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Feb. 18, 19.
Feb. 24.

FRED GRAVES, ALFRED GRAVES AND HARRY GRAVES ..... } APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Indictment for murder—Trial—Charge to jury—Misdirection—Constructive murder—Natural consequence of act—New trial.

On the trial of an indictment for murder of one Kenneth Lea it was proved that the prisoners, who had been drinking, came on the deceased's lawn and commenced to shout and sing and use profane and insulting language towards him. He twice warned them away, and finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah where he stood, when he took hold of the barrel of the gun and struck one of the prisoners with the stock. The gun was discharged into his body and there was evidence that the prisoners then maltreated him and his wife. He was taken to a hospital in Halifax where he died shortly after. The trial judge in charging the jury instructed them that the prisoners were doing an unlawful act in trespassing on the property of deceased and that if they were actuated by malice it would be murder, if not it was manslaughter, drawing their attention especially to sections 256 and 259(*b*) of the Criminal Code. The prisoners were found guilty of murder. On appeal from the decision of the Supreme Court of Nova Scotia on a reserved case:—

Held, that the above direction to the jury ignored the requirements of the Code formulated in sub-section (*d*) of section 259, to which the Judge should also have drawn their attention directing them to find whether or not the prisoners knew, or ought to have known, that their acts were likely to cause death, and his failure to do so left his charge open to objection and constituted misdirection for which the prisoners were entitled to a new trial.

APPEAL from a decision of the Supreme Court of Nova Scotia, affirming, on a case reserved, by an

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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equal division of opinion, the conviction of the appellants for murder.

Under the circumstances set out in the above headnote the appellants were found guilty of the murder of Kenneth Lea at Wolfville, N.S. The prisoner's counsel then presented to the trial judge thirty-six objections to the charge and verdict and asked him to reserve a case for consideration to the full court, which he refused to do. On application to the full court he was ordered to reserve a case on thirty-two of the objections(1), and after argument on the case so reserved the court was equally divided and the conviction stood. The prisoners then appealed to the Supreme Court of Canada.

Roscoe K.C. for the appellants. In a criminal case it is not necessary that evidence should be objected to. *Reg.* v. *Gibson*(2); *Rex* v. *Brooks*(3); *Rex* v. *Farrell*(4). The rule in civil cases does not apply to criminal cases. *Reg.* v. *Thériault*(5).

When the facts render it necessary, in order to guide the jury, that a direction on law should be given, want of direction on the point of law is ground for a new trial. *Prudential Assurance Co.* v. *Edmonds* (6); *Hawkins* v. *Snow*(7); *Rex* v. *Blythe*(8). The chief defect in the judge's charge is the weight attached to the illegal presence of the appellants on the lands of deceased.

The term "malice," when used, should be defined to the jury. *Richardson* v. *The State*(9). The judge

(1) 46 N.S. Rep. 305.
(2) 18 Q.B.D. 537, at p. 540.
(3) 11 Ont. L.R. 525-9.
(4) 20 Ont. L.R. 182, at p. 187.
(5) 2 Can. Cr. Cas. 444.
(6) 2 App. Cas. 487.
(7) 28 N.S. Rep. 259.
(8) 15 Can. Cr. Cas. 224.
(9) 28 Tex. Cr. Rep. 216.

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charged that if the jury found that the appellants were actuated by malice and ill will in going to Lea's premises, and behaving as they did, even though they did not intend to injure him, the crime was murder. The words and actions of drunken men, as indicative of malice, should be differentiated from those of a sober man. *The People* v. *Rogers* (1); *Rex* v. *Thomas* (2).

Failure to instruct upon the distinction between murder and manslaughter is also the proper subject of reservation. *Rex* v. *Wong On* (3); *Rex* v. *Walkem* (4). Any point submitted by the judge to the jury should be considered as materially affecting the conviction. The Crown must shew affirmatively that the misdirection did not influence the result. *Allen* v. *The King* (5).

