1960

*Oct. 4
Dec. 19

HER MAJESTY THE QUEEN .....APPELLANT;

AND

CECIL RAYMOND WARNER .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Murder—Conviction quashed by Court of Appeal on ground inter alia it could not be supported by the evidence—Whether question of law raised—Jurisdiction of Supreme Court to hear appeal —Criminal Code, 1953-54 (Can.), c. 51, ss. 201, 202, 592 (1)(a)(i).

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

The respondent was found guilty of murder. He appealed and, by a unanimous decision, the Appellate Division of the Supreme Court quashed the conviction of murder, and substituted therefor one of manslaughter.

It was not disputed that the victim was killed by the respondent. According to the latter's evidence, the deceased while sitting in his car with the respondent, made an indecent proposal to the respondent who was drunk. The respondent seized the deceased by the neck and choked him. When the respondent came to his senses he found the victim limp and he attempted unsuccessfully to revive him. Thinking that the man was dead, he drove the car a short distance and then dragged the body to a ditch. He placed the man's belt around his neck, took his wallet and the car and left the place.

The pathologist who performed the autopsy concluded that death was caused by strangulation due to the tightening of the belt.

Held (Locke, Fauteux, Martland and Judson JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Abbott JJ.: There was no jurisdiction in this Court to hear the appeal. The Chief Justice of Alberta, speaking on behalf of the Appellate Division, considered that the evidence was not sufficient to support a conviction, which was a question of fact. This first reason was not *obiter dictum* merely because he also gave another reason. *Gravestock v. Parkin,* [1944] S.C.R. 150; *Jacobs v. London County Council,* [1950] A.C. 361, referred to.

Per Taschereau, Cartwright and Abbott JJ.: The Appellate Division quashed the conviction on the ground *inter alia* that it could not be supported by the evidence. This was a distinct ground on which its judgment was based, and was a ground raising no question of law in the strict sense. It was *nihil ad rem* that the judgment was based also on other grounds raising such points of law.

Per Ritchie J.: In finding that a reasonable doubt existed as to whether or not the respondent believed his victim to be already dead at the time when he in fact caused his death, the Appellate Division made a finding of fact which excluded the application of s. 201 of the Code from the circumstances of this case, and which was not subject to review in this Court.

If the Appellate Division erred in finding that such a doubt existed, then this was an error of fact from which other errors necessarily flowed, including that s. 202 was the only one under which the jury could have found the accused guilty of murder. The error, if error it was, raised a mixed question of fact and law, and as such was not a competent ground of appeal to this Court. *R. v. Décary,* [1942] S.C.R. 80, referred to.

As the Appellate Division quashed the conviction on the ground *inter alia* that it could not be supported by the evidence, no question of law in the strict sense was raised by this appeal.

Per Locke J., *dissenting*: The language of the Chief Justice of the Appellate Division did not indicate that the decision of that Court rested upon the insufficiency of the evidence. If, however, it should be so construed, what was said as to the insufficiency of the evidence referred only to a charge of murder under s. 202 of the Code and not to such a charge under s. 201. This was misdirection. It

1960

THE QUEEN v. WARNER

was further made manifest that one of the grounds for this conclusion was the opinion that, as it could not be said with assurance that the accused did not believe the victim to have been dead when he tightened the belt around his neck, there could be no conviction for murder under s. 202. These were errors in law, which this Court was vested with jurisdiction to correct. *Thabo Meli v. R.*, [1954] 1 W.L.R. 228; *Bradley v. The Queen*, [1956] S.C.R. 723, referred to.

Per Fauteux, Martland and Judson JJ., *dissenting*: Although the Chief Justice of the Appellate Division was strongly of the opinion that the verdict of murder could not be supported by the evidence, he was not satisfied that this opinion had that degree of finality required to assert it as a distinct ground for the decision of the appeal.

If, however, it could be said that the decision of the Appellate Division was that the verdict could not be supported on the evidence, it appeared that this conclusion rested on the proposition stated when the Chief Justice, after dealing with s. 202, said: "this is the only section under which the jury could have found the accused guilty of murder." This was tantamount to saying that there was no evidence on which the jury could have convicted under s. 201, which was a question of law.

Where it appears that a decision of a court of appeal that a verdict cannot be supported by the evidence has been founded on a wrong conclusion of law, this Court is not without jurisdiction to hear an appeal from it. It was an error in law to say that there was no evidence upon which the jury could have found the accused guilty of murder under s. 201, which was the conclusion, in a relation to that section, which was ultimately reached by the Chief Justice of the Appellate Division.

