.

APPEAL from the judgment of the Court of Appeal for Manitoba, affirming the conviction of the appellant for murder.

J. L. Crawford for the appellant.

A. S. Dewar for the respondent.

The judgment of Kerwin C.J. and Taschereau and Fauteux JJ. was delivered by

FAUTEUX J.:—This is an appeal from a unanimous judgment, delivered without written reasons by the Court of Appeal for Manitoba, affirming a verdict of murder rendered against the appellant. The grounds of law, upon which leave to appeal to this Court was granted, are all exclusively related to the address of the trial judge to the jury. These grounds and all the material facts leading to the conviction of the appellant, are set out in detail by other members of the Court and need not therefore be recited here.

On a consideration of the uncontradicted evidence of medical and law enforcement officials, who took charge of the case when the body of the victim was found lying in a lane on the morning of January 6, 1955, and of the admittedly free and voluntary statements made by the appellant, one is irresistibly forced to the conclusion that, failing any defence susceptible to flow from the evidence, the conduct of the appellant throughout the entire transaction can only manifest an intention either to cause the death of the person he killed or to cause to that person bodily injury known to him to be likely to cause or accelerate death and being reckless whether death ensued or not.

In the course of the fight in which both were engaged in the lane, around two o'clock of the night, the appellant gave a blow with his fist to the deceased and the latter fell to the ground; the appellant then kicked him; and knowing that the victim was lying unconscious, in that deserted lane, at that hour of a very cold night—it being four degrees below zero—the appellant removed the coat of his victim, placed a leather belt around his head, running it through his mouth and knotting it tightly behind his left ear; and he then abandoned his unconscious victim, who was profusely bleeding, with part of his body exposed.

No one suggests that without these and all the other injuries inflicted on him by the appellant, Flatfoot would have died that day from any other cause; indeed, the case was pleaded throughout on the basis that the appellant himself caused the death of the victim. It is impossible to say with any degree of certitude to which one of the various injuries then suffered by the deceased death could ultimately be attributed. It is clear, however, that even if the fracture of the skull was, as suggested by counsel for the appellant, the result of the fall to the frozen ground or on some iron junk and that this fracture was the primary cause of death, the victim did not die immediately. He was still alive when the accused proceeded thereafter to tie the belt around his head and through his mouth, to remove his coat and to abandon him in this critical condition of unconsciousness and haemorrhage, in the circumstances above described. In the opinion of Doctor Ross, "death was not instantaneous but more prolonged" and exposure was a contributing cause. The large quantity of blood found, in the morning, where the head of the body was resting and which, while the appellant was kneeling close to the victim, permeated parts of his clothes, does not suggest that the circulatory system had immediately ceased to function. Whether the fracture of the skull was caused by the appellant, intentionally or accidentally, what he actually did, once his victim had become unconscious, on the medical evidence accelerated death and there is no place for any speculation as to what his intentions then were if they are to be measured by his actions. This was not an abandonment devoid of significance nor the case of a hasty flight from the scene of the crime. Subject to the consideration of possible defences

1956

BRADLEY v. THE QUEEN

Fauteux J.

which might arise from the evidence and assuming, particularly, that the appellant was sane and sober, as he is presumed under the law to have been unless the contrary is shown, there can be no doubt that what he then did is only reasonably consistent with either an intention to kill or to cause to the person he killed such bodily injury known to him to be likely, in the circumstances, to cause or accelerate death, being reckless whether death ensued or not. In Archbold's Criminal Pleading, Evidence & Practice, 32nd ed., it is stated at page 893 that:—

> If a man is suffering from a disease, which in all likelihood would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this is such a killing as constitutes murder (1 Hale 427), or at the least manslaughter.

In the case of *Edmunds* (1), the Lord Chief Justice, speaking for the English Court of Criminal Appeal, said at p. 258:—

> It is clear that if the injuries accelerated the death, the question whether the deceased was in a weak state of health at the time they were inflicted is immaterial, and that the appellant would be guilty of murder.

Under s. 199 of the *Criminal Code*:—

> Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

The fact that such other cause would be, as in the present case, attributable to the same person who accelerates the death does not, in the eyes of the law, improve the position of the appellant.

Subject to the consideration of possible defences, whether such a killing by acceleration amounts to murder rather than manslaughter depends upon whether, on the evidence, the case is one within the provisions of section 201(*a*)(i) or (ii).

With respect to possible defences, the trial judge charged the jury as to insanity, provocation, self-defence and drunkenness. These directions are unimpeached by the appellant. It is the defence of drunkenness, however, which in this case, was the defence of substance and indeed, on the evidence, drunkenness was the crucial issue. While it may be said that, when dealing generally with the presumption

(1) (1909), 2 Cr. App. R. 257.

that a man is presumed to intend the natural consequences of his act, certain statements of the charge could be objectionable, the same matter was dealt with again, as it had to be, when the specific instructions were given as to drunkenness and were then related to the provisions of section 201(*a*)(i) or (ii). In this regard, the following instructions may be quoted:—

If you decide that the accused caused the death of the deceased, you must next decide, Did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.

* * *

If you come to the conclusion that the accused was not insane at the time the offence was committed, the question of drunkenness is still a matter requiring careful consideration, because it affects the capacity to form an intent and to know the consequences of his act. This involves a careful consideration of all the evidence relating to drunkenness.

* * *

Then, if you decide he was drunk, you must decide if he was, firstly, so drunk as to be insane; secondly, drunk to a lesser degree, but so drunk as to be unable to form an intent about what he did or to appreciate the consequences of his act; and thirdly, drunk, but not so drunk as to be unable to form such an intent. Upon any of these points if you have a reasonable doubt, the accused must be given the benefit of that doubt.

Now if you come to the conclusion that the accused was not insane or so drunk as to be insane, then you must decide if he was so drunk as to be unable to form an intent to commit the crime with which he is charged. If on a full consideration of the evidence you conclude that he was in such a state of drunkenness as to be unable to form such an intent or if you have a reasonable doubt on the matter, then subject to the questions of self-defence and provocation, which counsel for the accused really left me to deal with and which I will have to deal with, you must find the accused not guilty of murder but guilty of manslaughter.

The judge then reviewed exhaustively all the evidence related to drunkenness and said:—

If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

And at the end:—

I want to remind you again when the accused came before this Court he did so, as every accused does, with the presumption of innocence in his favour, and the burden of proving the guilt of the accused is upon the Crown from the beginning to the end of the case. There is never any

1956

BRADLEY v. THE QUEEN

burden on the accused to prove his innocence. It is not until the evidence is all in that a verdict can possibly be found. If the evidence raises a reasonable doubt as to the guilt of the accused, he is entitled to the benefit of that doubt on every point that has to be decided.

Fauteux J.

From the verdict rendered, it is evident that the jury reached the view that none of the defences upon which they were instructed was made out. Having particularly failed to find that the appellant was drunk to the extent required by law to support a defence of drunkenness, there was, in my view, no other verdict possible but the one rendered by the jury. Whatever may be the merits of all the points of law raised, there was, in view of the evidence before the jury, no substantial wrong or miscarriage of justice. I agree with the conclusion reached by the Court of Appeal for Manitoba. The appeal should be dismissed.

RAND J. (*dissenting*):—The controlling question in this appeal is whether the charge dealt properly with the matter of the intent of the accused.

