1959

*Jan. 27, 28
Feb. 26

PAL SALAMON ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Charge to jury—Drunkenness—Provocation—Rule in Hodge's case—Criminal Code, 1953-54 (Can), c. 51, ss. 201(a)(ii), 203.

The appellant was convicted of the murder of a woman at whose house he was a boarder. After the appellant and the woman had returned home from a drinking party, a quarrel took place between them. The woman's husband intervened, brought the quarrel to an end, and the woman proceeded to a wash-room. She was shortly after followed by the appellant, and in a matter of minutes one witness heard a shot while another heard the appellant calling the woman an insulting name, and the latter retaliating in a similar fashion, and then the shot. The woman was found fatally injured. The conviction was affirmed by the Court of Appeal.

Leave was granted by this Court to appeal on questions of law respecting the trial judge's charge to the jury on the issues of drunkenness, provocation, and the rule in *Hodge's* case.

Held (Cartwright J. dissenting): The conviction should be affirmed.

Per Taschereau, Fauteux, Abbott, Martland and Judson JJ.: The trial judge related the defence of drunkenness to the capacity to form the intent specified in s. 201(*a*)(*ii*) of the *Criminal Code*. The jury was, therefore, properly instructed on that defence.

With respect to provocation, culpable homicide committed in the heat of passion generated by a provocation lacking the feature of suddenness does not come within the terms of the opening paragraph of s. 203 of the *Criminal Code*. In this case, there was no evidence of sudden provocation within the meaning of the section, and therefore there was no duty on the trial judge to instruct the jury on the subject. In any event, no fault could be found with the instructions given to the jury on this matter.

On the facts of this case, a reasonable jury, even applying the rule in *Hodge's* case, could only, if acting judicially, reach the conclusion that the appellant, having entered the room, produced his revolver and fired it at the woman, either at once or upon the exchange of insults. It was no part of the case for the prosecution, but for the defence, to explain away this fact attending *actus reus* and *mens rea,* by evidence showing accident, self-defence, sudden retaliation to sudden provocation, or drunkenness affecting the capacity to form the relevant specific intent. Drunkenness and provocation were adequately put before the jury and rejected. Accident or self-defence were not raised, nor was there any evidence to support either.

Per Locke J.: The trial judge's charge adequately and accurately stated the law to the jury with regard to the defence of drunkenness.

There was no evidence of provocation within the meaning of s. 203 of the *Criminal Code* and therefore the appellant was not entitled to have the issue put to the jury. An accused person who, as the appellant did, provokes another to fight by striking or abusing him and is struck in self-defence and kills such person in an ensuing fight, cannot escape conviction for murder by saying that the killing was committed in the heat of passion.

The rule in *Hodge's* case was to be followed only when the evidence relied upon was wholly, or to a material extent, circumstantial. In this case, the instruction was unnecessary since no other inference was possible than that the appellant had fired the fatal shot.

Per Cartwright J., dissenting: On the question of provocation, there was non-direction amounting to misdirection which may well have affected the verdict. The trial judge did not make it clear to the jury that in dealing with the question whether the accused was in fact provoked they should consider the accused's condition of drunkenness, and certain passages in his charge tended to give the jury the impression that they should not consider it. There was, furthermore, no room for the application of s. 592(1)(*b*)(*iii*) of the *Criminal Code.*

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the appellant's conviction for murder. Appeal dismissed, Cartwright J. dissenting.

J. O'Driscoll and *J. H. Gillies,* for the appellant.

W. C. Bowman, Q.C., and *F. L. Wilson,* for the respondent.

The judgment of Taschereau, Fauteux, Abbott, Martland and Judson JJ. was delivered by:

FAUTEUX J.:—This is an appeal, by leave of this Court, from a unanimous judgment of the Court of Appeal for Ontario affirming the verdict of a jury finding the appellant guilty of having, at the city of London, in the province of Ontario, on the 26th day of July 1958, murdered one Joyce Alexander.

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The appellant, a "freedom fighter" during the 1956 Hungarian revolt, having escaped to Austria in November of that year, arrived in Canada in January 1957 and, from the end of February 1957 to the date of his arrest, lived and worked in the city of London. At the time of the fatal occurrence, he was residing with Mrs. Alexander, her husband and her child at 499 Hamilton Avenue and had for some time entertained a close relationship with her and contributed to her support and that of her child.