Newcombe K.C. for the Attorney-General of Nova Scotia discussed the evidence in regard to the *res gestæ,* and referred to 1 Hawk. P.C. (Ker ed.), page 86, para. 10; page 513, and page 99, paras. 41, 42; Bishop Crim. Law (8 ed.), pages 534, 535, 654, 858; Foster's Cr. Cas., pages 55-57, 259; Hale P.C. 451; 9 Halsbury, Laws of England, page 572, paras. 1158 *et seq.;* "Criminal Code," sec. 261(3); *Blake* v. *Barnard* (6); 1 Russell on Crimes, 879; 1 East P.C. 225; *Reg.* v. *Martin* (7).

DAVIES J. agreed with Anglin J.

(1) 72 Am. Dec. 484.
(2) 7 C. & P. 817.
(3) 8 Can. Cr. Cas. 423.
(4) 14 Can. Cr. Cas. 122.
(5) 44 Can. S.C.R. 331.
(6) 9 C & P. 626.
(7) 8 Q.B.D. 54.

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IDINGTON J.—The appellants were convicted of murder as result of a trial by the learned Chief Justice of Nova Scotia and a jury.

Their counsel took some thirty-six objections to the learned judge's charge to the jury, asked for a reserved case thereon and being refused, appealed to the court *en banc,* which directed the learned Chief Justice to state a case as to thirty-two of the grounds for these objections. The result was that in disposing of his statement of case framed as thus directed the court was equally divided and hence this appeal.

Of these thirty-four alleged points of law I may say that the great majority of them are in law without foundation. In the result reached by this court it is needless to shew why I have come to such conclusion or to say more about all of them than this: With the one exception I am about to deal with, and a few other instances in which the remarks objected to may have a bearing more or less direct on that one point, it seems to me these points would never have been directed to be stated or upheld if due regard had been had to the curative provisions governing criminal appeals. I have selected that point on which Mr. Justice Drysdale put his finger as containing the pith of all that was objectionable and which I find so well founded as to entitle appellants to a new trial. That objection is No. 28, stated as follows:—

> 28. Whether the law applicable to the case was stated sufficiently to enable the jury to determine whether if the defendants were guilty of homicide such homicide was murder, and the facts applicable to such law pointed out.

I think the first question we must ask ourselves in all criminal appeals where the objections taken are well founded or arguable, is whether or not we can say

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that in our "opinion some substantial wrong or miscarriage was occasioned thereby at the trial."

I am not disposed to interpret this statutory duty in any narrow metaphysical sense, for if we did so we might frame a judgment in every case of mistake no matter how trivial so as to demonstrate that there might have been somebody in the jury panel that might have taken another view of the matter if this supposed error had not taken place.

I think this and every other appellate court acting under our Criminal Code must grasp the matter presented with a strong hand and not allow the trivial error to lead them into the land of speculation founded on some shade of possibility.

We must see, however, that the trial has been one of the legal offence charged.

We must also, I submit, assume that the jurors have brought to the subject dealt with that close attention to what has taken place in the course of the trial and that strong common sense what would enable them in light thereof to apprehend the language of the learned trial judge in charging them, and in many instances mentally, and automatically as it were, correct the accidental slips of the tongue the most careful judge may chance to make.

In this case we have illustrations in many of the objections made of how this should work out. The learned Chief Justice, it appears, used expressions which, isolated, and read without having regard to the evidence and general scope of his charge, might be held to be misdirection, partly of law and partly relative to fact, but which ought not to lead astray or be supposed to have led astray any intelligent jury acting in the spirit which, I submit, should be presumed to have governed them.

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The general outline of the evidence herein was so clear and simple that properly marshalled there should not have been any misapprehension in this regard of the duties such evidence had cast upon the jury in this case. Simple as the case in this regard is there happened to be two phases of the problem to be solved which were not kept as clearly separated throughout as they might have been, and there is thus the greater difficulty in escaping from the conclusion I have reached, or of applying the curative provision I have referred to.

Briefly put the facts in outline as presented for the prosecution were that on a Sunday afternoon the appellants, who had been drinking, carried one or more bottles of liquor with them, drank more, and when thus in an intoxicated condition in front of deceased's premises stopped and trespassed on his lawn. There they used grossly offensive language and though asked by deceased to retire, refused. The deceased and his wife and others who had been on the verandah, withdrew into the house or outbuildings.

