

CANADA / JUDGMENT

Morris v. The Queen

[1979] 2 SCR 1041

COURT

Supreme Court of Canada

DECIDED

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Morris v. The Queen

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Report

[1979] 2 SCR 1041

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Pratte, Yves

On appeal from

New Brunswick

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Morris v. The Queen, [1979] 2 S.C.R. 1041

Date: 1979-06-14

Hubert Edwin Morris Appellant;

and

Her Majesty The Queen Respondent.

1978: November 16, 17; 1979: June 14.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Murder—Evidence—Confessions and admissions—Rights of the accused—Voir dire—Failure to charge jury as to evidence of accomplice/ accessory after the fact—Whether witness accomplice/ accessory—Defence of drunkenness—Criminal Code, s. 613(1)(b)(iii).

The appellant was tried on a charge of murder following the death, after a vicious beating, of the woman with whom he was living. There was little room for doubt that the deceased died as a result of the beating administered by the appellant. The appellant was reported to have made the observation in a tavern on the day after, “I beat her up; I don’t know if she is alive or dead”. The appellant was found guilty at what was his second trial on the same charge, his conviction at an earlier trial having been set aside and a new trial directed (1976), 29 C.C.C. (2d) 540.

The grounds of appeal to this Court were that the Court of Appeal erred in law in holding that the trial judge did not err in law, (first) in not holding a voir dire for various statements allegedly made by the appellant, (second) in not instructing the jury that the evidence of a witness, C.T., who had been present at the beating, should be treated as that of an accomplice, and (third) in finding that lack of knowledge, due to intoxication, that bodily harm inflicted by any person is likely to cause death is not a “defence” to a charge of murder, and therefore erred in not holding that the evidence of drunkenness in this case should have reduced the verdict to manslaughter. The first alleged error related to statements made by the appellant to two uniformed police officers alerted by C.T., an acquaintance of the appellant, when they arrived at the appellant’s room to find the appellant standing by the bed on which the victim lay unconscious, with C.T. sitting beside her.

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Held (Laskin C.J. and Spence, Dickson and Estey JJ.: dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Pigeon, Beetz and Pratte JJ.: In the particular circumstances of the case the trial judge was in error in admitting the statements made by the appellant at the time that the police officers arrived at his room. The police officers were in uniform and the girl’s condition must have made it obvious that they were investigating at least a serious case of assault. Appellant’s counsel however made no objection to the absence of a voir dire notwithstanding that one had been held at the first trial and this taken in conjunction with the mass of other evidence made it appropriate to apply s. 613(1)(b)(iii) of the Code.

While C.T. was present during the terrible events of the night and morning in question and had taken no steps to stop the appellant in his actions this did not mean that he should have been treated either as an accomplice or as an accessory. A person does not become an accomplice

merely by witnessing an act and failing to intervene to prevent it. Further the evidence of two statements as to the victim's condition to the effect that she was alright, merely sleeping, and that nothing happened, when read in light of s. 23(1) of the Code, which defines an accessory after the fact as one who knowing that a person had been a party to an offence receives, comforts or assists him for the purpose of enabling his escape did not justify the conclusion that C.T. was an accessory.

Finally, the Court of Appeal was in error when it said "...lack of knowledge, due to intoxication, that bodily harm inflicted by any person is likely to cause death is not a defence to a charge of murder". Notwithstanding this error there was however no justification for the further allegation that the evidence of drunkenness justified a reduction of the verdict to manslaughter.

Per Laskin C.J. and Spence, Dickson and Estey JJ. dissenting: Under these circumstances the two police officers when in the apartment were regarded by C.T. and the accused as "persons in authority" and were so acting. While not holding that counsel for the appellant waived the requirement of a voir dire, or even that such a waiver is possible, these facts and the mass of other evidence justified the application of s. 613(1)(b)(iii) of the Code. The admissibility of the very brief exculpatory statement without determining its voluntary character caused no substantial miscarriage of justice.