The medical evidence presented by the Crown included that of Dr. Ross, a pathologist, who had performed the autopsy. Besides two cuts in the scalp to the bone each $1\frac{1}{4}''$ to $1\frac{1}{2}''$ long and one above each ear he found a star-shaped laceration $1\frac{1}{4}''$ in diameter $1\frac{1}{2}''$ behind the left ear which led to a fracture of the skull $2\frac{1}{4}''$ below. The fracture held four bone fragments covering an area of $1\frac{1}{4}''$ by $\frac{3}{4}''$. These were raised or extended $\frac{3}{4}''$ inside the skull and into the brain which was lacerated and covered with blood. In the doctor's opinion the fracture was caused by external violence applied from above downwards, a much greater force than would be required for the cuts above the ears. The latter could have been caused by the kick of a boot shown to have been worn by the accused, who admitted having kicked the deceased "a couple" of blows. The doctor did not, however, believe that the stellated wound and fracture had been caused by the toe of a boot. He described the kind of instrument indicated by the form and character of the wound and fracture as having a surface moderately sharp with a relatively blunt point like a small-headed hammer or a very sharp rock. A scarf had been tied about the deceased's neck, but no evidence of constriction of the neck or of any obstruction to the throat was found. A belt had been fastened around the head covering the mouth or

lips and its effect in relation to the death was speculative. The motive behind either the scarf or belt is not clear. An analysis of the blood showed 396 milligrams of alcohol concentrated in 100 milliliters of blood, indicating severe intoxication.

In his opinion several factors may have contributed to the death. An exposure to four degrees below zero of a person so intoxicated could itself have been fatal and that cause could have been accelerated by the brain injury. Conversely the contusion of the brain was equally sufficient, and probably aggravated by the alcoholic condition and the exposure:—

> . . . the skull injuries were such that they would render a person unconscious, and being exposed to cold in this manner would result in his death. A high blood level of that level would similarly render a person unconscious and in similar exposure would be expected to cause his death.

He could not say which of the two had rendered the deceased unconscious but Mr. Dewar agreed that it could be taken as the fracture. It is not suggested that the other two scalp wounds or the abrasions on the cheeks played any part in the death.

It can be seen, therefore, that the vital physical fact was the brain contusion. It follows from the doctor's description of the instrument which might have caused it that if the deceased had been struck in the face and had fallen backwards on a sharp stone or piece of metal, the fracture could have resulted; and this possibility is strengthened by the direction taken by the violence, downwards and inwards. There was, near the body, in a lane leading to the rear of buildings, a pile of miscellaneous pieces of iron. The accused with the deceased had walked from a restaurant to the lane; two others who had been with them and were called as witnesses, following after, had stopped in a vacant lot 40 or 50 yards from where the body was found and after remaining there ten minutes or so had returned to the cafe. The movements of the accused from midnight until 3.05 a.m. were fairly well covered by a number of witnesses and nothing indicates the possession of an instrument that fits the description given. There was snow on the ground covering the area. The time taken up by the drinking and

1956

BRADLEY v. THE QUEEN

Rand J.

leading up to the quarrel was not considerable and Mr. Dewar rather stressed the fact that the period between leaving the restaurant and reaching the railway where the accused entered a box car was within 45 minutes.

The charge did not deal with the iron pile as a condition within the area in which the fight had taken place or whether or not the accused was aware either of it or other objects scattered around that could have been the means of such a fracture: and there can be little doubt that he did not realize that such an injury had been suffered. The deceased was a well built man, evidently in good health, probably around thirty-five or forty years of age. The accused is thirty-seven and likewise seems well set up. Both had been drinking beer and alcohol. From an earlier incident the same night, the deceased seemed easily provoked although on that occasion easily mollified. What in fact took place between them was a brutal drunken brawl.

The question, then, of actual intent became of the first importance. In the course of the charge, the trial judge used the following language:—

> In considering whether an accused is capable of having the intent to cause death or of having the intent to cause bodily harm, and being reckless whether death ensues or not, and knowing that the bodily harm done is likely to cause death, we start with two presumptions of law. . . . The second presumption of law you have to consider is that every man is presumed to have intended the natural consequences of his acts, and therefore, for example, where one man deliberately shoots a gun at another, an intent to cause death, or at least to cause bodily harm likely to cause death, will be presumed.
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> * * *
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> The injury (the fracture) was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later, so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.
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> * * *
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> If you decide that the accused caused the death of the deceased, you must next decide, Did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.

Other passages emphasized "capacity" to the same effect. In none of them is any distinction made between what is meant by the "natural consequences" as related to the

direct or indirect cause of death in fact and as related to the intention made responsible for death. What the language used embraces is the consequence of death regardless of hidden and unappreciated causes. So stated it means that the legal presumption would hold the accused, because of the illegal fighting, to have intended to bring about the death by the fracture and the injury to the brain, an intention which, assuming him to be capable of forming it, the jury were told they must attribute to him.

This, with the greatest respect, confuses the question of causing a homicide with that of attributing to the accused an intent or state of mind. Under the *Code* as at common law the person whose act with its consequences operating directly or indirectly in fact do bring about a death is looked upon as the cause of it and in the earliest days that itself was sufficient to attract legal responsibility. In the course of years this was modified and under the *Code* the classification of the stages of homicide leading from the actual cause to the final liability for murder or manslaughter is clearly set out. Section 250 of the former *Code* defines "homicide" in the sense I have indicated. Next is a subdivision into "culpable" or "not culpable", with the latter of which we are not concerned. Culpable homicide is "the killing of any person either by an unlawful act or by an omission", s. 252(2), and is either murder or manslaughter. Section 259 proceeds to the definition of murder and in s. 260 it becomes associated as an incidental consequence with the commission of certain other crimes. By s. 252, culpable homicide, not, within those two sections, amounting to murder, is manslaughter, which is therefore the residual aggregate of acts of culpable homicide. The *Code* following the common law, does not expressly distribute *mens rea* to all cases of manslaughter; for example, "unlawful acts" still remain a not wholly determined area, the nearest pronouncement being that of the House of Lords in *Andrews* v. *Director of Public Prosecutions* (1).

Assuming that the death here was a culpable homicide, the first and essential inquiry is whether it comes within the two sections dealing with murder. Applicable to the facts, there is, by s. 259(*a*), the specific intent to cause the

(1) [1937] A.C. 576.

1956

BRADLEY v. THE QUEEN

Rand J.

death, and (*b*) that the offender "means to cause to the person killed any bodily injury *which is known* to the offender to be likely to cause death, and is reckless whether death ensues or not". If, in this case, the fracture was caused by the fall backwards on a sharp point of iron, it is not suggested by the Crown that the presence of such a means of injury was shown to be within the knowledge of the accused, much less that he intended to cause bodily injury by that means. Then in s. 260 the other crimes out of which murder may arise are specifically named but they do not include a mutual battery, to which the language, "means to inflict grievous bodily injury for the purpose of facilitating the commission of" an offence named or his flight thereafter, is inapplicable. Finally s. 261 reduces the act that would otherwise be murder to manslaughter if it is inflicted in the heat of passion aroused by provocation. But in the absence of knowledge of the iron or other object there was nothing to bring the case within the provisions of ss. 259 and 260 unless the intent was connected with the blow of the fist or the kicking and, apart from the fact that if these had been done in the passion of the fight an intent to kill would not have converted the offence into murder, that either could have caused the death, a view rejected by the medical evidence, is not contended.