In the morning of the 25th of July, he and Mrs. Alexander arranged to meet at a certain place, about 4 o'clock of the afternoon. The latter failed to keep the appointment and the appellant, apparently looking for her, proceeded to visit beverage rooms, where he met Joseph Kish, one of his acquaintances, and consumed beer with the latter. Both returned to 499 Hamilton Avenue, where Joyce Alexander was and each of the three had two bottles of beer. The three left at 9 o'clock, conveyed the child to a baby-sitter and went to the Brunswick Hotel where they stayed from 9.30 to 11.30, drank beer and were, on the occasion, joined by John Gnay and Alex Kapler. A heated discussion on communism took place and was brought to an end by the intervention of a waiter. Kish, on the invitation of Kapler and Gnay, and the appellant and Mrs. Alexander, on the invitation of Kish, then proceeded to 5 Prospect Avenue, the home of one Olejnik, fetching the child on their way, and arriving there at about midnight. While at that place, wine was consumed; Kapler asked Mrs. Alexander to accompany him to his farm; and once again, appellant became involved in an argument on communism. Being requested to leave, he asked Mrs. Alexander to accompany him and upon her refusal, left, but returned for the purpose, he testified, of asking Kish to prevail upon her to go home. To attract Kish's attention, he rapped on a window and broke a pane of glass. Kapler came out, a struggle ensued between the two, appellant broke away, fired five shots in the air with his revolver and eventually found his way to 499 Hamilton Avenue. When later, between 1 a.m. and 2 a.m., Alexander arrived home, the accused, who was lying on his bed fully clothed, got up and asked him whether he had seen Joyce Alexander; the husband answered in the negative and went to bed. Appellant had consumed a

certain quantity of beer and was, for some time, either lying or sitting on his bed when, it being close to 4 o'clock a.m., Mrs. Alexander entered the house with Kish and the child. Salamon came out of his room, asked her and received an explanation for her failure to keep the afternoon appointment. An argument followed between the two. He requested her to give him immediately the shoes and skirt she was wearing and which he had bought for her. She told him that she would give them the next day. He insisted, assaulted her. Blows were struck, her skirt torn off and they began throwing dishes at each other. Alexander testified that, at this stage, he came out of his room, brought the quarrel to an end and told his wife to go to the adjoining bathroom to wash the blood off the back of her neck, which she did. It is the contention of the Crown that, at that moment, appellant went to his room to get his revolver. Kish testified that the appellant did go to his room and Alexander said he did not. Appellant himself, when examined in chief, testified that he remembered nothing of what took place then or thereafter; on cross-examination, however, he admitted having some recollection of going to his room and this, he said he did because he wanted the quarrel to end. He was seen by both Kish and Alexander entering the wash-room but neither of these two saw what took place therein. However, the door having been left open, in a matter of moments after the entrance of Salamon, Alexander heard a shot while Kish said he heard, in quick sequence, appellant calling the woman a dirty name, then the latter retaliating in a similar fashion, and then the shot. Appellant immediately emerged from the wash-room, carrying his revolver in the right hand and pointing it at Alexander and Kish, picked up his coat and left the room. When apprehended by the police a few minutes later at the back door of the house, he had his revolver, cocked, in his right hand. The police, who wrested it from him, found, in the barrel, five live bullets and one discharged cartridge, indicating that appellant's revolver, having seven cartridge-chambers, had been re-loaded, subsequent to the discharge of the five shots at Olejnik's place, and either prior or subsequent to the fatal shot. On the

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evidence, it is not open to say that between the two shootings, that is the one at Olejnik's and the fatal one, any one, but the accused, had the physical possession of this revolver or knew where it was.

As the trial judge indicated to the jury, with the apparent approval of counsel for the accused, the defence was provocation and drunkenness which defence, in the circumstances of this case, implied that Salamon was in fact the author of the death. There was no suggestion of accident or self-defence nor is there any evidence in this respect. The jury rejected the defence of provocation and drunkenness and found the prisoner guilty.

