

17 MAR 1975

REG. v. LESTER ROLAND BINGAPORE

CRIMINAL APPEAL NO. 34 of 1974

Dates of Hearing: 18th and 19th February, 1975.

COURT OF CRIMINAL APPEAL:

Coram: Bright, Sangster and Jacobs JJ.

J U D G M E N T of the Court of Criminal Appeal

(appeal against conviction upon trial by jury
before Mitchell J.)

Counsel for the Appellant:	Mr. P.H. Waye
Solicitor for the Appellant:	Mr. R.D. Park
Counsel for the Respondent:	Mr. K.P. Duggan
Solicitor for the Respondent:	Mr. L.K. Gordon, Crown Solicitor

Court of Criminal Appeal.

This is in part an appeal as of right pursuant to Section 352(a) of the Criminal Law Consolidation Act 1935-1972 and in part an application for leave to appeal pursuant to placitum (c) of the same section and is wholly against the appellant's conviction for murder.

The surrounding facts which appear to be either not in dispute or not seriously in dispute are as follows. On Thursday 18th April 1974 a number of Aboriginal or part Aboriginal persons were drinking together at the Carrington Hotel, Carrington Street, Adelaide. Shortly after closing time, and apparently at some time between 10 p.m. and 10.30 p.m., these persons went to some unoccupied premises (formerly a lodging house) at Angas Street, Adelaide, a short distance away from the Carrington Hotel. There they took possession of a front room in the premises in which were, amongst other things, some mattresses and a wardrobe; they then sat or reclined upon the mattresses or the floor and continued drinking, one or more of the party having brought alcoholic drinks with them.

On the same day (Thursday, 18th April, 1974) one Gilbert Roy McMillan and his wife Dawn Kathleen McMillan, a middle-aged white couple, left their lodgings at 22 Allen Place, Adelaide, an address not very far from the unoccupied premises already referred to; the couple had been asked to leave; the husband left ostensibly for his place of employment in Angas Street and the wife in fact to look for new lodgings. She did find new lodgings at 18 McLaren Street, which also is not very far from any of the premises already mentioned; having found the new lodgings she went to her husband's place of employment to inform him and found that he was not there; she stayed on the Thursday night at the new lodgings without her husband and early

the next morning at about 6 a.m. she went looking for her husband- first to their former lodging place and then to the unoccupied premises at Angas Street already mentioned, where the McMillans had lodged before those premises ceased to be a lodging house consequent upon its closure by the Health Department. She saw the group in the front room but her husband was not with them; she then saw her husband alone in a room in a separate building at the rear of the main premises; the McMillans then found their way into the front room and so it came about that on the morning of Friday 19th April, 1974, the following persons, at least, were gathered in the room where some, at least, of the main events took place,

The appellant

Nelson Leon ("Oggie") Dodd

Trevor Kevin ("Kevin") Milera

Terry Wilson

Rodney Lovegrove

Vivian "Doolie" Lovegrove

Clifford Percival ("Mundy") Williams

Kaylene Highfold

Brenda Faith Edwards (or "Golan")

Harry Gibson

Graham John Wynne

Karen Wynne (or "Loo")

Peter Gephart

Anthony Steven ("Tony") Dodd

Janice Iris ("Iris") Duke (or "Rankin")

all of whom were Aboriginal or part Aboriginal persons

Gilbert Roy McMillan

Dawn Kathleen McMillan

both of whom were white persons.

At some time during the morning Mrs. McMillan⁵⁹¹ claimed that her purse was missing, some of the other persons present took umbrage at the suggestion that any of them had stolen the purse or its contents, Mr. McMillan took some part in the ensuing conversation, and two separate but apparently connected incidents occurred, namely,

- (1) an assault upon, or fight involving, Mrs. McMillan and one or more of the other women, in the course of which, it seems, Mrs. McMillan's clothing was torn and removed from her
- (2) exchanges between Mr. McMillan and some of the other persons, leading to violence upon him including his being punched and kicked.