The charge then never really put to the jury the substantial defence. If the accused knew nothing of the skull fracture nor existing conditions that coupled with a knockdown could cause it, I am quite unable to see how anything flowing from it could be considered to be within any legal presumption of intention related to consequences, natural or unnatural. As put to the jury, the only question to be considered was the mental capacity of the accused to appreciate such a sequence of events and such a result, a capacity which I will assume him to have had; but that omitted the vital link of knowledge actual or imputed that could produce such a "natural consequence", as well as the intent to bring such an injury about. This, in my opinion, was a fatal omission which vitiated the charge.

These considerations deal with what may be called the primary acts which brought about the death. A subsidiary or supplementary cause, distinct and separate from the former, is suggested in the tying of the belt around the head

of the deceased, the possible effect of which I have mentioned, and the flight of the accused, thereby abandoning the victim, drunk and unconscious, in a remote spot, in early morning and zero weather. These acts, it is said, "accelerated" the death, as on the evidence they might have been found to have done so, and are to be held themselves conclusively to constitute acts of murder.

Assuming that flight, after knocking down in a mutual fight a person who, through a hidden cause, is rendered unconscious, can be looked upon as a new and felonious act, and assuming also that the charge sufficiently differentiated between these two groups of facts as independent causes, it is obvious that from the general verdict found it is impossible to say whether the jury proceeded upon the one or the other; and any finding by a court in appeal that the jury must have found guilt on the one or the other might be on that which the jury rejected.

But there is still graver objection to such a step. This supplementary conduct to be brought within s. 259 must have been carried out with the intent of bringing about death or was such as to be known by the accused to be likely to cause death and was done recklessly as to its result. It must further be found that before being done there had been time for the passion of the fight to have cooled. That these facts could have been found in favour of the accused cannot, in my opinion, be seriously contested. Nothing of this was contained in the charge and it would be a usurpation of the function of the jury for any Court to make, as we are asked by the Crown under s. 1014(2) of the *Code* to make, such a finding on this part of the issue.

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

LOCKE J.:—This is an appeal brought pursuant to leave from a judgment of the Court of Appeal for Manitoba, dismissing the appeal of the present appellant from his conviction for murder, after a trial before the Chief Justice of Queen's Bench and a jury.

The five questions of law upon which leave to appeal was granted are stated in other reasons to be delivered in this matter and I do not repeat them.

1956

BRADLEY v. THE QUEEN

Locke J.

It is necessary for a proper consideration of this matter to consider in detail the facts which were proven in evidence at the trial. So far as they are relevant they were as follows:—

At about 2.15 of the morning of January 6, 1955, the appellant left the St. Louis Café, a small restaurant situated on Higgins Avenue in Winnipeg, a short distance east of Main Street, in company with an Indian, August Flatfoot, and two other men, by name Jorundson and Bard. The appellant and the Indian had been drinking intermittently during the previous evening and earlier that morning. Both had been drinking a mixture of rubbing alcohol and some soft drink and, to the restaurant keeper who saw them at the time, Flatfoot appeared drunk. The four men separated shortly after leaving the place, the appellant and Flatfoot announcing they were going to get some more alcohol and walked together east on Higgins Avenue. Jorundson and Bard said they would wait for them and, according to them, after waiting a few minutes, the other two not returning, they left to go to a place where they might spend the night.

At about 7 o'clock that morning the body of Flatfoot was found lying in a lane running east and west, south of and parallel to Higgins Avenue. Macdonald Avenue lies to the south of Higgins Avenue and runs parallel to it and the body was found lying face downward in the snow at the rear of 107 Macdonald Avenue, which is approximately opposite to the rear of 154½ Higgins Avenue. Later that day the appellant was apprehended at St. Malo, a village south of Winnipeg, and brought by an officer of the Royal Canadian Mounted Police to that city and lodged in the jail.

Early the following morning the appellant, after being properly warned, made a statement to the police which was admitted in evidence at the trial. When he was informed by Detective Hinton that he might be charged with the murder of Flatfoot, he said first that "It was self-defence" and then dictated a statement which was taken down by the detective and, after having been read over, signed by the

appellant. His statement, after reciting his movements up to the time he had gone to the restaurant and met Flatfoot and the other two, said:—

> Gus and me kidded each other along, and then we tossed up for the coffees and Gus lost, so he bought for the four of us. Then we went down Higgins Ave., you know that lot at the back of the terraces there. We started drinking there, then Gus started swearing at me. I guess I swore at him too, and then he pushed me. I got mad and we started to fight. The other two guys walked away. Gus hit me about three or four times. He gave me one right in the mouth. I got a couple of scratches. I hit him with my left. I got in a few, but I hurt my hand. You can see it's all swollen. Gus fell down and I kicked him a couple. I guess it was self-defence. Then I fell down, that's when I got the blood on my pants. I put his scarf around his neck because he was unconscious, and I thought he might get cold. I put the belt around his head loose. I guess I thought it would do some good.

Some two hours afterwards, Detective Hinton, with another officer, after again properly warning the appellant, asked him what had happened to the coat Flatfoot was wearing and he then said:—

> After the fight, Gus was lying on the ground, he had his coat half on, so I guess I took it off him. I put it under my arm. I had it with me in the gravel car. I was using it to sit on and that, and I left it in the car when I got off the train.

When brought to the police station on the afternoon of the previous day, the condition of his clothing and of his body had been examined by Inspector Webster of the city police force. The left leg of his trousers was stained at the knee and the underwear worn by him was stained in the same place, and the stains were shown to have been caused by blood. The appellant's left hand was badly swollen from the base of his fingers to the wrist and there were three slight scratches on his face. There was no evidence of any other physical injury.

The body of Flatfoot was lying with the head to the north, the feet being 4 feet distant from the back of a shed at the rear of 107 Macdonald Avenue. The conditions existing at the place were observed by police officers Edwards, Booden and Scott and photographs were taken before the body was moved. The coroner, Dr. Fryer, was summoned, arriving at 7.40 a.m. and, after examining the body, pronounced life to be extinct. He gave in evidence some account of its condition and attempted to estimate the time of death which, he thought, had been some time

1956

BRADLEY v. THE QUEEN

Locke J.

between 1 and 3 o'clock that morning. The man was not wearing an overcoat, his trousers had been ripped down from the waist to the crotch, both back and front, and his buttocks were partly exposed. A leather belt obviously taken from the body of the victim ran through the man's mouth and was tightly knotted behind his left ear. The hands were bare and the arms and the eyelids were frozen. It was 4° below zero and there was no wind. To what extent the rest of the body was frozen was not stated by the coroner. He observed the wounds on the head which were more closely described by Dr. Ross, a pathologist, who later the same day conducted a *post mortem*.