The jury having rejected the defence of drunkenness, the suggestion of the Appellate Division that the trial judge should have put to the jury "a suggestion" that the accused put the belt around the victim's neck to assist in dragging him from the car to the ditch, was untenable. In directing a jury, the trial judge has not the duty to speculate and instruct them as to all the views which one might possibly take of the evidence.

As to the errors found in the Court below, and as to the grievances alleged for respondent in the notices of appeal to that Court, there was nothing of real substance.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], quashing a conviction of murder and substituting one of manslaughter. Appeal dismissed, Locke, Fauteux, Martland and Judson JJ. dissenting.

W. Shortreed, Q.C., for the appellant.

Bruce D. Patterson, for the respondent.

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

[1] 127 C.C.C. 394.

THE CHIEF JUSTICE:—In my opinion there is no jurisdiction in the Court to hear this appeal. The first two sentences of the reasons for judgment of the Chief Justice of Alberta, speaking on behalf of the Appellate Division, are as follows:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

I read the first sentence as meaning that the Chief Justice considered that the evidence was not sufficient to support a conviction,—which is a question of fact. As to the second sentence and the remainder of the reasons, the decisions, referred to on the argument, of *Gravestock v. Parkin*[1] and *Jacobs v. London County Council*[2] show authoritatively that the first reason given by the Chief Justice of Alberta was not *obiter dictum* merely because he also gave another reason.

While it was announced that we had jurisdiction, further consideration has persuaded the majority of the Court that such is not the case.

The appeal should be dismissed.

The judgment of Taschereau, Cartwright and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Appellate Division of the Supreme Court of Alberta[3] pronounced on March 31, 1960, allowing an appeal from the conviction of the appellant on January 22, 1960, before Greschuk J. and a jury on the charge that at Edmonton on or about August 23, 1959, he did murder Stanley Valpeters. The Appellate Division quashed the conviction of murder, substituted a conviction of manslaughter and subsequently sentenced the appellant to ten years imprisonment.

The appeal is brought pursuant to an order made by this Court on May 12, 1960, granting the appellant leave to appeal on the following questions:

> (*a*) Did the Appellate Division err in law in holding that there was nondirection amounting to misdirection, if not misdirection, in respect to the offence of murder under section 202 of the Criminal Code, and that

[1] [1944] S.C.R. 150, 2 D.L.R. 337.
[2] [1950] A.C. 361, 1 All E.R. 737.
[3] 127 C.C.C. 394.

1960

THE QUEEN v. WARNER

Cartwright J.

the grounds on which the jury could find the accused guilty of murder while committing robbery were not placed before the jury as facts to be found by them;

(*b*) Did the Appellate Division err in law in finding that the trial judge should have put to the jury "a suggestion" that the accused put the belt around Valpeters' neck to assist in dragging him from the car to the ditch, in the absence of evidence to support any such suggestion;

(*c*) Did the Appellate Division err in law in holding that the judge's charge was inadequate in failing to explain the theory advanced by the Crown that strangulation was used to facilitate the commission of robbery, and, hence, whether it was intended to cause death or not the act constituted murder;

(*d*) Did the Appellate Division err in law in holding that only under section 202 of the Criminal Code could the jury have found the accused guilty of murder.

The order granting leave was made by a court consisting of five members, two of whom, dissenting, would have dismissed the application.

It is not disputed that Valpeters was killed by the appellant. There were no eye-witnesses of the killing other than the appellant himself who made a voluntary statement to the police after his arrest on the charge of murder and also gave evidence at the trial. The effect of the evidence is sufficiently summarized in the following passage in the reasons of Ford C.J.A. who delivered the reasons of the Appellate Division:

The facts of what happened when the deceased, Valpeters, met his death must be ascertained from the story told by the accused himself with the reasonable inferences to be drawn therefrom, the location and condition of the body when found, and the opinion evidence of the two doctors called by the Crown.

The story of the accused is that he is a drink addict and had been drinking throughout part of the afternoon of Saturday, August 22nd, 1959 and all of the evening, during which time he visited at least two hotels, the Hotel Regis, and the King Edward. He said that he met a constable on the street and asked to be taken into custody for being drunk as he wanted to go to Belmont for treatment because of his drink habits. Being unsuccessful in this, he went to police headquarters and suggested that there was a charge of false pretences that could or should be laid against him on which he could be taken into custody. In this, too, he was unsuccessful. There is no doubt that he tried to have this done as it is confirmed by the evidence of the police constables.