About 11.45 a.m. a business man parked his car in Angas Street near the unoccupied premises; he noticed a man, slumped against the railings outside the unoccupied premises, appearing to be dazed and holding what appeared to be a red coloured rag against his head; that man then moved off towards Police Headquarters further west along Angas Street. Somewhere about that time McMillan arrived at Police Headquarters, was seen to be bleeding profusely, an ambulance was called and McMillan was taken to the Royal Adelaide Hospital and admitted.

In the meantime a number of the persons who had been in the unoccupied house moved to the Carrington Hotel or to the vicinity of that hotel and in the vicinity of that hotel some of them (including the appellant) were spoken to by some police officers; to the police the appellant denied that he had been in the Angas Street premises and said that he had spent the night in the park near the Stag (presumably referring to a hotel in another part of the city) and had had a fight with Milera and that his (the appellant's) trousers must have been torn during that fight.

At the Royal Adelaide Hospital, McMillan's condition was found to include a profusely bleeding wound to the head and, after some trouble, an artery was sutured and the bleeding stopped; internal head injuries were suspected; he was kept at the hospital overnight. On the Saturday at about 12.30 p.m. conversations took place between a resident medical officer, McMillan, and Mrs. McMillan, the brief effect of which was that the medical officer warned both the McMillans of the danger involved in McMillan leaving the hospital, namely the danger of death, notwithstanding which McMillan signed a "risk form" and the McMillans left the hospital. They walked to the new lodgings at McLaren Street and some six hours or thereabouts later Mr. McMillan was brought back to the Royal Adelaide Hospital by ambulance, was seen to be in need of urgent attention, and within 4½ hours was operated on, but unsuccessfully, and he died the next day from brain damage caused by subdural haemorrhage which, in turn, was described in evidence as consistent with trauma to the head within a range of times which included the Friday morning.

On 30th July 1974 some Western Australian detectives called at a house at Kelmscott (apparently near Perth) in Western Australia and found the appellant present there; they took him to Police Headquarters in Perth and took a statement from him, read it to him, and obtained his signature thereto (that statement was admitted in evidence both in oral form from one of the detectives - omitting a passage that counsel for the appellant had asked be omitted - and in written form - exhibit P.67.) All that was admitted was admitted without objection from the appellant or his counsel. Subsequently a detective from Adelaide went to Perth and brought the appellant back to Adelaide; he had a conversation with the appellant, reduced it to writing,

and obtained the appellant's signature thereto. That document was also admitted without objection from the appellant or his counsel. The appellant, to the South Australian detective, as appears from the document, retracted what he had earlier said to the Western Australian detectives.

One of the Dodds, Milera, and the appellant were charged with murder and tried jointly.

At the trial some only of the persons who had been present in the room of the premises at Angas Street were called as witnesses and all who were called were called by the Crown; they were Mrs. McMillan, Iris Duke, Rodney Lovegrove, the other Dodd, and Brenda Edwards. Insofar as their evidence tends to inculcate the appellant it was, on the face of the transcript, far from satisfactory and (from the remarks of the learned trial judge and from her direction to the jury to acquit the appellant's co-accused, neither of whom had been proved to have made any significant confession) the demeanour of these witnesses was apparently as unsatisfactory as their recorded words.

At the trial the appellant made an unsworn statement the gravamen of which was that at the time of any attack upon McMillan he, the appellant, was too drunk to remember what happened. In this statement the appellant admitted that he had said to the Western Australian detectives and to the South Australian detective what had been attributed to him in their evidence and in the two exhibits already mentioned.