A plan prepared by Constable Scott, from measurements made by him, before the body was moved, showed the width of the lane to be 18 feet. Its northern limit lay 82 feet to the south of the southerly limit of Higgins Avenue, the southerly limit being the same distance from Macdonald Avenue. Billboards erected opposite the place on the south side of Higgins Avenue obstructed the view from that street. The evidence of the constables and the photographs taken by the photographer Allison show that, a short distance to the east of the head and shoulders of the man as he lay on the snow and at a lesser distance to the east of his buttocks, there were large patches of what they assumed to be, and was proven to be, blood. Flatfoot's hair, which was long and thick, was matted with blood which had come from three cuts on his head, one over each of the ears and one at the back behind the left ear, and there was blood on the back of his clothing. Between the place where the body was lying and the rear of the shed above referred to, there was what was described and which appears from the photographs to have been a quantity of metal and other junk, including what appears to be an old carriage wheel, part of a metal bed and some other miscellaneous material. Snow had drifted over the lower part of this junk.

In the back yard of 154½ Higgins Avenue, a hat which proved to be that of Flatfoot was found at a distance of 30 feet from his body.

Around the place where the body was lying, the snow had been trampled. The photographs of the snow drifted against the pile of junk do not indicate that it had been

trampled or that there were any bloodstains on it, and there is no suggestion in the oral evidence that there was any blood found on this snow, or on the junk itself.

The nature of the injuries to the body of the deceased man was described by Dr. H. M. Ross, who performed the *post mortem*. Over the right ear there was a cut 1½ inches long, the edges of this were sharp and it had cut through the tissues right to the bone. A somewhat similar cut 1½ inches in length was found above the left ear, of the same nature as the one first described. An inch and a half behind the left ear there was what the witness described as "a similarly-sized laceration except that it was more star-shaped in that it had a number of other cuts coming from it". Altogether it was 1¼ inches across. The examination disclosed in the immediate neighbourhood of this last injury a fracture of the back part of the skull, the bone having been broken inwards. This the doctor described as a depressed fracture of the skull and the brain in that region was covered with blood and lacerated. Dr. Ross considered that this injury had been "caused by external violence applied at this point above—downwards". In addition to these very serious injuries, there were various minor abrasions on both cheeks but these were not through the skin and, some of them at least, he considered had been caused some days prior.

Since the appellant had admitted that he had kicked Flatfoot after the latter had fallen down, the doctor was asked whether, in his opinion, the serious injuries could have been caused in this way. As to this, he said, after being shown the shoes worn at the time by the appellant, that he considered they could have caused the cuts above the ears but, as to the injury behind the left ear where the fracture was, he said:—

> The toe of a boot I do not believe in one blow could make all the various branches that this particular wound had.

Later, on cross-examination, he said that he did not believe the skull fracture had been caused by the shoes. It was suggested to him that if a man hit in the face by another fell in a junk pile of iron of various sizes he might receive such an injury, and to this he said it was quite possible.

1956

BRADLEY v. THE QUEEN

Locke J.

The *post mortem* was conducted in the afternoon of January 6. Earlier that day, the belt fastened through the mouth and knotted at the back of the head had been removed and this had left what the doctor described as a white mark and a depression on either side of the mouth about three-quarters of an inch wide which, he considered, could have been caused by the belt. Further examination disclosed that the lungs were greatly congested and contained an abnormal amount of blood which suggested to him that death had not been instantaneous. The examination of the blood disclosed a very high level of alcohol and Dr. Ross said he would expect that the man had been suffering from "severe intoxication".

Whether the way in which the belt was in the man's mouth prevented him from breathing through it is not made clear, either by the evidence or the photographs. Dr. Ross was asked as to the effect it would have on causing or expediting death and he said:—

> I detected only the marks. I had no knowledge, other than a photograph I was shown, that there was a constriction about the mouth. In a person dying of asphyxiation, as occurs in a number of unconscious persons when their tongue and the soft tissues fall backwards and block the airway, it is entirely possible. . . . The more unconscious a person is, the more likely it is that it could be aggravated by pressure over the mouth. Similarly, if a person were depending on breathing, for some reason or other, by mouth breathing, then similarly that would obstruct it. The determinations [*sic*] of the tissues in this particular area were such and the number of effects were such that I cannot state that this patient [*sic*] died only of asphyxiation.
>
> Q. But it might interfere with him if he were in the depths of a coma? A. Yes.

And later he said:—

> In this precise case I believe that there was some evidence of asphyxial changes in the tissues, but I will not state as to the degree to which they influenced the death.

Asked for his conclusion as to the cause of death, Dr. Ross said:—

> I felt that there were a number of factors contributing to death in this case. The contusion of the brain as the result of the depressed fracture of the skull would be probably the most important, but I have seen people with such an injury survive for a considerable period of time. There was evidence of considerable loss of blood but I was unable to estimate how much or how severe that was, but the amount of blood in the scalp and the numerous injuries to the scalp would contribute, would be expected to cause the loss of considerable blood. There was the level of

blood alcohol, which is a very serious level of alcohol and would certainly aggravate other serious conditions. There was evidence that the breathing would be possibly obstructed to a certain extent and that the congestion of the lungs and the other observations I made in the internal organs would suggest that the subject wasn't getting all the air into his lungs that he should.

Asked again as to the effect of the belt on obstructing the passage of air, he said:—

> If he depends on air coming through his mouth it would interfere with it. If the belt so applied pressed the jaw upwards and caused the soft tissues of the back of the mouth, the palate, to close the airway, then it would, too, but it is difficult for me to state from a picture what would happen.

When asked if a person suffering from such a fracture of the skull and contusion of the brain were exposed to the elements in cold weather what effect it would have, he said that it would greatly accelerate the deleterious effect.

The clothing found on the appellant when he was arrested was examined by Dr. D. W. Penner, and the stains on the trousers and underwear were found to have been caused by human blood. As stated in the confession, Bradley had removed Flatfoot's overcoat and this he took with him on to the freight train which he boarded immediately afterwards, by which means he reached Dufrost, a place on the Winnipeg-Emerson line not far from St. Malo. For obvious reasons, he got rid of this coat *en route,* throwing it apparently on the railway right-of-way where it was found by the section foreman near Grande Pointe, a few stations north of the point where Bradley left the train. This was a brown tweed overcoat and there were a large number of reddish brown stains over most of the back and the lower half of the right arm as well as a number of stains over the front of the shoulder on the right side, all of which Dr. Penner found to have been caused by human blood.

It appears that Bradley had been arraigned for the offence at an earlier date and had been then found mentally unfit to stand trial. At the outset of the present trial the question of whether he was then so unfit was tried and evidence given by alienists and he was found fit. It was undoubtedly because of this and of the fact that the appellant had been drinking heavily that night that the learned Chief Justice felt it necessary to explain at some length in the charge to the jury the effect of s. 16 of the *Code* and

1956

BRADLEY v. THE QUEEN

Locke J.

instruct them that excessive drinking might produce a condition such as *delirium tremens* which, if it existed, might be a defence to the charge.

The argument addressed to us on this appeal has invited us, in effect, to consider the sufficiency of certain passages in the charge to the jury as if the affair which resulted in the death of Flatfoot had been limited to the blows which the appellant struck with his fist and which presumably felled the victim. The matter cannot be split up in this way but all of the acts of the appellant above recited must be considered together. A contention that a charge of homicide might be dealt with in the manner suggested to us was recently rejected by the Judicial Committee in *Meli* v. *The Queen* (1).

The first ground of appeal is a contention that the learned Chief Justice erred "in making a finding in law that the appellant's participation in the fight was an unlawful act and a crime when the facts were in dispute". The short answer to this is that the facts were not in dispute and that assaulting another person is a criminal offence subject to exceptions which were fully explained in later portions of the charge. I do not know what is meant by alleging error in treating the unlawful act as a felony. The distinction between felony and misdemeanour was abolished by s. 14 of the *Criminal Code* (R.S.C. 1927, c. 146). I find no substance in this objection.