After this he roamed the streets of Edmonton until about two o'clock Sunday morning. During this period he was put out two or three times from the Rose cafe. This is also confirmed by independent evidence. About the hour just mentioned, when still in search of liquor, he met a stranger somewhere near the same restaurant. This stranger, who has turned out to be Valpeters, invited him to go in his car out of the City of Edmonton into the country to consume a bottle of whiskey. Valpeters

drove out past the oil refineries until the car was brought to a stop somewhere in the entrance to a farmhouse in the country. Valpeters invited the accused into the back seat in order to drink the whiskey. After both got into this seat he invited the accused to perform an act of gross indecency, whereupon a struggle began in which some blows, apparently ineffective, were struck, and Valpeters got the accused down and the accused seized Valpeters by the neck and choked him. The accused said that when he came to his senses Valpeters was all limp and that he attempted to revive him. The accused said that he had had some training with the St. Johns Ambulance. The attempt to revive was unsuccessful and, after feeling his heart and pulses, he thought the man was dead.

He said that he was in fear because of what he had done and backed the car out of the entrance way to the farmhouse and drove it a short distance along the road to a ditch where he got out and pulled the body from the back seat and dragged it by the armpits to the ditch. He said that he tried again to revive the man but could not do so. He said also what is the most serious evidence against himself that he put the man's belt around his neck when he was in the ditch and took his wallet and the car and left the place. That is where the body was found the following Monday afternoon.

The accused, on taking the car, drove to where he was living in Edmonton and took with him the woman with whom he was living and their son, that same morning, and drove back to the home of her parents in Ontario where he was later arrested.

I do not find it necessary to consider the several errors of law alleged by the appellant to have been made by the Appellate Division as I think it is clear that the Appellate Division allowed the appeal on two main grounds:

(1) that, in the opinion of the Appellate Division, the verdict of guilty of murder should be set aside on the ground that it could not be supported by the evidence, and

(2) that there had been errors in law in the charge of the learned trial judge.

So far as the judgment of the Appellate Division is based on the first ground mentioned, this Court is powerless to interfere with it. The question whether the Appellate Division was right in proceeding on this ground is not a question of law in the strict sense. It is a question of fact or, at the best from the point of view of the appellant, a mixed question of fact and law.

The reasons of the learned Chief Justice of Alberta open with the following paragraph:

I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

1960

THE QUEEN v. WARNER

Cartwright J.

Later in his reasons, the learned Chief Justice says:

> No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

This is a finding of fact made by the Appellate Division as a result of its examination of the evidence. It is irrelevant to inquire whether we would make the same finding if we had the power, which the Appellate Division has but which we have not, to proceed upon grounds of fact.

The jurisdiction of the Appellate Division to allow the appeal is found in s. 592(1)(*a*) of the *Criminal Code* which reads:

> 592(1) On the hearing of an appeal against a conviction, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

On reading the reasons as a whole, I am satisfied that the Appellate Division was exercising its jurisdiction under s. 592(1)(*a*)(i) and was setting the verdict aside on the ground that, in its opinion, it could not be supported by the evidence.

It was suggested during the argument that what the Appellate Division really did was to rule that there was no evidence on which the jury could have convicted the respondent of murder and that the question whether there is any evidence, as distinguished from the question whether there is enough evidence, is a question of law.

I cannot agree with this suggestion for several reasons. First, it appears that there was, as indeed both counsel concede, some evidence on which it would have been open to a properly instructed jury to find a verdict of murder and I am not prepared to assume that the Appellate Division overlooked or misunderstood this evidence. Secondly, if the Appellate Division had intended to hold that there was no evidence they would have said so; it is significant that they followed the very words of s. 592(1)(*a*)(i). This clause gives jurisdiction to the Court of Appeal to proceed on grounds of fact, while clause (ii) which follows immediately gives it jurisdiction to proceed on the ground that there has been

a wrong decision on a question of law. Thirdly, while a large number of grounds of appeal were put forward in the notice of appeal to the Appellate Division these did not include the ground that there was no evidence to support the conviction, while the following grounds were all appropriate to found the submission that the verdict should be set aside under s. 592(1)(*a*)(i) as being one that could not be supported by the evidence:

> (1) That the said conviction is against the law, evidence and weight of the evidence.
>
> * * *
>
> (3) That the jury failed to give proper, fair, reasonable and adequate consideration to the evidence and came to a hasty conclusion.
>
> (4) That the verdict of the jury was perverse and contrary to the evidence at the trial.
>
> * * *
>
> (19) The verdict of the jury was perverse and contrary to the evidence in that it generally failed to give the appellant the benefit of reasonable doubt and more particularly with respect to the following:
>
> (*a*) That the medical evidence indicated that a person rendered unconscious by pressure on the carotid nerve would become dead in a matter of minutes if certain steps such as lowering of the head between the knees and relieving of the pressure did not take place and there being no evidence that the deceased was so relieved prior to the placing of the belt.
>
> (*b*) That the medical evidence indicated death by strangulation and the evidence of the appellant indicated the deceased was limp and appeared to be dead in the car, which evidence was consistent with appellant's theory and defence as to cause and time of death or at least raised reasonable doubt that death occurred from the placing of the belt on the deceased's neck in the ditch and not by reason of the appellant's actions as stated in the car.

However, I may have dealt with this suggestion at undue length for the grounds on which leave to appeal to this Court was granted do not include a ground that the Appellate Division erred in holding that there was no evidence on which the jury could have convicted the respondent of murder.

If I am right in my view that the judgment of the Appellate Division is based on distinct grounds, with one of which we cannot interfere because it raises no question of law in the strict sense, it is of no consequence that the other grounds on which they proceeded did raise such questions of law. If authority be needed for this proposition it is to be

1960

THE QUEEN v. WARNER

Cartwright J.

found in the cases referred to by the Chief Justice during the argument of the appeal, *Gravestock v. Parkin*[1] and *Jacobs v. London County Council*[2]: in the last mentioned case Lord Simonds, with whom the other Law Lords agreed, said at page 369:

> But, however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing.

At the risk of appearing repetitious, I venture to suggest that if the learned Chief Justice of Alberta, as he might have done, had simply said:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence . . . I would allow the appeal and quash the conviction of murder . . . we order that the conviction for murder be quashed, and a conviction of manslaughter be substituted.

no one would have suggested that this Court had power to review the judgment of the Appellate Division. I am unable to see how we acquire such power because the learned Chief Justice felt that he "must go further, and set out other reasons for setting aside the conviction"; his use of the word "other" makes it plain that he had already given one reason. The meaning of the word "other" as here used is that given first in the Concise Oxford Dictionary "not the same as one or more or some already mentioned or implied, separate in identity, distinct in kind, alternative or further or additional". Once a distinct reason has been given its character is not altered by the giving of additional reasons.

I conclude that the Appellate Division quashed the conviction on the ground *inter alia* that it cannot be supported by the evidence, that this was a distinct ground on which its judgment was based, that it is a ground raising no question of law in the strict sense and that it is *nihil ad rem* that the judgment was based also on other grounds raising such points of law.

I would dismiss the appeal.

LOCKE J. (*dissenting*):—The passage from the judgment of the learned Chief Justice of Alberta which is relied upon to support the argument that this Court is without jurisdiction to entertain this appeal must be read together with

[1] [1944] S.C.R. 150, 2 D.L.R. 337. [2] [1950] A.C. 361, 1 All E.R. 737.

other passages of the reasons which discuss the grounds upon which that portion of the opinion is based. After saying:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

the learned Chief Justice said in part:

> I would hold that there was non-direction amounting to misdirection, if not misdirection, in respect of the offence of murder under Section 202 of the Code. This is the only section under which the jury could have found the accused guilty of murder.

and again, after referring to the fact that the belt of the deceased was drawn tightly about his neck, this admittedly having been done by the respondent, and that the medical evidence was to the effect that the man had died of strangulation, it was said:

> No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

With great respect, I am of the opinion that upon the evidence the accused might properly have been found guilty of murder under s. 201 of the *Criminal Code* and I consider the learned trial judge properly charged the jury upon that section.

I am further of the opinion that the fact that the accused may have believed that Valpeters was dead when he put the belt around his neck and drew it tight does not affect the question as to whether the offence was murder under either sections 201 or 202.