Up to the time of the jury's verdict the appellant may be said to have given three versions of his activities at or about the time of McMillan receiving the injuries which later proved fatal. First the appellant's initial denial on Friday 19th April 1974 that he had been present at the premises at Angas Street. Secondly, his confession to the Western Australian

detectives including the statement "the next thing I knew was that I was fighting with the white man. The fight started in the front room and then me and him ended up in the passage. I punched him a few times in the head and the body and knocked him to the ground. After I knocked him down I kicked him twice in the head". Thirdly, to the South Australian detective, that although the written statement obtained by the Western Australian detectives correctly set out what was said, what the appellant had told them was "all bullshit" and that "I didn't hit Gilbert at all. I tried to hit him once and missed. I busted my hand. Kevin Milera was hitting him and he said 'I can't knock him out' and I said 'let me try' and I missed". Although in a sense the unsworn statement may be described as a fourth version, it is really no version at all for he says, so far as concerns McMillan's injuries, "I was drunk and I do not remember what happened" although he did say that he was at the premises and that he remembered the accusations concerning the purse and the incident concerning Mrs. McMillan.

The evidence placed before the jury at the trial and the conduct of the trial, were lengthy and we do not suggest that the above summary is complete, but it is intended to provide some setting in which to express our views on the grounds of appeal (as amended from time to time and as finally falling to be determined) and the evidentiary material and arguments adduced in support thereof.

The main weight of the appellant's challenge to his conviction came under the head of fresh evidence or, alternatively, evidence which although not "fresh" in the technical sense, was evidence which was not put before the jury at the trial and which was so significant that a Court of Criminal Appeal ought to quash the conviction. To use a neutral expression this proposed

additional material can be subdivided into

- (a) material relating to the events at the house in Angas Street
- (b) material relating to the circumstances in which the appellant had the conversations with the Western Australian and South Australian detectives respectively and signed the two documents resulting therefrom and produced at the trial.

Relative to the first of those subdivisions, the appellant sought to adduce the evidence of one additional witness, namely Clifford Percival ("Mundy") Williams and to that end tendered an affidavit sworn by Williams on 17th February 1975 and (pursuant to leave granted by us) called Williams to give oral evidence before this court upon this appeal.

When application was made to call Williams as a witness before us, it was not possible to say with certainty whether or not his evidence was "fresh", in the sense of not being known or reasonably available at the time of the trial, but now that we have heard his evidence we find it impossible to say that it comes within the category of "fresh" evidence. It therefore affords no basis for an assertion that the accused has not had a fair trial, and it falls far short of convincing us that there has been a miscarriage of justice in the sense that a verdict of guilty cannot be allowed to stand. The material relative to the question of whether or not it was "fresh" evidence was twofold

- (1) an intimation from the Bar table by counsel for the appellant (who had been present at the trial as counsel for one of the appellant's co-accused, namely Milera) that Williams was not called on behalf of the appellant at the trial because his evidence was thought likely to prove adverse to two of the accused, Dodd and Milera.

- (ii) The oral evidence of Williams himself that he had been at the Adelaide Gaol at the same time as the appellant at a time before the trial of the appellant - the witness being in custody there upon some other matter - and the witness and the appellant had talked about the appellant's case; the appellant had "hinted" that the appellant would like the witness to give evidence at the trial and the witness had "hinted" that he did not wish to do so.

No detail was placed before us as to what was or was not said between the witness and the appellant at the Adelaide Gaol or elsewhere at any time before the appellant's trial but it is perfectly clear that at least at the time of his trial the appellant or his counsel or both were well aware that Williams had been present at the house at the relevant time and could say something about the relevant events although what he could say was likely to be adverse to the interests of Dodd and Milera; it is also clear that a deliberate decision not to call Williams was made by or on behalf of the appellant. Although there was some uncertainty before us as to whether the witness Williams was at all relevant times available in the sense of being able readily to be found by those acting for the appellant, it is clear that the appellant never made any effort to find Williams and has certainly not established or even seriously suggested that there would have been any difficulty in finding him had the appellant or his advisers really wished to do so.

Further, we are not inclined to regard the witness Williams as likely to have come into any different category from those witnesses whose evidence the learned trial judge regarded as having but little weight; it was quite noteworthy before us that the witness Williams was, generally speaking,

very definite on those matters which had been set out in his affidavit sworn a day or two before he gave his oral evidence and quite vague on practically everything else, thereby giving a strong appearance of having come to this Court for the purpose of assisting the appellant by saying what he had come to say and, so far as possible, by avoiding saying anything else.