The second ground is that the learned trial judge had erred in saying that the appellant was presumed to intend all the consequences which might flow from the fight, even though he may not have known that Flatfoot had suffered a fracture of the skull and that he was thus presumed to be guilty of murder, subject to possible defences. The contention is based upon the following portion of the charge:—

> The accused didn't have to know whether the injury was sustained in that way. The injury was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.

(1) [1954] 1 W.L.R. 228.

The charge is to be considered as a whole: the passage quoted is not to be divorced from the context. At the outset, after explaining in a manner to which no exception is or could properly be taken what constitutes homicide, culpable and non-culpable, and reading to the jury ss. 196, 199 and 201(*a*) of the *Code,* the learned judge, referring to the expressions "means to cause his death" and "means to cause him bodily harm that he knows is likely to cause his death" in the latter subsection, said:—

> By using this expression the *Code* makes it clear that the person charged must have intended to do the act complained of; that is, he must have intended to cause the death of the deceased or he must have intended to cause the bodily harm that he knows is likely to cause his death, at the same time being reckless whether death ensues or not.

And later said:—

> When we are considering intention, the intention that we are considering here is the intention to commit the crime with which the accused is charged.

In a following passage, which preceded the language complained of, the jury was informed that there was a presumption of law that every man is presumed to have intended the natural consequences of his acts and, by way of example, that when a man deliberately shoots a gun at another, an intent to cause death, or at least bodily harm likely to cause death, will be presumed, a statement which was followed by instructions that the presumption would not apply if on all the evidence there was a reasonable doubt that the accused was capable of having the intent either to cause death or to cause some bodily harm known to him to be likely to cause death in reckless disregard of the consequences.

Following that portion of the charge first above quoted, the evidence of Dr. Ross as to the factors which, in his opinion, contributed to the man's death, and the evidence as to the condition in which Flatfoot had been left by the appellant was reviewed and the jury were instructed that, if they decided that he had caused the death, they must then decide if he had meant to cause bodily harm that he knew was likely to cause death and was reckless as to whether death ensued or not. Thus the necessity of proof of the intent required by s. 201(*a*) was again impressed on the jury.

1956

BRADLEY v. THE QUEEN

Locke J.

Thereafter, the circumstances under which a person unlawfully assaulted may repel force by force, even though he causes death or grievous bodily harm, dealt with in s. 34 of the *Code* was explained and the nature of the provocation that may reduce what would otherwise be murder to manslaughter under s. 203.

The fight referred to in the passage complained of was not intended to refer merely to the blows struck while Flatfoot was still on his feet but everything that occurred up to the time that the appellant left him unconscious face down in the snow.

While the second ground of objection was based upon the passage from the charge to which I have referred, a further passage has been said to be open to a similar objection. The learned Chief Justice dealt at length with the evidence as to the condition of both the appellant and of Flatfoot as a result of their drinking, apparently considering that this raised the question as to whether the condition of the appellant was such as to render him unable to form the intent referred to in s. 201(*a*). Following this, the learned judge said:—

> If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

This language must be read with the instructions twice repeated that they must find that in fact he had intended to cause the death or meant to cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not. It cannot be assumed, in my opinion, that the jury would disregard these specific instructions twice theretofore repeated.

Read in conjunction with other portions of the charge to which I have referred, there was, in my opinion, no misdirection.

The third question arises from a contention that there was error in failing to instruct the jury that if the deceased fell during the course of the fight and fractured his skull on some object "it would be unintentional and could amount

to no more than manslaughter". To so instruct the jury would clearly be misdirection since, if the appellant struck Flatfoot with his fists intending to kill him or cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not, it would be murder and not manslaughter. The point itself illustrates the manner in which this Court has been asked to deal with the appeal by considering only the offence of striking the blows which caused Flatfoot to fall and ignoring all the rest of the evidence. The jury were required to consider all of this evidence in coming to a conclusion on the question of intent.

As to the fourth question, the learned Chief Justice had, as stated, after referring to the condition in which Flatfoot had been left by the appellant, read s. 196 to the jury. With this I think no further instruction was needed than that given in the charge read as a whole to which I have already made reference.

The fifth ground asserts that there was error in failing to instruct the jury that, if they found the appellant accelerated the death of the deceased, under what circumstances it would amount to manslaughter and not to murder. The question ignores the instructions to which I have referred, which put the questions as to whether the appellant had caused the death of the deceased and as to his intent in assaulting the accused in the manner described and leaving him gagged and unconscious in the snow. There was no error, in my opinion.

The appeal to the Court of Appeal was heard by a court consisting of the Chief Justice of Manitoba, Coyne, Montague and Schultz JJ.A. and Tritschler J. (*ad hoc*) and dismissed, no written reasons being delivered. We are, therefore, not informed as to whether the Court acted on the ground that no error had been shown in the proceedings or under the powers vested in it by s. 592(1)(*b*)(iii) on the ground that no substantial wrong or miscarriage of justice had occurred.

If there was error in the charge on any question of law (and in my opinion there was none), the application of that section should be considered.

1956

BRADLEY v. THE QUEEN

Locke J.

The evidence before the jury may be summarized as follows: the accused had admitted striking Flatfoot with his fists, that the latter had fallen down and that he had then kicked him and "put the belt around his head loose" while the man was unconscious, and had thereafter removed his overcoat and taken it away. He said that he had also fallen down and that he had then got the blood on his pants. The deep cuts inflicted on both sides of the victim's head had obviously been caused by blows of some nature when the man was prostrate on the ground. The three police officers who described the manner in which the deceased was found lying prostrate, and the places where they observed the snow to be stained with blood, said nothing about finding any blood or any evidence of a struggle on any of the junk a few feet distant from the body or upon the snow with which it was partially covered. In cross-examination, they were not asked any question as to whether there were any traces of a struggle or any blood found on or around the pile of junk. The photographs taken by the photographer Allison, showing the man's body lying as it was found and and patches of blood already referred to, disclosed no blood-stains on the snow which partly banked the pile of junk or any of the miscellaneous material in the pile. The coroner who also attended before the body was moved said nothing about seeing any evidence of struggle on or close to the junk pile and it was not suggested to him in cross-examination that there was any.

The belt had apparently been forcibly removed from the man's body, one of the loops holding it in place on the trousers and some buttons torn off the buckle of the belt, and the clothing had been ripped in the manner described leaving his buttocks partially bare. The photographs showed that the belt, contrary to what the accused said in his statement to the police, was tightly tied about the head, knotted behind the left ear and passed between the man's lips holding them apart. Whether the belt completely stopped the passage of air through the mouth or only did so partially does not appear to be clear either in the oral evidence or in the photographs, but it would completely prevent him from crying out. The man had bled profusely from his head wounds and his hair was matted with blood. His hat had been thrown over the fence into the back yard

of 154½ Higgins Avenue, 30 feet from the place where he lay. The view from Higgins Avenue was shut off by the billboards to which reference has been made. It was 4° below zero when the body was found at 7 o'clock. No evidence was given as to the temperature around 2 o'clock but in cross-examination by counsel for the defence a question was directed to one of the medical witnesses which was based on the assumption that the temperature was the same at the earlier hour, and this appears to be common ground. The man's hands were bare and the body was at least partially frozen. Flatfoot had not apparently died at once after receiving the injuries to his head since, when his body was moved from the place where it lay face downward, the snow was glazed with ice to some extent, showing that the heat of his body had caused some melting.