Upon the respondent's own statement, in the struggle with Valpeters in the car he struck him several times with his fists and attempted to throttle him and, after moving the car to another location, dragged the man to the ditch and there placed and tightened the belt around his neck. These were all facts which formed part of the offence of either murder or manslaughter and were properly all considered together. The argument that the various unlawful acts causing the death of a person may be split up and the intention of the accused considered in respect of each of them separately was made and rejected by the Judicial Committee in *Thabo Meli v. R*[1]. In that case the accused

[1] [1954] 1 W.L.R. 228, 1 All E.R. 373.

1960

THE QUEEN v. WARNER

Locke J.

persons had planned to kill the victim and had beaten him so severely that they thought he was dead. They then threw his body over a cliff for the purpose of indicating that the man had accidentally fallen over and been killed. It was shown at the trial that the injured man died not from the beating to which he had been subjected but from the exposure when lying out at the foot of the cliff. The contention that as the accused persons thought the man was dead when they threw him over the cliff and did this accordingly without the intent of killing him was rejected, for reasons which are applicable in the present case. I would add that a similar contention was advanced in this Court and rejected in *Bradley v. The Queen*[1].

I agree with my brother Fauteux, whose reasons I have had the advantage of reading, that the language of the learned Chief Justice above quoted does not indicate that the decision was rested upon the insufficiency of the evidence. If, however, it should be so construed, it is my opinion that there is jurisdiction in this Court to hear the appeal. Clearly, what is said as to the insufficiency of the evidence refers only to a charge of murder under s. 202 and not to such a charge under s. 201 and this, with respect, was misdirection. It is further made manifest that one of the grounds for this conclusion was the opinion that, as it could not be said with assurance that the accused did not believe Valpeters to have been dead when he tightened the belt around his neck, there could be no conviction for murder under s. 202. These were errors in law, in my opinion, which this Court is vested with jurisdiction to correct.

I would allow the appeal and restore the judgment at the trial.

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

FAUTEUX J. (*dissenting*):—In the early afternoon of August 24, 1959, two hunters discovered a body, in a ditch beside a municipal road, outside the city limits of Edmonton, in the Province of Alberta. The body, later identified

[1] [1956] S.C.R. 723 at 742, 6 D.L.R. (2d) 385.

as that of one Stanley Valpeters, was partly hidden by growing grass and was lying face down with a belt around the neck.

The pathologist who subsequently performed the autopsy observed, amongst other marks of violence, that there were, all around the neck, a straplike constriction and a furrow to which blades of grass were stuck. When the belt was exhibited to him and when told of its finding around the neck of the body, he expressed the opinion that the furrow could have resulted from a tension sustained for some time on the free end of the belt. He estimated it would take a minimum of about five minutes for constriction to stop the breath so as to cause death. His findings indicated to him that Valpeters was alive prior to the exertion of the pressure that caused the furrow. He concluded that death was caused by strangulation.

Investigation by the police led to the arrest of respondent a few days later, in the city of Toronto. Warner was then found in possession of Valpeters' wallet and automobile, the wallet containing identification papers of the latter and the license plates, issued for his automobile, having been substituted.

Respondent made an admittedly voluntary statement to the police. In the first part thereof, he relates at length and with details various occasions during which, the week before the date of the fatal occurrence and on the very day itself, he consumed alcoholic liquors. Then follows a narration of events contemporaneous and immediately subsequent to the killing of Valpeters, including his hurried departure from Edmonton, with all the members of his family, in the automobile of the latter. Respondent says that, in the early hours of the 23rd of August, 1959, the day before the discovery of the body, he and the deceased, who were strangers to one another, met casually on a street within the city limits of Edmonton. He accepted an invitation of Valpeters to drive to a suitable place to consume a bottle of liquor which the latter said he had in his automobile. They eventually stopped on a gravel road "or a kind of track or cattle-path in some bushes", where, on respondent's story, the following events took place:

He (Valpeters) says "Let's get in the back seat because the whiskey is there". Both of us got in the back seat with him behind the driver's seat and I was on his right. Instead of producing a bottle of whiskey

1960

THE QUEEN v. WARNER

Fauteux J.

he put his hand over and started to undo my pants. The next thing I knew I got mad and proceeded to struggle with him. I started to choke him. I don't remember too much how long I was choking him or what but when I came to my sense again he was all limp.

I tried to feel a heart beat but couldn't and I got scared. This was in the back seat with my door open and I tried artificial respiration with him laying on the back seat. Nothing happened so I closed the back door and climbed into the driver's seat. I backed the car out of there on to the road and I drove a short distance from there. It wasn't very far. I got out and pulled him out of the car into the ditch.