The witness Williams says that "Oggie" Dodd hit McMillan, that McMillan fell against a wall of the room, that Dodd said "I can't knock him out", and that the appellant said "I'll knock him out". Incidentally, the appellant attributes this statement to Milera. Williams says that both McMillan and the appellant got to their feet and that the appellant took a swing at McMillan, missed, and hit the wall with his fist, that McMillan dropped to the floor in avoiding the punch and that Milera then kicked McMillan in the head, possibly more than once, that McMillan was lying on the floor bleeding and the witness got up and with Kaylene Highfold took McMillan to an upstairs bathroom and there washed McMillan's face; that Williams advised McMillan to leave the premises before he suffered worse injury; that McMillan fell down the stairs and at the bottom of the stairs, whilst lying stunned, was kicked by Rodney Lovegrove two or three times quite hard and that McMillan then got up and left the premises. Some of Williams' evidence, of course, tallies in broad outline with what the appellant had told the South Australian detective, but not only does it conflict with the appellant's first blanket denial to the police on the day of the events in question and conflict with the confession made by the appellant to the Western Australian detectives, but it fits ill with the appellant's unsworn statement and with his defence as presented at the trial. Before pursuing this point, we should refer further to the proceedings at the trial.

After the Crown had called all its witnesses and tendered all its exhibits and presumably (although this does not appear expressly on the transcript) closed its case, counsel for Dodd and counsel for Milera, each in the absence of the jury, made submissions to the learned trial judge on the Crown case. The substance of the submissions was accepted by the learned trial judge, who then reminded the jury that all the accused were in the hands of the jury from the time when they were arraigned, but invited the jury at that stage to bring in a verdict of not guilty against Dodd and against Milera, and to this invitation the jury acceded and brought in a unanimous verdict of not guilty in respect of each of those two accused. The transcript does not make it clear whether counsel for the appellant submitted that the learned trial judge should invite the jury to acquit the appellant; certainly counsel for the appellant made some brief submissions including that she adopted "what my friends have said insofar as it might be either accurate or of advantage to my client" and on behalf of the appellant said "on the charge of murder I would submit that there is no evidence of intent to go to the jury either by deduction or by actual evidence given by any of the witnesses"; she also conceded "I must say I am in a much worse position from the outset from the other two". The learned trial judge did not invite the jury to acquit the appellant and the trial against the appellant proceeded.

The further material sought to be adduced from the appellant himself and from the witnesses Wynne and Hardy was said to be for the purpose of showing that the confessions alleged to have been made by the appellant were involuntary, or, alternatively, were made in circumstances that rendered it unsafe and unfair to admit the evidence thereof. It is not disputed that the facts bearing upon this part of the appeal were known

to the appellant throughout his trial. It is also clear from the affidavits of the appellant himself, filed for the purposes of this appeal, that he knew throughout his trial the names of the proposed witnesses Hardy and Wynne and most, if not all, of what they could say (for those persons were known to him and he was present with them at nearly all, if not all, the events to which they might be expected to depose). Indeed, counsel for the appellant conceded that, apart from the proposed evidence of Williams, the other evidence now sought to be called was available to the appellant at the time of his trial. At the trial counsel for the appellant did not seek to cross-examine on the voir dire any of the detectives who were about to give evidence of alleged confessions nor to call the appellant or anyone else to give evidence on the voir dire as to the admissibility, or as to the exclusion pursuant to discretionary powers, of any of the alleged confessions proposed to be given in evidence. By way of contrast the witness Shervill (from whom the Crown had proposed to adduce evidence of alleged confessions by Milera) was cross-examined on the voir dire by Milera's counsel and Milera himself gave evidence on the voir dire; in the result the learned trial judge, in the exercise of her discretion, excluded the evidence of the alleged confession by Milera to which the voir dire related. As we have said, in his unsworn statement the appellant conceded that the evidence of the alleged confessions was correct, although as we have said, in his unsworn statement the appellant retracted some of the confessions he had made to the detectives.