The grounds upon which leave to appeal was granted are, in the order in which they will be considered, the following:

(1) Did the learned trial Judge err in his charge to the jury in regard to the defence of drunkenness?

(2) Did the learned trial Judge err in his charge to the jury in regard to the defence of provocation?

(3) Did the learned trial Judge err in failing to instruct the jury in accordance with the rule in Hodge's case?

Defence of drunkenness. The substance of the submissions of counsel for the appellant is (*a*) that the trial judge failed to direct the jury that they should consider whether, at the time Salamon fired his revolver, he was affected by drunkenness to the point of being unable to form the intent specified in s. 201(*a*)(*ii*), and (*b*) that he misdirected them in telling them that if they believed that to be the case, or were left in doubt, they could—instead of directing them that they should—reduce murder to manslaughter. On a careful reading of the charge, I am satisfied that the jury was properly instructed on the defence of drunkenness. The learned trial judge did relate the defence of drunkenness to the capacity to form the intent indicated. While, in a general reference to the power of the jury to reduce murder to manslaughter, he used the word "may", which is the word mentioned in s. 203(1), he made it clear that it was their duty to do so should they find, or be left in doubt, that the situation, where such a reduction is open, was present in the case.

Defence of provocation. The relevant part of s. 203 reads as follows:

203. (1) 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.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section the questions

(*a*) whether a particular wrongful act or insult amounted to provocation, and

(*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Appellant testified that when he left Olejnik's house, he "was not mad" at Joyce Alexander; he wished her to go home with him. On his own story, he cannot be said to have then been in a state of provocation. Even assuming there had been, at that stage, provocation from her, the length of time elapsing from this point to that of the fatal occurrence would negative any relation of suddenness between the fact of such provocation at Olejnik's place and the fact of the alleged retaliation at 499 Hamilton Avenue. As stated by Rand J. in *The Queen v. Tripodi*[1]: "Suddenness must characterize both the insult and the act of retaliation". Evidence of sudden provocation, if any, must then be found in the events taking place subsequently at the home of the deceased woman. In the consideration of these events, again it must be kept in mind that culpable homicide committed in the heat of passion generated by a provocation lacking the feature of suddenness does not come within the terms of the opening paragraph of the section. The evidence shows that from the time Joyce Alexander entered her home to that of the fatal shot, the appellant, and not she, took, and kept throughout, the initiative of the events leading to her death. He was evidently waiting for her arrival. He started the quarrel during which she retaliated. The dispute subsided with the intervention of the husband and, as instructed by the latter, she proceeded to the wash-room. Appellant went to his room, then proceeded to the wash-room, called her a dirty name, causing her to retaliate in a similar fashion, and then shot, or shot without anything being said.

[1] [1955] S.C.R. 438 at 443, 112 C.C.C. 62, 21 C.R. 192, 4 D.L.R. 445.

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On this evidence, appellant cannot justify or excuse his actions in saying that he was facing a situation characterized with suddenness, unexpectedness or lack of premonition. He had and kept the initiative of the situation in which he found himself. There was no sudden provocation on the part of Joyce Alexander causing sudden retaliation on his part. On this view that there was no evidence of sudden provocation within the meaning of the section, there was no duty for the trial judge to charge the jury on the matter and it is unnecessary to consider the minute criticism which counsel for the appellant made of the address of the trial judge in the matter.

Assuming there was such evidence, I must say that no fault can be found as to the manner in which the trial judge dealt with the question. The only submission as to which comment may be found necessary is the alleged omission of the trial judge to direct the jury that, in order to decide whether the appellant was actually provoked, they had to take into consideration the question of drunkenness. The jury having been told that there were two distinct defences, *i.e.*, that of provocation and that of drunkenness, the trial judge proceeding to deal with the first, invited them to consider the question in two stages: (*i*) Whether an ordinary person would be deprived of his self-control because of anything said or done by the deceased woman and (*ii*) Whether the accused had been actually provoked by her conduct. With respect to the first question, he told them: "At this stage you must not consider the character, background, temperament, or condition of the accused", implying that such matters were not ruled out of the consideration in the second stage. With respect to the second question, he instructed them to consider the "background, temperament, psychological background" of the accused, the concluding directions in the matter being reported as follows in the transcript of the charge:

> I think I mentioned to you the fact that if you get over the hurdle of whether the ordinary man would be provoked and decided that this man was also provoked, you can also consider how drunk he was, and that is something which you should take into consideration.