I don't know whether I was still mad or crazy but I took his belt from his pants and wrapped it around his neck. I left him there.

I took his wallet from him but I don't know just what pocket it was in. I put it in my own pocket. Then I drove out of there and went home. It was just breaking daylight when I got home. I went into the house and got my wife out of bed and told her we were leaving right away as we were going to Drayton Valley and to pack everything that she could get in the car and we would send for the rest of the stuff later.

Respondent was then charged with the murder of Valpeters. At trial, he testified in his own defence repeating, with some additions, what he had already stated to the police. Thus, he suggested that while wrestling in the car, he was overpowered by his victim and then started to choke him. He said he had some knowledge of first aid and that, to practise artificial respiration, he thought it better, being in fear that attention of people in the neighbourhood might have been attracted by the scuffle, to drive some distance away. Having done so, he dragged Valpeters by the arm-pits in the ditch where, he said, he attempted to revive him and then he put the belt around his neck—an act for which, he testified, he was unable to account.

On this direct and other incriminating evidence of a circumstantial nature, the jury, having been directed particularly on the various issues raised in defence, to wit, drunkenness, provocation and self-defence, found the accused guilty of murder.

Respondent appealed and, by a unanimous decision, the Appellate Division of the Supreme Court quashed the verdict of murder, substituting thereto one of manslaughter.

The reasons for judgment were delivered by Ford C.J.A., and concurred in by the other members of the Court. In the opening paragraph of his reasons for judgment, the learned Chief Justice said:

I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

He then proceeded to review the evidence, relating it to the offence of murder under s. 202 Cr.C., i.e., murder associated with robbery, and, having found fault with the address of the trial Judge in that respect, he disposed of the appeal in the manner just indicated.

The Crown then applied to this Court for leave to appeal. On this application, counsel for respondent, relying on the first sentence of the opening paragraph of the reasons for judgment, contended that this Court had no jurisdiction in the matter.

Subject to the right of respondent to raise the question of jurisdiction at the hearing of the appeal on the merit, leave to appeal was granted on questions of law here mentioned in the order in which they will hereafter be considered:

(i) Did the Appellate Division err in law in holding that only under section 202 of the Criminal Code could the jury have found the accused guilty of murder.

(ii) Did the Appellate Division err in law in finding that the trial judge should have put to the jury "a suggestion" that the accused put the belt around Valpeters' neck to assist in dragging him from the car to the ditch, in the absence of evidence to support any such suggestion;

(iii) Did the Appellate Division err in law in holding that there was nondirection amounting to misdirection, if not misdirection, in respect to the offence of murder under section 202 of the Criminal Code, and that the grounds on which the jury could find the accused guilty of murder while committing robbery were not placed before the jury as facts to be found by them;

(iv) Did the Appellate Division err in law in holding that the judge's charge was inadequate in failing to explain the theory advanced by the Crown that strangulation was used to facilitate the commission of robbery, and, hence, whether it was intended to cause death or not the act constituted murder;

Dealing with the objection to the jurisdiction of this Court.

It may well be impossible to affirm our jurisdiction in a case where a Court of Appeal states, clearly and without more, that a verdict is set aside on the ground that it cannot be supported by the evidence. This is not the situation in the present case. Here, the Chief Justice said:

I am strongly of the opinion that the verdict of murder cannot be supported by the evidence.

This sentence, he immediately and substantially qualified in adding:

But I feel I must go further, and set out other reasons for setting aside the conviction.

1960

THE QUEEN v. WARNER

Fauteux J.

Read together, these two sentences indicate, I think, that while entertaining, even to a strong degree, the opinion expressed, the Chief Justice was not ready to rest a decision upon it, but felt compelled to "go further" and give, not *the other reasons,* but *"other reasons"*, meaning reasons other than the opinion expressed, to justify the setting aside of the verdict of murder. In other words, strong as was this opinion, the Chief Justice was not satisfied that it had that degree of finality required to assert it as a distinct ground for the decision of the appeal which he ultimately rested on grounds stated as follows at the end of his reasons for judgment:

> I would hold that there was non direction amounting to misdirection, if not misdirection, in respect of the offence of murder under s. 202 of the Code. This is the only section under which the jury could have found the accused guilty of murder.

On this interpretation, the decisions in *Gravestock v. Parkin*[1] and *Jacobs v. London County Council*[2] have no application in this case.