That the deep cuts on either side of the victim's head had been caused by kicks delivered by the appellant was settled by the confession since there were no injuries to the man's body elsewhere than in the head. That a kick delivered by a powerful man to the side of the head, sufficient to cause the deep cuts, would render a man senseless, if he were not already in that condition, would be obvious. Whether these kicks were delivered before or after the wound to the back of the head was known only to the appellant and he elected not to give evidence. While Dr. Ross had at first said, as above pointed out, that he did not believe a blow of the toe of a boot could cause this latter wound and, later, that he did not believe it had been caused by the shoes, that was a matter upon which the jury were at complete liberty to form their own opinion. There was no evidence to suggest that it had been caused by the man falling backwards on the pile of junk and the only evidence available would seem to negative any such suggestion. In view of the profuse bleeding from the wound, it would inevitably have been the case that had Flatfoot fallen backward on the pile there would have been evidence of that fact to be found in the snow and on the junk itself. The jury might properly assume that if there had been any blood or other evidence of struggle on or around the pile, the police officers, in fulfilment of their duty, would have disclosed the fact and that the photographer would have

1956

BRADLEY v. THE QUEEN

Locke J.

been directed to take further photographs, and further, that the three police officers, the photographer and the coroner would have been cross-examined to establish the fact that there were such traces, if that were the fact or if that was even suggested on behalf of the accused person.

The photographs showed that the belt was fastened so tightly through the man's mouth and around his head that considerable force must have been exercised in tying the knots behind his ear. The belt could only have been tied tightly in this position while the man lay face downward in the snow. The blood which had saturated the appellant's trousers around his left knee, and the underwear at that place, was the blood of Flatfoot and it was an inference which the jury might properly draw that the appellant had knelt on the man's back while tying the knots in the belt and that the blood came from the wound at the back of the skull. The knots so firmly tied, as shown by the photographs, were only a few inches from the place where the skull was fractured. While, in my opinion, in view of the other injuries inflicted and the condition in which the man was left helpless in the snow, it is a matter of no consequence as to whether the appellant did or did not know the severity of this particular wound, the jury may well have considered that since in tying the knots he would be looking directly at the wound (unless, indeed, it was inflicted after the knots were tied) the severity of it would be obvious to him.

Had the jury concluded that that particular injury had been caused in fact in the manner suggested in argument, that would not of itself have reduced the offence to manslaughter. There was still the question as to the intent with which the blows with the fists had been struck and the intent with which thereafter the appellant had inflicted the cuts on either side of the man's head, torn his clothing leaving part of his body exposed, knotted the belt around his head, removed his overcoat and left him unconscious in an unfrequented place where it was improbable that he would be found until daylight. The jury, finding that the appellant was capable of forming the intent necessary to constitute the offence of murder, has by its verdict found that

he had formed that intent. In my opinion, no other finding was open to them upon the evidence. I find no evidence of any wrong or miscarriage of justice in this case.

I would dismiss this appeal.

CARTWRIGHT J. (*dissenting*):—On November 2, 1955, the appellant was convicted before Williams C.J.Q.B. and a jury of having, on January 6, 1955, murdered August Flatfoot. His appeal to the Court of Appeal for Manitoba was heard on February 8, 1956, and was dismissed, at the conclusion of the argument, by a unanimous judgment for which no written reasons were given.

On February 27, 1956, my brother Kellock made an order granting the appellant leave to appeal to this Court on the following grounds:—

1. That the learned Trial Judge erred in making a finding in law that the Appellant's participation in the fight was an unlawful act and a crime, when the facts were in dispute, and in treating the unlawful act as a felony.

2. That the learned Trial Judge erred in charging the jury to the effect that the Appellant was presumed to intend all the consequences which might flow from the fight even though he, the Appellant, may not have known that the deceased suffered a fracture to the skull in a fall during the course of the fight and was thus presumed to be guilty of murder, subject to other possible defences.

3. That the learned Trial Judge erred in failing to instruct the Jury that if the deceased fell during the course of the fight and fractured his skull on some object, it would be unintentional, and could amount to no more than manslaughter.

4. That the learned Trial Judge erred in failing to instruct the Jury that if they found, under Section 196 of the Criminal Code of Canada, that the Appellant caused the death of the deceased, either directly or indirectly, under what circumstances the Appellant would be guilty of manslaughter and not of murder.

5. That the learned Trial Judge erred in failing to instruct the Jury that if they found the Appellant accelerated the death of the deceased, under what circumstances it would amount to manslaughter and not to murder.

As, in my view, there should be a new trial I will refer to the evidence only so far as may be necessary to make clear the reasons for the conclusion at which I have arrived.

The appellant did not give evidence at the trial and no witnesses were called by the defence.

The body of August Flatfoot, hereinafter called "the deceased" was found at about 7 a.m. on January 6, 1955, in

1956

BRADLEY v. THE QUEEN

Cartwright J.

a lane in the City of Winnipeg. A *post mortem* examination, performed by Dr. Ross, shewed that in addition to some superficial injuries on the face the deceased had sustained, before death, (i) a laceration 1½ inches in length on the head 2 inches above the right ear, (ii) a laceration 1¼ inches in length on the head 1½ inches above the left ear, (iii) a stellate laceration 1¼ inches in diameter on the head 1½ inches behind the left ear, and (iv) a depressed fracture of the skull on the left side which, in the opinion of Dr. Ross, had been caused by the same force which caused the stellate laceration; this fracture was 1¼ inches by ¾ of an inch in size and four fragments of bone were depressed inwards ¾ of an inch; it had caused contusion of the brain tissue and haemorrhage.

The *post mortem* also shewed that the blood of the deceased contained 396 milligrams of alcohol per 100 millilitres of blood, which, according to the evidence of Dr. Penner, indicates a degree of intoxication which would not infrequently cause a loss of consciousness.

A statement made by the appellant to the police was admitted in evidence. From this statement and the evidence of other witnesses it appears that the accused was drinking heavily with the deceased and some other companions up to about 2 a.m. on January 6 and that during this time a good deal of rubbing alcohol was consumed. At about 2 a.m. the appellant and the deceased decided to go to Higgins Avenue to get some more liquor. The statement of the appellant as to what happened from that point on is as follows:—

> Then we went down Higgins Ave., you know that lot at the back of the terraces there. We started drinking there, then Gus [*i.e.*, the deceased] started swearing at me. I guess I swore at him too, and then he pushed me. I got mad and we started to fight. The other two guys walked away. Gus hit me about three or four times. He gave me one right in the mouth. I got a couple of scratches. I hit him with my left. I got in a few, but I hurt my hand. You can see it's all swollen. Gus fell down and I kicked him a couple. I guess it was self-defence. Then I fell down, that's when I got the blood on my pants. I put his scarf around his neck because he was unconscious, and I thought he might get cold. I put the belt around his head loose. I guess I thought it would do some good. Then I walked over to the railroad tracks, and I climbed into a car and laid down to sleep. It was a half car, open like a gravel car. Then the train pulled out.