With the following opening sentence, he then proceeded to deal with the defence of drunkenness: "The other defence is that of drunkenness itself".

Counsel for the Crown suggested and, I think, rightly so, that what the trial judge is reported to have said when concluding his instructions on provocation, is, in part, inaccurately reported in the transcript in that he did not say "and decided", but said "in deciding". Be that as it may, read as a whole, I think that the address in the matter makes it clear that the jury were instructed that it was their duty to consider the condition of drunkenness of the accused to decide whether he had acted on provocation.

The *Hodge's Case*[1] rule. The proposition that the trial judge erred in failing to instruct the jury in accordance with the rule in the *Hodge's Case* is predicated on the submission that there was no direct evidence that: (*i*) the appellant had a gun when he entered the wash-room, (*ii*) that the appellant was the one who fired a shot and (*iii*) that if the appellant did fire the shot, such was not accidental or in self-defence or the result of provocation by the deceased in the wash-room. Hence it is said that there is only circumstantial evidence both as to *actus reus* and *mens rea.*

From all the facts preceding, accompanying and following the fatal shot, and particularly from the fact that when Joyce Alexander proceeded to the wash-room, for the purpose indicated, she had no knowledge that the appellant would follow her to that room, and much less knowledge as to where the revolver was, and from the direct evidence of what was heard to take place, either instantaneously or in quick succession, in the wash-room, a reasonable jury, even applying the *Hodge* rule, could only, if acting judicially, in the absence of evidence explaining it away, reach the conclusion that appellant, having entered the room, produced his revolver and fired it at the woman, either at once or upon the exchange of insults. It was no part of the case for the prosecution, as suggested in (*iii*) above, but for the defence to explain away this fact attending *actus reus* and *mens rea,* by evidence showing accident, or self-defence, or sudden retaliation to sudden provocation, or drunkenness affecting the capacity to form the relevant specific intent. Appellant is presumed to have intended the natural consequences of his act and, as stated by Lord Birkenhead in the *Beard Case*[2], this presumption is not

[1] (1838) 2 Lew. C.C. 227, 168 E.R. 1136. [2] [1920] A.C. 479.

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rebutted by evidence of drunkenness falling short of an incapacity in the accused to form the intent necessary to constitute the crime. The defences of drunkenness and provocation were adequately put before the jury and rejected by them. Accident or self-defence were not raised at trial, nor is there any evidence in support thereof.

On these views, this ground of appeal is ill-founded and it is unnecessary to deal with the real purport and limits of application of the *Hodge's Case* rule or with what was said by this Court in this regard, with respect to the particular circumstances in the case of *Lizotte v. The King*[1].

I would dismiss the appeal.

LOCKE J.:—The questions of law upon which leave to appeal was granted are stated in other reasons to be delivered in this matter.

I consider that the judge's charge adequately and accurately stated the law to the jury in regard to the defence of drunkenness.

In my opinion, there was no evidence of provocation within the meaning of that expression as it is used in s. 203 of the *Criminal Code* and, accordingly, this was not a ground upon which the offence committed might be reduced to manslaughter.

As the evidence of the witness Kish shows, when Joyce Alexander returned to the premises where she lived with her husband, the appellant was the aggressor in the dispute and the struggle which was followed within a very few minutes by her death. According to Kish, after reproaching the woman for failing to keep an appointment with him that afternoon, the appellant attempted forcibly to take off her shoes, saying that he had given them to her, and this precipitated a struggle in which each struck the other. After failing to remove the shoes, he forcibly removed her skirt and immediately thereafter the two commenced throwing dishes at one another. At this stage, the woman's husband appeared and stopped them and, as his wife was bleeding from a cut at the back of her neck, told her to go into the adjoining wash-room to remove the blood. How the woman received this wound is not explained. She then

[1] [1951] S.C.R. 115 at 133, 99 C.C.C. 113, 11 C.R. 357, 2 D.L.R. 754.