During the hearing of the appeal application was made to call other witnesses, including Wynne and Hardy, in addition to Williams. Because the proposed evidence was not fresh evidence and because of the course of the trial we rejected this

application.

The law on appeals against conviction, based on the production of evidence not given at the trial, has been dealt with recently and authoritatively and needs no exposition by us. See -

Ratten v. R. 1971 V.R. 87 and 1972 A.C. 378 (for the facts)

re Ratten 1974 V.R. 201 (for the views of the Victorian Full Court on a reference to it of the prisoner's petition based on evidence not given at the trial)

Ratten v. R. (1974) 48 A.L.J.R. 380 (an appeal from the lastmentioned decision)

and see particularly the reasons of Barwick C.J. (with whose reasons McTiernan, Stephen and Jacobs JJ. expressly agreed) at 382-384. We would emphasise the two different situations summarised in the headnote namely -

- (a) if the new material, whether or not it is fresh evidence, convinces the court upon its own view of the material that there has been a miscarriage of justice in the sense that a verdict of guilty would not be allowed to stand, the verdict will be quashed without more;
- (b) if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no new trial will be ordered if that new material is not fresh evidence; but if there is fresh evidence which in the court's view is capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as a remedy for the miscarriage which has occurred because of the absence at the trial of the fresh evidence.

and particularly that the first of these situations imposes a more stringent test upon the substance of the proposed further evidence than does the second of them. As summarised in the headnote "A trial will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of the trial or of which, bearing

in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial". We would also emphasise that the relevance, credibility and cogency of the proposed further evidence must be considered in the light of the evidence produced at the trial, and, indeed, in the light of the appellant's whole case as presented at the trial.

In our view the proposed additional evidence, taken as a whole, is not capable of being considered to be fresh evidence and we therefore decline to treat it as affording grounds for ordering a new trial. Moreover, in our view it does not, even taken at its face value, lead us to think that the verdict of guilty should not be allowed to stand.

What the appellant is really seeking is a new trial at which he would seek to present a different view of the facts and a different defence, based upon evidence which has been known and available to him throughout, but which he chose not to call upon the trial at which he was convicted. For reasons which no doubt appeared to him and his advisers to be good reasons, he chose at his trial to rely instead upon his retraction to the South Australian detective of the admissions he admitted having made voluntarily to the Western Australian detectives, together with his assertion of drunkenness, although he did not support either aspect of his defence by his own sworn evidence. It seems clear that the jury gave no weight to his unsworn statement in support of his retraction of his confession, and rejected the defence of drunkenness. His defence having failed, he now seeks to assert that the confession was involuntary or otherwise inadmissible, and to present through Williams a possibly exculpatory version of the facts which, though broadly similar, differs in material particulars from the version he gave to the

South Australian detective. It would be entirely contrary to well-established principles of the administration of the criminal law to order a new trial in these circumstances.

For these reasons we can find no basis for disturbing the verdict on the ground of fresh evidence or of other material now sought to be adduced and which was not in fact adduced at the trial. It necessarily follows that the remaining grounds of appeal are to be considered only in the light of the material which was before the jury at the trial.

Counsel for the appellant, having failed with respect to the proposed additional evidence relating to the admissibility as a matter of law, or the admission as a matter of discretion, of the evidence of the confessions, nevertheless sought to challenge that admissibility, and admission, on the ground that the confessions followed an unlawful arrest of the appellant by the Western Australian detectives. We need go no further than to say that there was no material presented at the trial upon which to found such an argument either there or here, and no authority for the suggestion that the learned trial judge, on finding that the appellant was in custody at the time of the confession, should have enquired whether that custody followed a lawful arrest. We were referred to R. v. Deathe 1962 V.R. 650, but that was a case where the trial judge left to the jury the decision as to admissibility which decision the trial judge himself should have made, the material relevant to that decision being already before him. The discretionary exclusion of evidence of a confession is an exception to the rule and it is for the accused at a trial to bring himself within the exception - see R. v. Lee (1950) 82 C.L.R. 133 per curiam at 152-153.