It should be mentioned that the men referred to as "the other two guys" were called as witnesses but deposed they had left the appellant and the deceased before any quarrel or fight started and, apart from the appellant's statement, there was no evidence of any eye-witness as to how the deceased received his injuries.

The train referred to in the statement pulled out at 3.05 a.m., so that the fight apparently occurred between 2 a.m. and 3 a.m. It was a cold night 4 degrees below zero Fahrenheit.

Dr. Ross testified that while the injuries described as (i) and (ii) above could have been caused by kicks delivered by someone wearing the shoes of the appellant, the depressed fracture of the skull could not have been so caused; that death was not instantaneous; that a number of factors contributed to cause death; that the depressed fracture of the skull was the most important cause and that it was quite possible that it might have been caused by the deceased falling backwards and striking his head on a metal object. There was evidence that there was a pile of junk metal in the lane in which the body of the deceased was found.

It was one of the theories of the defence that if the jury found that the effective cause of the death of the deceased was the depressed fracture of the skull and that this injury was sustained as the result of the deceased being knocked down by a blow from the appellant's fist during the fight and striking his head on the junk pile they should find the appellant guilty of manslaughter and not of murder unless they were satisfied beyond a reasonable doubt that the appellant either (a) meant to cause the death of the deceased, or (b) meant to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not (*vide* the *Criminal Code*, s. 201).

Instead of so charging the jury, the learned Chief Justice told them that the accused was presumed to intend the consequences of his own act and that if the death occurred in the manner suggested the appellant was guilty of murder

1956

BRADLEY v. THE QUEEN

Cartwright J.

subject only to the defences of drunkenness or provocation. This is made clear by the following extracts from the charge:—

> Then we come to the other injury, the depressed fracture of the skull, the back part, the left-hand side, 1¼ by ¾ inches, and the contusion of the brain beneath. The depressed fracture broken into four bone fragments raised three-quarters of an inch inside the skull, betokening external violence, from outside, either a blow from above down or the skull pushed back against something which it would hit. And it would require a considerable degree of force; that the instrument which would cause it must be moderately sharp to cause it, because it was only an inch and a quarter by three-quarters of an inch, and would have to have a blunted point. A small-headed hammer or a very sharp rock might do it. That an ordinary wood implement would not likely make such an injury, but that if the man fell backwards as a result of a blow, and hit his head against some of the metal shown in the junk pile, that might have caused it. We don't know just exactly what did cause it. Counsel for the accused suggests that in the course of this fight—and I think undoubtedly there was a fight; and equally undoubtedly, gentlemen of the jury, a fight is an unlawful act and a crime—and that in the course of this fight, I think the suggestion was, that the accused might have hit the deceased, that the deceased might have fallen back on the scrap pile, and that as it was done, if the deceased sustained his injury in that way, the accused might not have known that the deceased sustained such an injury. The accused didn't have to know whether the injury was sustained in that way. The injury was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later, so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.
>
> * * *
>
> If you decide that the accused caused the death of the deceased, you must next decide, did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.
>
> I still have one or two matters to deal with. If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you

come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

The meaning of these passages is not doubtful. The jury are told not that they may but that they must find that the accused had the intent required by s. 201(*a*)(i) or (ii) of the *Criminal Code* unless they find that he was through drunkenness incapable of forming the intent mentioned. In my view this was misdirection which is fatal to the validity of the conviction and there is nothing to be found in the remainder of the charge to correct this error. It was for the jury, giving due weight to the rebuttable presumption which imputes to a man an intention to produce those consequences which are the natural result of his acts, to decide as a fact whether the appellant had the guilty intent necessary to make him guilty of murder; and, in particular, it was for the jury to say whether the fracture of the deceased's skull was a natural consequence of any blow struck by the appellant.

The point with which I have just dealt is included in grounds 2, 3 and 4, on which leave to appeal was granted. I do not find it necessary to deal with any of the other questions argued before us except that as to the possible application of s. 592(1)(*b*)(iii) of the *Criminal Code* providing that the Court of Appeal may dismiss the appeal where

> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

It is unnecessary to refer to the numerous authorities dealing with this subsection. Bearing in mind that it was open to the jury to find that the injuries from which the death of the deceased resulted were sustained in the course of a sudden fight between two drunken men in which no weapon was used and that there was no evidence of any previous ill-will between them, I find it impossible to affirm that a

1956

BRADLEY
v.
THE QUEEN

Cartwright J.

jury properly instructed and acting reasonably must necessarily have convicted the accused of murder. In my opinion it was open to the jury on the evidence to find a verdict of not guilty of murder but guilty of manslaughter. On the other hand, I am unable to agree with the submission of counsel for the appellant that there was no evidence on which a properly instructed jury could have found a verdict of guilty of murder, and, in my opinion, there should be a new trial.

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

NOLAN J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Manitoba, dismissing the appeal of the appellant from his conviction for murder, after a trial before the Chief Justice of Queen's Bench and a jury.

Leave to appeal to this Court was granted on five questions of law, which are fully set out in the reasons for judgment of my brother Cartwright and need not be repeated here.

On January 6, 1955, at about 7 o'clock in the morning, the body of the deceased, August Flatfoot, was found lying face down in the snow in a lane in the vicinity of Higgins Avenue in the City of Winnipeg. The temperature was 4 degrees below zero Fahrenheit. The body was clothed in long combination underwear, a shirt, a sweater, trousers, socks, shoes and overshoes, and a woollen scarf was tied around the neck, the knot being under the left ear. The trouser belt had been removed and tied tightly around the head through the lips and knotted at the back of the head. The trousers were ripped down the back and a portion of the buttocks was exposed. The belt buckle was lying on the ground near the body, two of the belt loops of the trousers were torn loose and a third was torn off completely. The deceased's brown fedora hat was found in a back yard in the vicinity. His overcoat was missing.

Dr. H. M. Ross, a certified pathologist with the Winnipeg General Hospital, made a *post mortem* examination of the body. He found a cut laceration, one and one-half inches long, two inches above the right ear, which went through the tissues to the bone. Dr. Ross was of the opinion that this cut laceration could not have been caused by a fist, unless there was a ring or some object in the hand, but could have been caused by a kick from a shoe. He found another laceration, one and one-quarter inches long, one and one-half inches above the left ear, which was essentially the same as the first laceration and could have been caused, in his opinion, in the same way as the cut above the right ear. He also found a stellate, or star-shaped, laceration, about one and one-quarter inches in diameter, situate one and one-half inches behind the left ear. Dr. Ross's opinion as to the cause of this wound was the same as for the wounds on both sides of the head, except that he did not believe the toe of a boot could, in one blow, have made all the various branches that this wound had and doubted that simply the toe of a boot could have caused it. There were a number of superficial abrasions on the right cheek in front of the ear, on the left cheek in approximately the same place and on the nose. One incisor tooth was missing.

The examination of the head disclosed a depressed fracture of the skull on the left side at the back, one and one-quarter inches by three-quarters of an inch, and four fragments of bone were depressed inwards three-quarters of an inch. The depressed fracture had caused contusion of the brain and was almost below the star-shaped laceration. Dr. Ross was of the opinion that a considerable degree of force would be necessary to cause this fracture and felt that such force might have been applied from above downwards, or by the skull being pushed backwards against some point above. The skull fracture and brain contusion were of such a nature as to cause unconsciousness. An examination of

1956

BRADLEY v. THE QUEEN

Nolan J.

the bones and cartilage of the throat disclosed no evidence of any obstruction or injury, nor was there any constriction mark upon the neck itself.