walked into the wash-room through a door which was standing almost wide open and, according to Alexander, she was immediately followed by the appellant and, within a matter of a few seconds, the shot was fired which caused her death. Kish, however, said that after the woman went to the wash-room the appellant went to another room in the house and returned apparently immediately thereafter and went into the wash-room. He was then heard by Kish to call the woman a vile name and she thereupon called him one equally objectionable and the shot followed immediately. Alexander's account and that of Kish differ in this respect that it was only the latter who said that the appellant left the room and returned before going into the wash-room and Alexander did not remember hearing his wife and the appellant calling each other names while in the wash-room. Also, while Alexander said that it was a matter of seconds between the time that the appellant went into the wash-room and the time the shot was heard, Kish said it was "a couple of minutes".

While the door of the wash-room was open, apparently the woman and the appellant were not visible to Kish and Alexander when the shot was heard. Immediately thereafter the appellant came out of the wash-room with a revolver in his hand and, after menacing Kish and Alexander with it, left the room and was shortly after arrested on the premises. Alexander, entering the wash-room, found his wife lying dying upon the floor and she shortly afterwards expired. The revolver which the police took from the appellant was loaded, with the exception of one chamber from which a shot had been discharged, and it was this bullet that killed Joyce Alexander.

It will be seen from this account that it was the appellant who provoked, first, the argument, and then, the struggle with the woman and, as the evidence of Kish showed, it was he who first applied to her a vile name when he followed her into the wash-room. In my opinion, under these circumstances, it cannot be successfully contended that if the accused became angered "on the sudden" he was provoked by the actions of the woman which followed upon his assaulting her in the manner described. An accused person who provokes another to fight by striking or abusing him and is struck in self-defence and kills such person in

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an ensuing struggle cannot, in my opinion, escape conviction for murder by saying that the killing was committed in the heat of passion. It was the unlawful act of assaulting the woman that led to whatever steps she took to defend herself, and what occurred in the wash-room when the shot was fired was merely a continuation of the struggle which had started in the adjoining room, whether, as Alexander stated, the appellant followed her immediately into the wash-room or after a short interval.

In these circumstances, there was, in my opinion, no evidence of provocation within the meaning of s.203. The learned trial judge, considering that there should be a question left to the jury on the point, in a passage of his charge used language which, with respect, appears to me to have been ambiguous in referring to the bearing that the drunkenness of the appellant might have upon the matter. Since, however, the appellant was not entitled to have the issue put to the jury, in my opinion no consequences injurious to the accused resulted.

The third question is based upon the failure of the learned trial judge to charge the jury in accordance with the instructions in *Hodge's Case*[1].

The only respect in which any portion of the evidence could be said to be circumstantial was due to the fact that no witness saw the shot actually fired: accordingly, that it was fired by the appellant was a matter of inference. The rest of the evidence upon which the appellant was found guilty was direct. As the examination of the record shows, the learned trial judge told the jury that, upon the evidence, no question of accident or self-defence arose and it was proven that the woman was killed by a shot fired from the revolver which the appellant had in his hand when he came out of the wash-room.

The rule in *Hodge's Case* is to be followed when the evidence relied upon is wholly or to a material extent circumstantial. In my opinion, however, in the circumstances of this case when no other inference was possible than that the appellant had fired the fatal shot, any such instruction to the jury was unnecessary.

I would dismiss the appeal.

[1] (1838) 2 Lew. C.C. 227, 168 E.R. 1136.

CARTWRIGHT J. (*dissenting*):—This is an appeal, brought pursuant to leave granted by this Court on November 18, 1958, from a unanimous judgment of the Court of Appeal for Ontario dismissing an appeal from the conviction of the appellant on September 12, 1958, after trial before Stewart J. and a jury on a charge of the murder of Joyce Alexander.

The questions of law on which leave to appeal was granted were as follows:

1. Did the learned trial judge err in failing to instruct the jury in accordance with the rule in Hodge's case?
2. Did the learned trial judge err in his charge to the jury in regard to the defence of provocation?
3. Did the learned trial judge err in his charge to the jury in regard to the defence of drunkenness?