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As to the second ground of appeal, a person merely witnessing an act does not thereby become an accomplice. Indeed counsel for the appellant in his address to the jury, although he attacked most vigorously C.T.'s credibility did not imply that C.T. might have taken any part in beating the victim. Nonetheless C.T.'s statements to the police officer, "Oh, she's alright, she's just sleeping" and "nothing happened" were false statements serving to conceal evidence and exonerate the appellant and C.T. in effect so admitted in his cross-examination. C.T. was therefore an accessory. As an accessory after the fact is "particeps criminis", and so an accomplice, the judge should have given an "accomplice warning". In view of the fact that C.T. was demonstrably a most unreliable witness, and of the thrust of his evidence, it was possible to say that a jury given the proper warning could not, acting judicially, have failed to convict the appellant. Upon this ground the appeal should have been allowed and a new trial directed.

On the third ground of appeal, the trial judge was doubtful that the jury could find that the appellant could have formed the necessary specific intent. It was for the Appeal Division to satisfy itself not that there was evidence but that the weight of such evidence was not so weak as to make the verdict of the jury unreasonable, a requirement which falls short of requiring the Appeal Division to substitute its opinion for that of the jury.

[Sykes v. The Director of Public Prosecutions, [1962] A.C. 528; Attorney General for Northern Ireland v. Gallagher, [1963] A.C. 349; Erven v. The Queen, [1979] 1 S.C.R. 926; R. v. Sweezey (1974), 27 C.R.N.S. 163; R. v. Morris (1976), 29 C.C.C. (2d) 540; Piché v. The Queen, [1971] S.C.R. 23; R. v. Taylor (1971), 1 C.C.C. (2d) 321 referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], dismissing an appeal from a conviction by Barr J. with a jury on a charge of murder. Appeal dismissed, Laskin C.J. and Spence, Dickson and Estey JJ. dissenting.

J. Brian Neill, for the appellant.

Patricia Cumming and David Hitchcock, for the respondent.

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The judgment of Laskin C.J. and Spence, Dickson and Estey JJ. was delivered by

SPENCE J. (dissenting)—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced on July 28, 1977. By that judgment, the Appeal Division affirmed the conviction of the appellant on June 5, 1976, by a judge and jury on the charge

THAT he did on or about the 5th of January, A.D. 1974 at the City of Fredericton, in the County of York and Province of New Brunswick, unlawfully cause the death of Linda Diana Hitchcock and did thereby commit murder punishable by life imprisonment, contrary to Section 218(2) of the Criminal Code of Canada and amendments thereto.

I shall recite the facts as set out by Limerick J.A. in his reasons for judgment for the Appeal Division and refer hereafter to any additional facts which are relevant to these my reasons. Limerick J.A. said:

At 8:20 a.m. on January 5th, 1974, Csts. Arbeau and Larder of the City of Fredericton police force received a radio call as a result of which they proceeded to the Windsor Hotel, a combined rooming house and hotel, at 151 Westmorland Street in the City of Fredericton to assist in taking a patient to the hospital.

On entering room No. 25, occupied by the appellant, they found the deceased, Linda Diana Hitchcock, lying crosswise on a bed. Carl Taylor, occupant of room No. 23 was sitting on the bed and the appellant was standing nearby. Miss Hitchcock was unconscious, her eyes were partly open and her breathing was shallow and labourous.

Cst. Arbeau asked what the problem was and the appellant replied that she had been drinking all night and had fallen down the stairs on her way to the bathroom. After communicating with police headquarters by radio, Cst. Larder carried the 90 pound Miss Hitchcock to the police car and placed her in the rear seat and the appellant sat with the girl's head on his lap. The police drove the car to the hospital and delivered Miss Hitchcock to the emergency ward where she was examined by an intern and two doctors, who then had her removed to the intensive care unit of the hospital. She was pronounced dead the following day.

Medical evidence established there were multiple bruises and cigarette burns on her arms, legs and body, a raised

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lump on one temple and a cut in her scalp at the back of her head as well as bruises, some of which were recent and others several days old.

An autopsy disclosed death was caused by a massive subdural haematoma resulting from the tearing of the sagittal vein lying between the two hemispheres of the brain which had caused internal pressure in the skull forcing the lower portion of the brain into the opening at the base of the skull and so damaging the part of the brain which controls the vital functions of the body, resulting in the paralysis of these vital functions.