The appellants remained on the lawn, or on the highway, continuing their unseemly conduct. The deceased after a time loaded his gun and proceeded therewith to the verandah in front of his house. The appellants gave evidence on their own behalf, and it was said by one or more of them that deceased asked them to go away or he would shoot them. They do not pretend that he ever came from his position on the verandah, which was fifty-six feet distant from the highway where they say they then were. The wife of deceased heard a rush of feet on the walk up to the verandah where deceased stood and immediately thereafter an explosion of a gun. It seems tolerably clear that the gun

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had been used as a club by deceased in resisting the onset of one or all of these appellants, and in the result an explosion of the loaded gun lodged its contents in the upper part of the thigh of deceased, from the ultimate effects of which, I assume for the present, he died, whether necessarily so if not further ill treated, might form another question. A hole was found in the screen front door of the dwelling and a bottle, or remains of one, were, immediately after this, found in the screen front-door of the dwelling and a other facts and especially the possession of a bottle or bottles by appellants, left ground for inference I need not dwell upon.

The wife of deceased rushed out and found all three appellants on the verandah or steps therefrom.

Up to this rush from the highway or lawn, whichever was the place they are supposed to have rushed from, there was not anything which took place that in law could properly be held as provocation so rousing the passions of appellants as to reduce the gravity of the offence, if any, committed by the appellants, or any of them, to manslaughter.

The charge, I respectfully submit, rather confuses thought in not restricting this question of manslaughter to be dealt with in treating of the later phase of the case and including there the whole.

The evidence warrants the inference that the appellants had unlawfully come to attack the deceased and as the charge puts it that he resisting or anticipating it, struck the foremost of them violently on the head with the butt end of the gun and thereby produced the explosion. But there are other possible inferences as to the exact cause of the explosion quite as much within the range of the consideration of the

struggle and its consequences. It may be possible to consider any of these and yet the result of guilt or innocence be open to a jury. Now all the errors, if any, in the learned judge's charge bearing only upon the evidence or its application so far, I count as nothing that need concern us.

Let it be assumed for argument's sake that the attack made or threatened by appellants or any of them was intended to be only an assault, the question arises whether or not the consequence which followed can be made the basis of a charge for murder.

The learned Chief Justice charged as follows:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet, as in the result it did they would be responsible for it and it would constitute the crime of manslaughter provided there was no malice on their part in doing what they did. On the other hand, if a party while engaged in the commission of a felony kills another it becomes murder and not manslaughter. What is meant by that is this: Suppose these men had come there at night for the purpose of committing burglary and in the course of the commission of that act Mr. Lea had been killed, that would be murder because they then would have been there committing a felony. * * *
>
> I will next draw your attention to the law bearing upon one of the most important features of the case. There is a common idea, or I have heard it said, that because Mr. Lea held in his own hand the gun the discharge of which inflicted the wound which proximately contributed to his death, the accused are not responsible for that part of the affray. I have heard—and probably you have—that they did not shoot him. It would be a sorry business if that were the law. It would be absurd if such were the law. They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun as much as if they seized the gun and discharged it into him. Did they rush at him with the intention of assaulting him and did Mr. Lea then use his gun? If so they are as responsible as if they seized the gun and discharged it into him. "A person may be responsible for the death of another either as murder or manslaughter, provided it was caused by his unlawful act resulting in corporal injury." The unlawful act here, as I have pointed out, would be the men assembling in a disorderly way, and trespassing on Mr. Lea's property and refusing to go away when asked.

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Now, on the facts I have outlined and bearing in mind the law to be applied, I think this charge misapprehended that law and consequently misdirected the jury.

The foundation of the law is in section 252 of the Code defining culpable homicide, and can be properly referred to as aiding any one to understand and interpret the later sections.

When we want to find the definition of the specific offence of murder applied and that applicable to this case, we must look to section 259 of which sub-sections (*b*) and (*d*) are as follows:—

> (*b*) If 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;
>
> * * * * *
>
> (*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

I refer to sub-section (*b*) because the learned Chief Justice says he read that sub-section to the jury, but he does not seem to have read or at all referred to and explained sub-section (*d*). With the greatest respect, I must hold this omission was misdirection.

I do not think as at present advised the evidence in this case warranted much reliance being placed on sub-section (*b*). I need not elaborate. Let any one consider the facts and read this sub-section and see how ill fitted they are to that sub-section.