Dr. Ross stated that there were a number of factors contributing to the cause of death, the most important of which was the contusion of the brain resulting from the depressed fracture of the skull. A considerable amount of blood had been lost. There was a high blood alcohol level and evidence of some constriction in the air supply and exposure. He was of the opinion that the fracture of the skull had been caused by something with a blunt point, such as a very small-headed hammer or a very sharp rock, and that death had not been instantaneous. There were several possible causes of death—alcoholic poisoning, if the deceased were rendered unconscious by alcohol; unconsciousness caused by alcohol, coupled with exposure to four degrees below zero weather. In such circumstances death would be inevitable and would not be accelerated by the skull injury. Death could also have been caused by the depressed fracture of the skull, coupled with exposure. It was impossible to tell whether the fracture or the alcohol rendered the deceased unconscious, or which caused his death. The *post mortem* examination disclosed that the deceased, with the blood alcohol level of 396 milligrams per 100 milliliters of blood, would be strongly under the influence of alcohol and would only be able to move about with difficulty. There was evidence that a few feet from the body there were two frozen piles of scrap iron, about three feet high, lying alongside some small, tumble-down sheds, and that, if the deceased fell backwards into the frozen iron, it would be quite possible that he would receive the fracture of the skull in the fall.

The evidence discloses that up to about 2 a.m. on January 6 the appellant was drinking heavily with the deceased and some other companions, during which time rubbing alcohol was consumed. The appellant, the deceased and two companions left the St. Louis Café shortly after 2 a.m. and proceeded east on Higgins Avenue. The appellant and the deceased proceeded ahead to obtain more

alcohol and the two companions remained behind awaiting their return. After about fifteen minutes of waiting, when the appellant and the deceased failed to return, the two companions went back along Higgins Avenue to the St. Louis Café and, finding it closed, proceeded west upon Higgins Avenue to Main Street and left the vicinity. Later that day the appellant was apprehended at St. Malo, a village south of Winnipeg.

The appellant made a statement to the police early the following morning, which was admitted in evidence at the trial. Apart from that statement, there was no evidence of any eye-witness as to how the deceased had received his injuries, as the two companions swore that they had left the appellant and the deceased before any quarrel or fight started. The statement of the appellant recited his movements up until the time that he met the deceased and two other companions at the St. Louis Café sometime after 1 a.m.:—

I met Gus and two other guys there. I don't know their names. Gus and me kidded each other along, and then we tossed up for the coffees and Gus lost, so he bought for the four of us. Then we went down Higgins Ave., you know that lot at the back of the terraces there. We started drinking there, then Gus started swearing at me. I guess I swore at him too, and then he pushed me. I got mad and we started to fight. The other two guys walked away. Gus hit me about three or four times. He gave me one right in the mouth. I got a couple of scratches. I hit him with my left. I got in a few, but I hurt my hand. You can see it's all swollen. Gus fell down and I kicked him a couple. I guess it was self-defence. Then I fell down, that's when I got the blood on my pants. I put his scarf around his neck because he was unconscious, and I thought he might get cold. I put the belt around his head loose. I guess I thought it would do some good. Then I walked over to the railroad tracks, and I climbed into a car and laid down to sleep. It was a half car, open like a gravel car. Then the train pulled out.

Some hours later, when asked what had happened to the coat that the deceased was wearing prior to the fight, the appellant, in a further statement, said:—

After the fight, Gus was lying on the ground, he had his coat half on, so I guess I took it off him. I put it under my arm. I had it with me in the gravel car. I was using it to sit on and that and I left it in the car when I got off the train.

1956

BRADLEY v. THE QUEEN

Nolan J.

The evidence discloses that the overcoat was found a number of miles away from Winnipeg along the railroad right-of-way and had considerable blood on the left side in the region of the shoulder and also on the right sleeve. When he was apprehended the appellant had a large blood-stain on his left trouser leg near the knee. His left hand was badly swollen from the base of his fingers to the wrist and there were three slight scratches on his face. There were no cuts, or lacerations, or marks on the rest of his body.

The following are extracts from the charge to the jury:—

Counsel for the accused suggests that in the course of this fight—and I think undoubtedly there was a fight; and equally undoubtedly, gentlemen of the jury, a fight is an unlawful act and a crime—and that in the course of this fight, I think the suggestion was, that the accused might have hit the deceased, that the deceased might have fallen back on the scrap pile, and that as it was done, if the deceased sustained his injury in that way, the accused might not have known that the deceased sustained such an injury. The accused didn't have to know whether the injury was sustained in that way. The injury was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later, so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.

* * *

If you decide that the accused caused the death of the deceased, you must next decide, Did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.

* * *

I still have one or two matters to deal with. If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

The jury was instructed that the appellant was presumed to have intended the consequences which flowed from the fight, even though he may not have known that the deceased suffered a fracture of the skull, and was instructed that an intent, as required by s. 201(*a*)(i) or (ii) of the *Criminal Code* must be attributed to him. It follows that the only matter left for the consideration of the jury was whether or not the defences of drunkenness or provocation could make the crime less than murder.

This was, with great respect, a fatal defect in the charge, because it was for the jury to say whether the intent, as required by s. 201, *supra,* was to be attributed to the appellant so as to justify a verdict of guilty of murder; and it was also for the jury to say whether the fracture of the skull was caused by a blow of the appellant, or was caused by the deceased falling backward onto a sharp point of iron.

The appeal to the Court of Appeal was dismissed without written reasons and consequently there is no indication as to whether that Court decided the matter on the ground that there was no misdirection, or on the ground that there was no substantial wrong or miscarriage of justice (s. 592(1)(*b*)(iii) of the *Code*). Nevertheless, it was contended by counsel for the respondent, in argument, that the appeal should be dismissed, pursuant to the powers vested in the Court under that section. I am unable to agree with that contention.

It is well established that the burden of satisfying the Court that no substantial wrong or miscarriage of justice has occurred is upon the Crown. In *Northey* v. *The King* (1), where s. 1014 of the old *Code* (now s. 592) was being considered, it was held that, where the irregularities at the trial are of such a nature that there is doubt whether the verdict would necessarily have been the same if they had not occurred, then the doubt should be resolved in favour of the accused. In the present case, in my view, such a doubt exists.

(1) [1948] S.C.R. 135.

1956

BRADLEY v. THE QUEEN

Nolan J.

The evidence establishes that the appellant and the deceased had, for some hours, been drinking rubbing alcohol and beer. There is no evidence of previous bad feeling between them. Swear-words were exchanged; a sudden fist fight took place, no weapon was used, and the deceased sustained injuries which caused his death. Section 203 of the *Code* provides that culpable homicide, that otherwise would be murder, may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation and before there was time for his passion to cool. In my view, it was for the jury to determine whether, on its view of the facts, manslaughter or murder was the appropriate verdict and there is a doubt, which must be resolved in favour of the appellant, whether the verdict would necessarily have been the same had no irregularity occurred.

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

Appeal dismissed.

Solicitors for the appellant: *Munson & Crawford.*

Solicitor for the respondent: *Hon. M. N. Hryhorczuk.*