The evidence discloses that for some months prior to Miss Hitchcock's death she had been living with the appellant in apartment No. 25, a two room apartment, in the Windsor Hotel. About 10:00 p.m. on the night of January 4th she had gone to the Canadian Legion dance in Marysville with Darrell White, Marjorie Arbeau and Kenny Hanson. They left the dance about 1:30 a.m. and after eating at a restaurant they, in company with Gerald Peterson, returned to the Windsor Hotel to apartment No. 20 where Mr. White and Miss Arbeau lived. The deceased then left apartment No. 20 to find the appellant and brought him back to that apartment.

Later that night Mr. White and Miss Arbeau went for a drive leaving the appellant, the deceased, Gerald Peterson and Kenny Hanson in White's apartment. The appellant struck the deceased both before and after Mr. White and Miss Arbeau left the apartment. On the occasion of the second slapping when told by Kenny Hanson to leave her alone, the appellant left the apartment. He later returned and carried the deceased out of the apartment.

Between 5:30 and 6:00 a.m. several of the tenants heard loud talking and shouting and two heavy thuds from the area of Carl Taylor's apartment (No. 23) just down the hall from that of the appellant. Mrs. Wilson, who had an apartment across the hall from No. 23, removed her children from their bedroom around 5:30 a.m. on that morning because of loud talking, crying and noises emanating from Taylor's apartment. She overheard the deceased crying and say to the appellant "Please don't hit me any more". She also heard the deceased ask Carl Taylor to make the appellant stop hitting her. Through the keyhole in her bedroom she saw the appellant through the open door of Taylor's apartment seated in Taylor's apartment. She heard the appellant say he wouldn't hit her any more and later again heard the deceased crying and say "I thought you weren't going to hit me any more".

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A number of witnesses testified that on previous occasions they had seen the appellant beating and slapping the deceased. Anita McGraw, a week previous to the 5th of January, observed the appellant slapping and punching the deceased in the face and head and banging her head against the wall of their apartment.

Carl Taylor, who was somewhat intoxicated on the night of January 4th, and somewhat confused as to times and the sequence of events on that night, testified that the appellant and the deceased were in his apartment No. 23 on the night of January 4 and that the appellant continually beat the

deceased, had thrown her on the floor and banged her head three or four times against the refrigerator door. He also testified the deceased had left the apartment to go to the toilet followed by the appellant. Taylor said he followed them out into the hall to see what was going on and saw the appellant helping the deceased up off the floor of the landing of the stairway in front of the bathroom. A police officer testified this landing was six and three quarters inches below the level of the hall floor or one step down. All three then returned to Taylor's apartment. The appellant finally returned to his own apartment about 7:30 a.m., dragging the deceased, who was at the time unconscious, by the hair. Taylor, worried by her condition, telephoned for an ambulance between 8:00 and 8:15 a.m.

Taylor testified the appellant about a week previously had threatened to kill him with a knife and for this reason was afraid of him and had not interfered to stop him beating the deceased.

Leave to appeal to this Court was granted on October 6, 1977, and the following three questions were put to this Court by the appellant as grounds of appeal:

1. Did the Supreme Court of New Brunswick, Court of Appeal err in law in holding that the learned Trial Court Judge did not err in law in not holding a voir dire for various statements allegedly made by the accused appellant, Hubert Edwin Morris?
2. Did the Supreme Court of New Brunswick, Court of Appeal err in holding that the learned Trial Court Judge did not err in law in not instructing the jury that the evidence of Karl Taylor, a Crown witness, should be treated as that of an accomplice?
3. Did the Supreme Court of New Brunswick Court of Appeal, err in law in finding that the lack of

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knowledge, due to intoxication, that bodily harm inflicted by any person is likely to cause death is not a "defence" to a charge of murder, and did they thereby err in not holding that the evidence of drunkenness in this case was so overwhelming that it should have reduced the verdict to manslaughter?

I shall deal with those three grounds of appeal in the same order.