I think sub-section (*d*) was that to which attention should have been called and its meaning, which is not clear to those ignorant of the history of the law, should have been expounded to the jury in such clear terms that they would understand the ground upon which they ought to have proceeded.

If the evidence would not warrant a conviction on this section, then it would be our manifest duty to say so and set the verdict aside on that ground alone.

I do not, however, so hold, but on the contrary think and hold there was evidence which would warrant the jury in finding thereupon a verdict of murder, resting it on this sub-section (*d*).

It is to that sub-section, I submit, the learned Chief Justice ought to have addressed himself in all he said relative to death resulting from the pursuit of an unlawful object and the bearing thereof on the charge of murder.

There are other specific unlawful purposes as in section 260 not appropriate to the peculiar facts in this case.

His general remarks as to the pursuit of an unlawful object do not seem to me to exactly fit the case. The unlawful, uncalled for and utterly unjustifiable attack on a man with a loaded gun in his hands was liable to produce a scuffle resulting as this did in the death of some one. The person or persons making the attack must according to their evidence for the defence, have known the gun was likely to be in a loaded condition and liable to explode as it did, and so result. This or something like it was what I conceive was quite competent for the jury to have adopted as a mode of reasoning to found a verdict of murder upon such facts as were presented. I am not to be taken here as doing more than illustrate a possible line of thought and by no means determining the legal result.

The learned Chief Justice did refer to a number of analogous cases. But each case in a matter of this kind must stand upon its own bottom. In applying these precedents, or rather as it seems to me this sub-

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section substituted as codification of the law touching such like cases, the measure of its utility and reasonable application in any case must abide the judgment of the jury.

No one can in all that branch of the law of homicide anticipate or do more than see that the jury are so fully and accurately instructed that they can intelligently address themselves to the task set before them by the law in said sub-section (*d*).

Theirs is the responsibility when once so instructed. Their understanding of the evidence within the scope of such instructions and application thereof is alone the limit of the practicable operation of the law that must determine the fate of the accused in any such case. In the absence of proper legal instructions in regard thereto there was no legal trial of the real issue of murder. Hence there was no possibility of applying the curative provision I have referred to.

Much was said of malice which is aside from the true issue presented here.

The doing an unlawful act or rather the pursuing an unlawful object carries with it the implication of malice in all the consequences thereof so far as the sub-section may reach.

I am by no means to be understood as implying thereby that evidence of hate or ill will external to that so implied or the operation of such other malice upon the mind of one pursuing an unlawful object is to be discarded. The existence of such and the possible influence it may have had on the conduct of one pursuing any unlawful object may be of value in helping those having to reach a conclusion in such a complex case.

But I repeat it is not an essential of the evidence

which may otherwise and independently thereof point to a conclusion of guilt.

I purposely omitted above all reference to evidence of the treatment meted out by the accused to the deceased after the explosion of the gun, for it seems to my mind we can by separating the two phases of the case the more clearly reach a proper conception of the law which must govern the case so far as the charge of murder resting upon the explosion of the gun is concerned.

I am not to be understood, however, as by any means holding that the evidence of such later action is to be discarded as not having any proper place for consideration in connection therewith. It may or may not shed light, but only, as I have suggested regarding evidence of hate or ill will, have a value in enabling a proper estimate to be made of the whole conduct of the parties and of their responsibility in the way of holding they ought to have known regarding the reasonably possible result of their conduct under the circumstances.

It is the basis also herein of the other phase of the case relative to the charge of murder and for that should be given separate consideration.

If there is any ground for the charge that thereby the death of the wounded man was accelerated this branch of the evidence touches directly upon that and it is in that connection alone that there was ground for referring to provocation resting on the severe wound the blow with the gun had inflicted on one of the assailants.

I do not see misdirection in what was said in that regard and need not dwell thereupon, but simply say that it would be better understood by distinct and

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separate treatment in any charge in such a view of the case.

The questions relative to manslaughter need not be dwelt upon, but allowed to remain for the future trial and take their proper place in any future charge.

I think the appeal must be allowed and a new trial be had.

DUFF J. agreed with Anglin J.

ANGLIN J.—In this case I am to deliver the judgment of my brothers Davies, Duff and Brodeur as well as myself.