Counsel for the appellant sought to overcome the hurdle that the appellant and his counsel had deliberately chosen not to challenge (but, on the contrary, expressly to accept) the proposed evidence of the appellant's confessions by referring to cases on appeals being allowed on points not taken at the trial: he referred to -

Stirland v. D.P.P. 1944 A.C. 315 (H.L.) per Viscount Simon I.C. at 323 (but when the whole passage is referred to, allowance of an appeal on a point not taken at the trial is seen to be exceptional).

Reg. v. Smyth (1956) 73 W.N. (N.S.W.) 539 per Street C.J. at 541 (but in the same passage his Honour emphasised the "bearing on the question" of counsel's failure to object at the trial: the appeal was dismissed).

R. v. O'Brien (1920) 20 B.R. (N.S.W.) per Cullen C.J. at 490 (but, again, one finds the comment that failure to object at the trial "will be taken into consideration")

R. v. Porritt 1961 1 W.L.R. 1372 per curiam (read by Ashworth J.) at 1376 (but that was a case illustrating the well known duty of the trial judge to direct the jury on every issue fairly raised by the evidence, whether or not raised by counsel - indeed sometimes although counsel might well prefer that the direction be not given).

Coles Foodmarket Pty. Ltd. v. Boucher (1971) 2 S.A.S.R. 323 (but that was an appeal by way of rehearing under the Justices Act and different considerations apply).

It seems to us more pertinent to refer to -

R. v. Neal 1949 2 K.B. 59 per curiam (read by Lord Goddard C.J.) at 596, speaking of the irregularity in that case, "..... is so serious an irregularity and departure from the procedure recognised by law that we have no option but to quash the conviction": their Lordships nevertheless went on to say, at 597,

"We desire, however, to emphasize that if an irregularity arises in a trial which can be cured, and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction".

If for "cured" in the passage quoted one substitutes "dealt with by evidence and argument on the voir dire" then the passage quoted seems fairly applicable to the present appeal.

The appellant attacked the verdict on the ground that it was unreasonable and could not be supported having regard to the evidence and that there was a miscarriage of justice in that upon the evidence it was not open to the jury to be satisfied beyond all reasonable doubt of the guilt of the accused or, alternatively, the evidence was equally consistent with innocence as with guilt.

The law on appeals based on unreasonableness of verdicts has been dealt with recently and authoritatively and we need look no further than the High Court in Raspor v. R. (1958) 99 C.L.R. 346, Plome v. R. (1963) 110 C.L.R. 234, and Haves v. R. (1973) 47 A.L.J.R. 603 and, in our own Court, R. v. Jansen 1970 S.A.S.R. 531 and R. v. Hayes 5 S.A.S.R. 278.

It was clear from the way in which the case was presented before this Court on behalf of the appellant that those attacks on the verdict were, in part, subsidiary to the grounds relating to fresh evidence or further material, but although the lastmentioned attack was considerably weakened by our view on the topics of fresh evidence and other material, nevertheless the lastmentioned attack was not abandoned and we must rule on it. The substantial answer to the suggestion that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence is that the jury's verdict of guilty may well have resulted from the jury having accepted some of the evidence as credible and rejected other of the evidence as not credible - a choice which belongs to the jury and which is beyond the reach of a Court of Criminal Appeal to review unless, on the face of the transcript, so much of the inculpatory evidence against the appellant was so clearly unreliable that no reasonable jury should have chosen to rely upon it. That cannot be said in this case. It was, in our opinion, open to the jury in the

light of the confession which the appellant made to the detectives in Western Australia and the making of which confession the appellant himself accepted in his unsworn statement, together with the oral evidence of the eyewitnesses (however weak that may have been standing on its own and particularly with regard to identification of participants) for the jury to say that they believed the events to be as the appellant described them in his confession to the Western Australian detectives, in which case the verdict at which in fact they did arrive, was clearly justified.