I find it necessary to deal only with the second of these questions and as, in my opinion, there should be a new trial I do not propose to make any extended reference to the evidence.

It was not suggested that the death of Joyce Alexander was not caused by a bullet fired from a revolver in the hand of the appellant. The shooting took place in a wash-room in a basement apartment at 499 Hamilton Road, London, Ontario, the door of which was open so that the witnesses in the room off which the wash-room opened could hear although they could not see what went on between the appellant and the victim in the very short period of time that elapsed between the former following the latter into the wash-room and the firing of the fatal shot.

Without going into the details of the evidence it may safely be affirmed that it would have been open to the jury to find such provocation as would reduce the crime from murder to manslaughter.

No exception is taken to the manner in which the learned trial judge charged the jury as to how they should approach the question whether the acts and insults alleged to constitute provocation were of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. He made it plain that on this branch of the inquiry no account should be taken of the idiosyncrasies of the appellant and that the standard to be applied was that of an ordinary person.

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What is said to constitute a fatal defect in the charge is the alleged failure of the learned trial judge to make it clear to the jury that in approaching the question whether the appellant was in fact provoked and fired the shot in the heat of passion caused by the provocation they were entitled, and indeed bound, to take into consideration his condition of drunkenness.

After dealing with the question whether an ordinary person would have been provoked, the learned trial judge continued:

> If you do not think so then you can forget all about provocation as a ground for reducing the charge from murder to manslaughter. If you do think, if you do think that there was provocation, that is that an ordinary man would be provoked to violence, then the next thing you have to decide is *was* the accused provoked to violence to such an extent that he suddenly lost control and committed the act which he did? In doing that you are entitled to consider the background of the individual. Now this is a difficult problem for you, but let me repeat: it is not provocation until the ordinary man would be provoked to violence. Forget about the ordinary man and say was the accused provoked, and if so you can say why. You have already answered that by saying the ordinary man would be provoked, but to determine whether or not the accused was provoked take into consideration his background, temperament, psychological background, and, if he was provoked, did he do this in the heat of the moment suddenly, or did he have the power to reflect, because provocation is only a defence in law if acted upon immediately and before there is power to reflect.

The learned judge then reviewed the evidence bearing on the question whether the appellant was in fact provoked; in so doing he made no mention of his drunkenness. He concluded this part of his charge as follows:

> I think I mentioned to you the fact that if you get over the hurdle of whether the ordinary man would be provoked, and decided that this man was also provoked, you can also consider how drunk he was, and that is something which you should take into consideration.

From this last quoted passage it seems to me that the jury would understand that it was not until after they had decided (i) that an ordinary person would be provoked and (ii) that the appellant was in fact provoked that they could consider how drunk he was.

This view is strengthened by the circumstance that the learned trial judge immediately proceeded to deal with the defence of drunkenness as a separate defence, and his charge contains such statements as the following:

> Now the test, so far as drunkenness is concerned, is, has it, has drunkenness, so affected the mind that it has caused a lack of capacity in the accused to form the intent to do what he did? If drunkenness only

extends to the extent that the man was so affected as to be more inclined to fight, more belligerent, more argumentative, more disposed to, let us say, shoot, that is not enough. Before drunkenness can be a defence there must be inebriety to such an extent that the man is incapable of forming a specific intent essential to constitute the crime.

I do not suggest that this is not a perfectly accurate direction as to the defence of drunkenness but it might well strengthen the impression which I think had already been given to the jury that drunkenness did not enter into the question of provocation in fact.

After reading and re-reading the charge in its entirety it is my opinion (*i*) that at no point in his charge did the learned trial judge make it clear to the jury that in dealing with the question whether the accused was in fact provoked they should consider his condition of drunkenness and (*ii*) that certain passages in the charge would tend to give the jury the impression that they should not so consider it.

In my respectful view, this was non-direction amounting to misdirection which may well have affected the verdict of the jury.

It could not be seriously contended that on all the evidence a jury, acting reasonably, might not have found a verdict of manslaughter and there is no room for the application of s. 592(1)(*b*)(*iii*) of the *Criminal Code*.

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

Appeal dismissed, Cartwright J. *dissenting.*

Solicitor for the appellant: J. O'Driscoll, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.