With very great respect for the learned Chief Justice who tried this case, a close study of his charge, which we have read and re-read, has driven us to the conclusion that he misdirected the jury in regard to what, under the circumstances of this case, it was essential that they should find in order to warrant a verdict of murder. He not only failed to bring to their attention at least one inference of fact which it was necessary that they should draw, but his charge, read as a whole, was tantamount to a direction that they might assume that fact — that they might properly bring in a verdict of murder without passing upon it.

The Crown charged the prisoners with murder (*a*) because they did certain unlawful acts which caused the deceased to do an act that resulted in his inflicting upon himself a gun-shot wound from which he died; and (*b*) because by their subsequent brutal treatment of him they accelerated his death. Both aspects of the case were presented to the jury. It is impossible to know whether their verdict of murder

was based upon both grounds or upon only one of them; and, if upon one only, it is impossible to know upon which. Misdirection as to the essential constituents of the crime of murder upon either aspect of the case would, therefore, amount to such a substantial wrong or miscarriage that it would entitle the defendants to a new trial, although the case had been properly presented upon its other aspect. Having reached the conclusion that there was such misdirection in connection with the degree of responsibility of the defendants for the infliction of the gun-shot wound which caused the death of Mr. Lea on the assumption that his death was not accelerated by what was afterwards done by them, but happened when it did solely as a result of the wound, we deal with the case as if there had been no subsequent ill-treatment of the deceased by the accused.

By section 252(2) of the Criminal Code it is provided that,

> Homicide is culpable when it consists of the killing of any person * * * by causing a person by threats or fear of violence or by deception to do an act which causes that person's death * * *

There is no evidence upon which it could be found that the acts of the deceased in "clubbing" his gun and striking Fred Graves over the head with its stock were the result of physical force or compulsion on the part of the defendants. These acts were, physically at all events, the acts of the deceased himself. Upon the evidence they were the immediate cause of his receiving the gun-shot wound from which he died. In order that responsibility for that result should rest upon the defendants so as to make them guilty of culpable homicide under section 252, it was necessary

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that the jury should find that such acts of the deceased were caused, *i.e.,* induced, "by threats or fear of violence, or by deception." There was here no suggestion of deception; but there were facts from which a jury might infer, if properly instructed, that the deceased acted through fear of violence on the part of the accused. Yet, although the learned Chief Justice read to the jury other portions of section 252, he entirely omitted to direct their attention to the vital provisions of sub-section 2 above quoted. He neither stated their effect to them, nor, as Mr. Justice Graham points out, did he give them any direction from which they should have gathered that they must find that the "clubbing" of the gun by the deceased and striking Fred Graves upon the head with it were acts induced by fear of violence. That was in itself a serious non-direction, which might amount to such a substantial wrong or miscarriage as would necessitate a new trial. But we do not dwell further upon it because there appear to be even more serious objections to those portions of the charge in which the learned Chief Justice directs the jury as to the facts they must find and the inferences which they must draw in order that what may have been culpable homicide on the part of the accused should amount to the crime of murder.

Without determining that the definition contained in sections 259 and 260 of the Criminal Code is exhaustive, under the circumstances of the present case it was, in our opinion, necessary for the Crown to establish and for the jury to find, in order to warrant a verdict of murder, such facts as would constitute that crime under clause (*d*) of section 259, read with sub-section 2 of section 252.

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259. Culpable homicide is murder.

* * * * *

(*d*) If the offender, for an unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

For the purposes of this appeal I assume that under this provision it was not necessary, in order to bring the charge of culpable homicide within it, that the jury should have found that the acts of the defendants were such as they knew or should have known were likely to cause the very acts to be done or the precise situation to arise which in fact resulted in the homicide, or to cause the death of the person who was killed, but that it would suffice if the jury had found that the accused did an act which they knew or should have known would be likely to induce the doing of anything or to bring about any situation likely to cause the death of some person — the person killed or any other person. That construction of section 259(2) is the least favourable to the accused.