This Court, on December 21, 1978, pronounced judgment in the appeal of Keith Bruce Erven v. Her Majesty The Queen[2]. In that appeal, reasons were delivered by Dickson J. which were concurred in by three other members of the Court. Concurring reasons were delivered by Pratte J. which were concurred in by another member of the Court, and dissenting reasons were delivered by Ritchie J., concurred in by two members of the Court. Dickson J., for himself and for his three concurring brethren, expressed the view at p. 943:

In my opinion, it is always necessary to hold a voir dire to determine the voluntariness of a statement made by an accused out of court to a person in authority. Only in this way can fairness to the accused be assured. To require a voir dire only if doubt is cast on the voluntariness of a statement by the circumstances under which it was made, as determined from evidence given in

the trial proper, would not only shift a burden to the accused but also, in other respects, cause him significant prejudice. One must be realistic with the jury process. If the statement is subsequently ruled inadmissible, the jury will, nevertheless, at least be left with the knowledge that a statement was made by the accused which has now been excluded. This is bound to arouse suspicion as to its content. If evidence of the context of the statement is allowed to be given for some time before anything casts doubt on its voluntariness, the jury will know something, and perhaps much, of its content. Prejudice will surely result. Such a limited requirement would destroy the fundamental distinction between the function of the voir dire, which is to determine voluntariness, and that of the trial proper, which is to determine guilt.

I can see no justification for engrafting upon the general rule, which is remarkably free of qualifications, any exception and, particularly, one expressed in such terms as “obviously voluntary” or “volunteered”. Attempts in

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the past to water down the rule have not met with success and, in my opinion, the present attempt should also be repelled.

With that view, I then concurred, as did two of my brethren, and I apply that view to the present appeal to say that the appellant’s statements to the two police constables Arbour and Larder should not have been admitted Unless and until their voluntary character had been determined in a voir dire.

Limerick J.A. suggested, as one of the reasons for the admissibility of the statements, that these two officers, when they entered the appellant’s apartment, were not “persons in authority”. The learned justice in appeal was of the view that they were not then investigating a crime and that there was no suggestion that a crime had been committed. I have read and reread the evidence of the constables. They testified that they were on patrol in a marked police cruiser at about 8:20 a.m. when they received a call on the police radio. Constable Larder merely testified “We received a call from our despatch”. Constable Arbour testified “I answered a call to Windsor Hotel or Windsor Apartments”. When the two constables entered the apartment, they found the victim lying across the bed unconscious, one thought at first that she was dead, and the appellant and the witness Carl Taylor present. Arbour asked who called the ambulance and also what was the trouble. With respect, I have not the slightest doubt that both the appellant and Carl Taylor had no other thought than that these two uniformed constables, appearing so immediately after the call for the ambulance and finding these two men with an unconscious woman, were “persons in authority” and were exercising their authority in the investigation of highly suspicious circumstances. I can see nothing in the circumstances which would permit a conclusion other than that it was a situation which required that the admissibility of the statements should be tested in a voir dire. I subscribe to what was said by Martin J.A. on this point in *R. v. Sweezy*[3], at p. 177:

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I am consequently of the view that a statement made by a person to a police officer conducting an investigation with respect to a suspected offence must be shown to have been made voluntarily before it is admissible against that person in a criminal trial in which he is an accused. The words “statement by an accused” used by Lord Sumner in *Ibrahim v. The King*, supra, in my view, refer to a statement made by a person who is an accused in a criminal trial when the statement is sought to be introduced against him rather than to the fact that he was an accused at the time he made the statement.

Then, is the failure to hold a voir dire, and the consequent submission to the jury of evidence which might have been inadmissible as not voluntary, fatal to the conviction? Dickson J., in *Erven*, was of the opinion that s. 613(1)(b)(iii) was available but that the circumstances in that case made its use inadvisable. Pratte J. expressed the same view. Ritchie J., in his dissenting reasons, was of the opinion that the statements were properly admitted without a voir dire but concluded, “I am, therefore, in any event of the opinion that this is a case in which s. 613(1)(b)(iii) of the Criminal Code should be invoked”.

I, therefore, turn to consider whether the failure to hold a voir dire in the circumstances of this case resulted in no substantial miscarriage of justice so as to permit the application of s. 613(1)(b)(iii) of the Criminal Code. The circumstances are quite unusual. The appellant had been tried previously for the same offence and was then represented by the same counsel who appeared on his behalf on the second trial, in the Appeal Division and in this Court. At the first trial, the admissibility of these statements was considered in a voir dire. After conviction, a new trial was directed (*R. v. Morris*[4]).