If, however, it can be said that the decision of the Appellate Division was that the verdict of murder could not be supported on the evidence, we must, in that event, read the remainder of the reasons for judgment as being explanatory of the decision which had been reached. When that is done, it appears to me to be clear that the conclusion rested upon the proposition stated when the learned Chief Justice, after dealing with s. 202, said: "This is the only section under which the jury could have found the accused guilty of murder." This is tantamount to saying that there was no evidence on which the jury could have convicted under s. 201, and that is a question of law.

Has this Court jurisdiction to hear an appeal under such circumstances? In my opinion it has. The situation is somewhat analogous to that which arose in *Lizotte v. The King*[3]. In that case the Court of King's Bench had affirmed a conviction of murder, one of the grounds being that there was no substantial wrong or miscarriage of justice, notwithstanding certain errors of law at the trial. The Court[4] had declared "que la preuve justifie amplement le verdict". Before this Court it was contended, on behalf of the Crown,

[1] [1944] S.C.R. 150, 2 D.L.R. 337. [2] [1950] A.C. 361, 1 All E.R. 737.
[3] [1951] S.C.R. 115, 2 D.L.R. 754. [4] [1950] Que. K.B. 484.

that, as this was a decision of fact, or mixed law and fact, it was not subject to review in this Court. That argument was rejected in the following terms at p. 134:

> I do not think that this argument is entitled to prevail. In the case at bar it might perhaps be disposed of by pointing out that in my opinion there were serious errors in matters of law at the trial which the Court of Appeal did not regard as being errors at all; but even had the Court of Appeal found the existence of all the errors in law which in my view did occur and nonetheless dismissed the appeal pursuant to section 1014(2), I do not think that this court would be without jurisdiction.

Similarly, in my view, where it appears that a decision of a court of appeal, that a verdict cannot be supported by the evidence, has been founded on a wrong conclusion on a question of law, this Court is not without jurisdiction to entertain an appeal from it. That this occurred in the present case is shown in the consideration of the first ground of appeal.

Dealing with the merits of the appeal. The question whether the Appellate Division erred in law in holding that only under section 202 could the jury have found the accused guilty of murder, must be answered affirmatively. As presented to the jury, the case was not and could not have been legally confined to the issue of murder under section 202, i.e., murder associated with robbery, but included the issue of murder under section 201. On the latter issue, it was open to the jury to accept the opinion of the pathologist that the straplike constriction and the furrow around the neck resulted from a tension sustained for about five minutes on the free end of the belt and that prior to the exertion of the tension, Valpeters was alive. From these facts and subject to the consideration of the various defences raised,—which were rejected,—the jury could validly infer an intention to kill and reach a verdict of guilty of murder under section 201.

In his reasons for judgment, the Chief Justice said:

> No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

It has been suggested that this constitutes a finding of fact which excludes the application of s. 201 of the Criminal Code, because, it is contended, if the respondent believed Valpeters to be dead he could not thereafter have conceived

1960

THE QUEEN v. WARNER

Fauteux J.

the intent to cause his death. It is then contended that, being a finding of fact, this Court has no jurisdiction to disturb it.

It should be noted, however, that the learned Chief Justice did not himself, in his reasons for judgment, relate the statement above quoted to the conclusion which he ultimately reached that the respondent could not have been convicted under s. 201. It occurs in the course of his consideration of the adequacy of the charge to the jury by the learned trial Judge in respect of the application of s. 202 of the Criminal Code, for, after discussing what was said in the charge in relation to that matter, he said:

> Taken by itself, this is not objectionable. But the real question for the jury was whether or not what the accused did was done in the course of a robbery and, basic to this, is the question of whether or not this was a robbery; and that, in turn, depends upon the intent in the mind of the accused up to the time that he thought the man was dead. No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

The question of the belief of the respondent as to the condition of Valpeters after the struggle is thus related by the learned Chief Justice solely to the question as to whether, prior to Valpeters becoming unconscious during the course of the struggle, the respondent had formulated the intent to rob him.

In any event, even if it could be said that the respondent did believe Valpeters to be dead, it does not follow that, because of this belief, he could not conceive the idea and form the intent to make definitely certain that any possible spark of life be conclusively destroyed. It was clearly open to the jury to infer that such an intent accompanied the commission of the very acts of violence by which the respondent did actually kill his victim; and this is murder under s. 201.