There was no suggestion that the defendants meant to cause the death of Mr. Lea or to cause him any bodily injury likely to cause his death. The evidence would not support such a finding. Yet the learned Chief Justice read to the jury clause (*b*) of section 259; but he neither read clause (*d*) nor stated its effect; nor does his charge contain any equivalent statement of the law. It was assumed that the acts of the accused, which, it was charged, had led to the deceased clubbing his gun and striking Fred Graves with the stock, were done for an unlawful object. But the jury were not instructed that before convicting of murder they must find not merely that the conduct of the accused had in fact led to the doing of that

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which resulted in death, but also that the accused knew or ought to have known that their acts were likely to cause death — to lead to the deceased so handling or using the gun that some person would probably be killed — that this was under the circumstances such a natural or probable consequence of their conduct that the defendants should have anticipated it. On the contrary the learned Chief Justice told them distinctly and repeatedly that if in doing what they did the defendants were actuated by spite or ill will towards Mr. Lea they should be found guilty of murder. I quote some of the passages in which this view was impressed on the jury.

Early in the charge, after reading section 259(*b*) to the jury, the learned judge says:—

> If a man goes on the property of another as a mere trespasser, and in the course of such trespass commits an assault or anything of that kind upon the owner of the property and death results, although he may have had no malice, if he is there unlawfully, he is guilty of manslaughter. If, on the other hand, he went there with some wicked purpose or with the intention of committing a felony it would be murder. That is the distinction that the law draws between the two offences. The rule that will reduce the crime of killing another from murder to manslaughter is the absence of malice or ill-feeling towards the deceased. If there was no malice or ill-will the crime would be manslaughter. If the evidence satisfies you that the accused, although not intending to kill the deceased, in what they did, were actuated by malice and ill-will in what they did and that his death resulted as a consequence of their unlawful conduct it will be murder and not manslaughter.

A few lines lower down he says:—

> They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun, as much as if they seized the gun and discharged it into him.

A little earlier he had said:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet, as in the result it did they would be responsible for it and it would constitute the crime of manslaughter provided there was no malice on their part in doing what they did.

Further on he says:—

Now, as I said before, you must judge their motives from their conduct, whether they were actuated by malice, spite and ill will in this inhuman treatment of Mr. Lea. Does the evidence satisfy you that in acting and behaving there as they did they were gratifying an old grudge that they bore towards Mr. Lea. If you find that they were actuated by malice and ill will in going there and behaving as they did, even though they did not intend to injure him, the crime is murder.

Towards the close of the charge we find the following passage:—

Now, just a few words in conclusion. I have explained to you as fully as I could, the difference between murder and manslaughter. I have told you that if you believe these men were actuated by ill will or malice towards Mr. Lea and did what has been detailed here, that would be murder, and that all of them should be found guilty. On the other hand, if you think that there was no such ill feeling, that it was a mere fracas, without previous ill feeling, then your verdict should be manslaughter. I have called your attention to the various witnesses who have come here and testified to different expressions of ill will towards Mr. Lea. and you have heard the expressions that they used on this occasion. You must weigh these. If you believe them it is evidence of malice and it is for you to consider them.

The jury subsequently returned to court and requested directions on the subject of malice. The notes of the ensuing proceedings are in part as follows:—

I thought I had defined that fully. "Malice" is where a man has ill-will towards another — any kind of wicked feeling towards his neighbour. If you come to the conclusion that what these men did resulted from hatred or dislike or ill-will that would make it murder. If there is evidence to satisfy you that these men were influenced by spite or ill-will, that with the other facts would constitute murder. But you must not find them guilty of murder unless you are satisfied from the evidence that they had a grudge, or spite, or ill-will against Mr. Lea.

A juryman asked for further directions as to premeditated murder and malice.

THE COURT: Premeditated murder would be an agreement to commit murder before they went there. There is not the slightest evidence of that. But if the grudge was there and they went there

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without any premeditated intention, if their acts were induced through ill-feeling that would constitute murder. If you are satisfied that what they did was not done through ill-will that would be manslaughter.

A JURYMAN: Then we do not need premeditation; all we need is malice ?

THE COURT: All you need is malice.

A juryman asked for further instructions as to the distinction between murder and manslaughter.

THE COURT: It is enough if they did the acts with malicious intent. If in carrying out the acts that they did after they got there there was malice, that would be malice sufficient to constitute murder.

* * * * * *

If after they got there they were carrying out a grudge, if they had it, it constitutes murder.

A JURYMAN: If they had malice, it is as bad as if they had premeditation.

THE COURT: Yes.