Upon Constables Larder and Arbour being called at the second trial, this same counsel made no objection to the admissibility of their evidence in which they testified as to the statements in question and made no request that such issue be considered in a voir dire. These two witnesses, and many others, were cross-examined minutely as to

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the fact that they failed to observe obvious signs of a beating when they first saw the victim. The statements objected to as inadmissible were totally exculpatory. “She had been drinking all night and she had fallen down the stairs on her way to the bathroom”, Arbour testified. That factor, however, does not remove the necessity of a voir dire (*Piché v. The Queen*[5]) but it is of importance in considering whether s. 613(1)(b)(iii) should be applied. Of much more importance is that counsel for the defence called two witnesses but did not call the appellant who, in conversation with another patron of a tavern the next morning, had made admissions very contradictory to his exculpatory statement the admissibility of which is here in question. In his address to the jury, counsel for the appellant attacked very strongly the reliability of the evidence of the Crown witness Carl Taylor which will be dealt with hereafter and other witnesses who had testified to a series of brutal assaults upon the victim by the appellant and then said:

If you are not satisfied, if you are satisfied that the injuries came about partly of her own volition, perhaps because she fell down the stairs, which evidence I will deal with in a few minutes, perhaps from a culmination of events over a period of time, which again is not the subject matter of this charge, then you must find the accused not guilty.

Counsel continued in his address to stress the evidence as to the appellant's intoxication in reference to his ability to possess the necessary intent but then returned to an analysis of the evidence of the other witnesses and of the medical evidence to show in it support for the statement of the accused, recited above, the admissibility of which he now contests even referring to the statement itself. Under these circumstances, there is much force to the comment made by Limerick J.A. that "the admission of the statement formed the basis for the defence that the beating inflicted on the deceased by the appellant was not the cause of her death".

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I am not ready to hold that counsel for the accused waived the requirement of a voir dire or even that such a waiver is possible. That matter is to be considered in another appeal. But these facts, together with the presence of a mass of evidence, not only from Carl Taylor but many other witnesses recounting the many assaults upon the deceased during that long terrible night, convince me that the admissibility of this very brief exculpatory statement without determining its voluntary character in a voir dire caused no substantial miscarriage of justice. Therefore, I would apply s. 613(1)(b)(iii) of the Criminal Code.

The second ground of appeal urged in this Court was the submission that the learned trial judge should have included in his charge to the jury a warning that Carl Taylor was an accomplice and that, therefore, it was dangerous to convict on his uncorroborated evidence although it was within their power to do so. Although Carl Taylor was arrested later in the morning after the constables' arrival at the scene and was taken to the police station, Constable Larder testified that it was because he was intoxicated not because he was considered to have been involved in the offence. Of course, when Constables Arbour and Larder arrived at the Windsor Apartments and entered the apartment in question, they found there the unconscious victim and two men, the appellant and Carl Taylor. The constables' investigation could not fail to include them both and for the purpose of that investigation both would be considered suspects. But after the evidence at the trial had been concluded and the judge charged the jury, it was apparent that Carl Taylor could not be considered an "accomplice" in the limited sense of the word. Despite the appellant's argument in this Court, I find no authority for the proposition that one who merely fails to prevent another person assaulting a third can be considered as an accomplice in the assault. I agree with Dickson J.A., as he then was, when he said in *R. v. Taylor*[6] at p. 329, "A person merely witnessing an act does not thereby become an accomplice".

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Indeed counsel for the accused, in his address to the jury, although he attacked most vigorously Carl Taylor's credibility, did not imply that Taylor might have taken any part in beating the victim. Carl Taylor, however, did make a statement to these officers which tended to exonerate the

appellant. Constable Arbour, in his testimony, reported Taylor as saying, after the appellant had stated that the victim had fallen down the stairs, “Oh, she is alright, she’s just sleeping”. Carl Taylor, in cross-examination, admitted that he told the officers that “nothing happened”. Carl Taylor assigned two reasons for this false statement: firstly, he feared that he himself might be accused of harming the girl and, secondly, he feared that the appellant, who had threatened him with a knife only a few days before, would harm him if he involved the appellant. In *The King v. Levy*[7], the Court of Appeal held that a person who concealed evidence, knowing that an accused was guilty, in an attempt to assist him in escaping conviction was an accessory after the fact. The Criminal Code defines an accessory after the fact in s. 23(1) as follows:

23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.