It was, therefore, an error in law to say that there was no evidence upon which the jury could have found the accused guilty of murder under the latter section, which is the conclusion, in a relation to that section, which was ultimately reached by the learned Chief Justice.

With respect to the second question, there is nothing in the evidence suggesting that the accused put the belt around Valpeters' neck to assist in dragging him from the car to the

ditch. On the contrary, in both his statements to the police and in his testimony, the accused said that the placing of the belt took place once the victim was in the ditch. The presence of blades of grass stuck to the furrow found around the neck is significant. Moreover, on his own story given at the trial, the accused specified that he dragged his victim by the armpits in the ditch, in order to revive him by practising artificial respiration. The jury having rejected his defence of drunkenness, the suggestion of the Appellate Division is, with all deference, untenable. In directing a jury, the trial judge has not the duty to speculate and instruct them as to all the views which one might possibly take of the evidence.

As to the errors found in the Court below and referred to in the third and fourth grounds of the appeal for the Crown, and as to the numerous grievances alleged for respondent in the original and supplemental notices of appeal to the Court below, I must say that, after having considered the address of the trial Judge and the evidence, I can find nothing of real substance. The jury were directed with exceptional care and clarity on all the issues upon which it was the duty of the trial Judge to do so, and more particularly on the defence of drunkenness, provocation and self-defence raised by the accused and ultimately rejected by the jury. While failure of counsel for an accused to object to the address of the trial Judge at the stage of trial is not fatal, it may be added that though invited to submit objections, none were offered by counsel.

I would allow the appeal, set aside the judgment of the Appellate Division, and restore the verdict of the jury.

RITCHIE J.:—The circumstances giving rise to this appeal are outlined in the reasons for judgment of Mr. Justice Cartwright and Mr. Justice Fauteux which I have had the benefit of reading.

In my view the opening words of the decision rendered by Ford C.J. on behalf of the Appellate Division of the Supreme Court of Alberta are the controlling factor in the determination of the difficult question as to whether or not a question of law in the strict sense is raised by this appeal. The learned Chief Justice said:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

1960

THE QUEEN v. WARNER

Ritchie J.

In the course of his decision, the learned Chief Justice also held that s. 202 of the *Criminal Code* "is the only section under which the jury could have found the accused guilty of murder" and it was contended on behalf of the appellant that this finding constituted an error in law and formed the basis of the opinion of the Appellate Division that the verdict of murder could not be supported by the evidence. It, therefore, becomes necessary to examine the grounds upon which the Appellate Division based its conclusion with respect to s. 202 of the Code.

Dominant amongst the reasons set out by the learned Chief Justice for allowing this appeal is the finding that "no one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed".

In my view this finding must be interpreted as meaning that on the evidence before them, all the members of the Appellate Division concluded that there was a reasonable doubt as to whether or not the respondent believed his victim to be dead before the belt was placed around his neck. The medical evidence was that the deceased came to his death by being strangled with his belt and must, therefore, have been alive when the belt was first applied, and it is implicit in the decision of the Appellate Division that this evidence was accepted.

If the respondent had believed his living victim to be dead after his efforts to revive him had failed, it follows that he could not thereafter have conceived the intent to cause his death which is a necessary ingredient of the offence of murder as described in s. 201 of the *Criminal Code* for no man can intend to kill a person whom he thinks to be already dead. It, therefore, seems to me that in finding that a reasonable doubt existed as to whether or not the respondent believed his victim to be already dead at the time when he in fact caused his death, the Appellate Division made a finding of fact which excluded the application of s. 201 from the circumstances of this case and which is not subject to review in this Court.

If the Appellate Division erred in finding that such a doubt existed, then this was an error of fact from which other errors necessarily flowed, including the finding that

s. 202 was the only one under which the jury could have found the accused guilty of murder. The latter conclusion follows directly from the former, and, accordingly, in my view the error, if error it was, raises a mixed question of fact and law, and as such is not a competent ground of appeal to this Court (see *The King v. Décary*[1]).

I agree with Mr. Justice Cartwright that, as the Appellate Division quashed the conviction on the ground, *inter alia,* that it could not be supported by the evidence, no question of law in the strict sense is raised by this appeal.

I would dismiss this appeal.

Appeal dismissed, LOCKE, FAUTEUX, MARTLAND *and* JUDSON JJ. *dissenting.*

Solicitor for the appellant: The Attorney General of Alberta, Edmonton.

Solicitors for the respondent: Patterson, Patterson & Shelton, Edmonton.