A JURYMAN: Would they have to have that malice at the time he was shot ?

THE COURT: Yes, they would have to have the malice at the time. If they had these malicious feelings or this antipathy towards the deceased, it must have existed at the time they did what caused his death, even though they had no intention of doing it before they went there. You must gather the existence or non-existence of malice from what they did at the time. You must take into consideration the threats made beforehand, although I do not know what value you would put on them to shew bad feeling towards Mr. Lea.

A JURYMAN: Is it necessary to prove that just before the crime was committed — a few minutes before — they had malice.

THE COURT: What I have told you is that if there was malice you can gather it from the facts of the whole transaction. If you think from the facts proved that they had this ill feeling during the time that they were doing the injuries, then it was malice.

(The jury then retired.)

When the jury next returned to the court room it was to deliver their verdict of guilty of murder.

The vital distinction — that, while, to sustain a charge of manslaughter, it would suffice that the acts of the accused, whatever their character, should in fact have aroused in the mind of the deceased a fear

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of violence which induced him to do that which resulted in his death (section 252(2)), in order that that culpable homicide should amount to murder those acts of the accused must have been such that they knew or should have known that the death of some person would be likely to be caused by them (section 259(*d*)) — was not brought to the attention of the jury. Whether the acts of the accused were of that character it was for the jury to determine; and the inference which they should draw would depend to a great extent upon whether in their opinion the accused knew or ought to have known that the gun in the hands of the deceased was loaded and whether they knew or should have known that their acts would be likely to lead to the deceased making some use of it which would be likely to cause death. Upon neither point can it be said that, under the circumstances disclosed in the evidence, a conclusion in favour of the Crown was so necessary that no reasonable man could have found otherwise. Indeed, the learned Chief Justice appears to have gathered the impression from the evidence that the deceased produced his gun not to shoot with it, but merely to frighten the accused. May not they have had the same idea; and, if so, may they not have thought that the gun was not loaded ? Again, there is no evidence whether the deceased clubbed the gun before or after the accused are supposed to have rushed at him. If before, may not that act have led them to think that a gun so handled was not loaded ? Can it be said that the use of the gun by the deceased in a manner likely to cause death was under the circumstances so clearly a natural or ordinary consequence of the acts done by the prisoners that the jury, acting as reasonable men, could not have found other-

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wise than that they knew or should have known that the deceased was likely to so use that gun? Upon both these matters of fact it was the function of the jury to determine what inference should be drawn. Upon neither were they given the opportunity of doing so. On the contrary they were directed that if they should "come to the conclusion that what these men did resulted from hatred or dislike or ill will that would make it murder."

It is not possible to read the charge of the learned Chief Justice without realizing that the jury were instructed that, although in the absence of personal grudge or ill will on their part towards the deceased the acts done by them and the consequences which ensued would have rendered them guilty only of manslaughter, those same acts and consequences, if accompanied by spite or ill will towards the deceased, would make them guilty of murder. The only question really left for the consideration of the jury in determining whether their verdict should be one of murder or of manslaughter was whether in doing what they did the defendants were actuated by ill will to the deceased.

With great respect, this involved ignoring the requirement of the Code that the acts of the accused must have been such as they knew or should have known would be likely under the circumstances, to cause death, or an assumption by the learned judge himself of the function of the jury in regard to that vital question of fact, or a direction that the acts of the accused were of such a character that as a matter of law the jury should assume that they knew or should have known that they would be likely to cause death.

Under such a direction the jury may have convicted of murder without at all considering whether the conduct of the accused was such that it was probable that it would cause the deceased to act in a manner likely to result in some person being killed. Indeed, they might return such a verdict, although no reasonable man could say that such a result from the acts of the accused should or even might have been reasonably anticipated. That this was a vital misdirection amounting to a substantial wrong or miscarriage in the trial seems only too plain.

It is unnecessary to express our views upon any of the numerous other points raised in the stated case.

It is abundantly clear that this is not a case in which we should exercise the power conferred by section 1018 of the Criminal Code sub-section (*d*) to direct that the appellants should be discharged.

For the foregoing reasons we are of the opinion, however, that their conviction must be quashed and a new trial had.

BRODEUR J. agreed with Anglin J.

Appeal allowed without costs.