I am of the opinion that *The King v. Levy*, supra, would have been so decided if that subsection of the Code had been applicable and *R. v. Andrews*, *R. v. Craig*[8], is to the same effect. I quote Lord Parker, C.J., at p. 962:

That he did not do so fully is clear, because a full direction entails telling the jury that they must be satisfied that the appellant did the acts complained of for the purpose of assisting the principal felon to escape apprehension or conviction.

R. v. French[9] is to the same effect.

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I cannot see that the fact that Carl Taylor’s action was motivated by fear of reprisal would make him any less an accessory after the fact in the present circumstances. With respect, I must differ from Limerick J.A. when he said:

There is no evidence to support the suggestion that Taylor told the police nothing happened with the intention of helping the appellant escape liability.

I am of the opinion that Taylor so admitted in his cross-examination.

The question, therefore, is whether it is necessary to give to the jury the “accomplice warning” in the case of a witness who was an accessory after the fact. The issue was referred to rather obliquely in *Horsburgh v. The Queen*[10], where the Court was considering whether the trial judge should have warned himself in accordance with the rule of practice, now become a rule of law, applicable to the evidence of accomplices, upon considering the evidence of a group of juvenile witnesses who had testified for the prosecution. It was the contention of the Crown that these witnesses could not be considered accomplices as they could not have been convicted of the charge against the accused. Martland J., at p. 755, cited and adopted the statement of Lord Simonds, L.C., in *Davies. Director of Public Prosecutions*[11] at p. 400:

There is in the authorities no formal definition of the term “accomplice”: and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category:—

- (1) On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors). This is surely the natural and primary meaning of the term “accomplice”. But in two cases, persons falling strictly outside the ambit of

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this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz:

- (2) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*Rex v. Jennings*, (1912) 7 Cr. App. R. 242; *R. v. Dixon*, (1925) 19 Cr. App. R. 36):
- (3) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration. (*Rex v. Farid*, (1945) 30 Cr. App. R. 168).

Martland J. continued at p. 756:

I do not agree that this result follows from the *Davies* case. *Particeps criminis* means one who shares or co-operates in a criminal offence. The passage cited from that case shows that the term includes an accessory after the fact, who certainly could not be convicted of the main offence. What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. Whether or not there has been such participation will depend upon the facts of the particular case.

It will be seen that Martland J. was there concerned with whether a person was “*participes criminis*” even if he could not be convicted of the offence of which the accused were charged. He illustrated that the definition of “accomplice” was not so narrowly confined by pointing out that the Lord Chancellor considered that even accessories after the fact were “*participes criminis*” although certainly accessories after the fact, or the witnesses in *Horsburgh* could be so convicted. As a matter of fact, the witnesses in *Horsburgh* were certainly not in the position of accessories after the fact. Martland J., for the majority, was of the opinion they were accomplices in that they were “*particeps criminis*”.

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In *R. v. Gratton*[12], at pp. 154-5, the Appeal Division of the Supreme Court of New Brunswick determined that an accessory after the fact was not an accomplice. Limerick J.A. there found that the inclusion of accessory after the fact in the definition of accomplices by the Lord Chancellor in *Davies*, *supra*, was not in accord with the law in Canada or, at any rate, in New Brunswick. *Horsburgh* was not cited.

In Ontario in *R. v. Riezebos*[13], the Court of Appeal for Ontario was concerned with a witness, Utting, who it was alleged was an accessory after the fact in that he assisted the accused for the purpose of enabling them to escape (at p. 8). Lacourciere J.A., in giving judgment for the Court, cited *Mahlikilili Dhalamini v. The King*[14], *Davies v. Director of Public Prosecutions*, *supra*, *Horsburgh v. The Queen*, *supra*, and *R. v. Gratton*, *supra*, and at p. 11 said:

With great respect, we are unable to agree with this submission or with the conclusion of the Court in *R. v. Gratton*, *supra*, and the other cases referred to. Logically, the evidence of an accessory after the fact should be regarded as untrustworthy because of his desire “to purchase lenient treatment for himself at the expense of the accused by co-operating with the authorities” per Ritchie J., in *Horsburgh*, *supra*, at p. 310 C.C.C., p. 719 D.L.R. It seems to us that the question whether an accessory after the fact should be treated as an accomplice has been answered affirmatively by the highest Court in the land in the *Horsburgh* case, *supra*, so that it is concluded and may be regarded as settled law in Canada.