The remaining grounds of appeal appear in the notice under the heading "Misdirections of the Trial Judge". As originally drawn, and, indeed, as the notice remained until the Court drew the attention of counsel for the appellant to the lack of factual foundation for the paragraphs to which we are about to refer, the notice included three paragraphs which misrepresented to this Court the factual position at the trial, and all of them on matters which even the most cursory reading of the learned trial judge's summing up could not have produced any misunderstanding as to what her Honour said. This Court has, on a number of recent occasions, endeavoured to draw to the attention of the profession that it is not only pointless, but improper, for a practitioner of this Court to include in a notice of appeal a statement that the learned trial judge was in error in directing the jury in a particular manner when the fact is that the learned trial judge did not direct the jury in that manner.

Three challenges were made to the learned trial judge's directions on causation - see paragraphs 4, 11 and 13. On causation we need look no further than R. v. Bristow 1960 S.A.S.R. 210 at 217 (citing R. v. Smith (1959) 43 Cr.App.R. 121

and 131 and, in turn, cited with approval in R. v. Hallett 1969 S.A.S.R. 141 at 150)

"It seems to the Court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound."

Counsel for the appellant contended that we should add to the law (as it is at present found in the authorities) a new proposition that where the gross negligence/unreasonable conduct/some degree of negligence more than mere negligence, (counsel used all three expressions without limiting his contentions to any one of them) contributed to the death of the victim, the chain of causation was broken. Alternatively, he contended, the learned trial judge's direction that causation was sufficiently established if the acts of the accused was "a" cause, should have been cut down to "the" cause, or alternatively "the most substantial" cause. Insofar as we are able to follow his contentions we do not agree with them. In any case, on the evidence as the jury must have viewed it, the chain of causation was violence by the appellant to the victim, subdural haemorrhage from that violence, and death from that subdural haemorrhage, a short and direct chain. The appellant's only complaint is that had an operation on the victim been performed earlier it might have saved him, and that the victim's wanton departure from hospital (to which he was returned at his wife's instance about 6 hours later) denied him any opportunity for such an earlier operation. That complaint, of course, relates not to a break in the chain of causation, not to a new cause but to the loss of a possible opportunity of avoiding death from a still operating cause, namely the violence inflicted by

the appellant. The act of the appellant causing injuries from which the victim dies does not cease to be a causative act because the victim thereafter acts to his detriment or because some third party is negligent. The case of Reg. v. Jordan (1956) 40 Cr.App.R. 152, to which we were referred, is clearly distinguishable, for there the victim did not die from injuries caused by the act of the prisoner, but from some other cause for which the prisoner could not be held responsible.

There were two challenges to the learned trial judge's directions on drunkenness - see paragraphs 7 and 10. Counsel for the appellant contended that the learned trial judge should have directed the jury that the Crown should negate the defence of drunkenness. That contention is plainly untenable. Where the evidence raises the topic, the trial judge should (as was done at this trial) direct the jury that the Crown must prove beyond reasonable doubt that the accused had the relevant intent taking into account the evidence as to the accused's consumption of, or condition in relation to, alcohol. In the sense under discussion, drunkenness is not a defence but a matter bearing on proof or otherwise of an element of the offence.

There remained in the notice of appeal a challenge to the learned trial judge's directions on a factual matter (para. 5) which, although not formally abandoned, was not pressed and, in our opinion, is untenable.

In our opinion there is no justification for any of the complaints made against the learned trial judge's directions; indeed, in our opinion, the directions correctly reflected the law and adequately instructed the jury upon the issues and the evidence in the case before it and is unexceptional in all respects.

For these reasons the appeal, insofar as there is an appeal as of right, is dismissed. As to the application for

leave to appeal we think that the proper course is to grant leave and dismiss the appeal.