The same issue came before this Court in *Paradis v. The Queen*[15]. There, Pigeon J., giving reasons for judgment for himself and two others, held that although the warning need not be given in the case of an accessory after the fact, the witness in question on the evidence in the particular case would have to have been determined by the jury to be an accomplice before he could have been found to be an accessory after the fact and, therefore, the trial judge was correct in including the warning in his charge. Martland J., for the majority, at p.

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265, agreed with that determination but added as to the decision of the Court of Appeal of Quebec that the warning need not be given in the case of an accessory after the fact:

I am not, however, prepared to accept the view expressed by the Court of Appeal on that issue. The Court approved the judgment of the Court of Appeal for New Brunswick in *R. v. Gratton* (1971), 5 C.C.C. (2d) 150. In the later case of *R. v. Riezebos* (1975), 26 C.C.C. (2d) 1, the Court of Appeal for Ontario did not agree with the conclusion reached in the *Gratton* case, and preferred to adopt the definition of the term “accomplice” stated by Lord Simonds, L.C., in *Davies v. Director of Public Prosecutions*, [1954] A.C. 378, at p. 400, which was accepted by my brother Ritchie and by me in *Horsburgh v. The Queen*, [1967] S.C.R. 746, at pp. 768 and 756. I am not persuaded that we were wrong in so doing.

In that paragraph, Martland J., for the majority of the Court, reaffirmed the view which he had expressed in *Horsburgh*, again for the majority, that an accessory after the fact was “particeps criminis” and so an accomplice and therefore that the warning should be given as to the testimony of such a witness.

In *R. v. French*, *supra*, the Court of Appeal for Ontario was concerned with the testimony of a witness who had first stated to police that the accused was elsewhere at the time the crime was committed and testified she had so stated for fear of her life. The Court held, in a unanimous judgment, that the trial judge was in error in not leaving to the jury the question of whether the witness were an accessory after the fact if she had so acted for the purpose of enabling the accused to escape. MacKinnon J.A., as he then was, said at p. 214:

Lacourciere, J.A., speaking for this Court in *R. v. Riezebos* (1975), 26 C.C.C. (2d) 1, reviewed the law with relation to accomplices and accessories after the fact and quoted the following passage from the majority judgment in *Horsburgh v. The Queen*, [1968] 2 C.C.C. 288 at pp. 298-9, 63 D.L.R. (2d) 699, [1967] S.C.R. 746 at p. 756 [p. 10]:

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Particeps criminis means one who shares or co-operates in a criminal offence. The passage cited from that case shows that the term includes an accessory after the fact, who certainly could not be convicted of the main offence. What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. Whether or not there has been such participation will depend upon the facts of the particular case.

The Court in *Riezebos* came to the conclusion that the question whether an accessory after the fact should be treated as an accomplice had been answered affirmatively by the Supreme Court of Canada in the *Horsburgh* case. The majority of the Supreme Court reaffirmed this view in *Paradis v. The Queen* (1977), 33 C.C.C. (2d) 387, 73 D.L.R. (3d) 745, 13 N.R. 251.

Despite the clash of opinion between the appeal courts in New Brunswick, Quebec and Ontario, I have come to the conclusion that MacKinnon J.A., as he then was, was correct when he stated that the majority of this Court had, in *Paradis*, reaffirmed that the trial judge should give to the jury the accomplice warning as to witnesses whom they find to be accessories after the fact. I realize the obiter character of statements to this effect in both *Horsburgh* and *Paradis* but it is an obiter which has been repeated and, at least in Ontario, has been adopted as a firm statement of the law. The rule, in my opinion, is a salutary one for the reason referred to in *Horsburgh* by Ritchie J. and stated again by Lacourciere J.A. in *Riezebos* at p. 11:

Logically, the evidence of an accessory after the fact should be regarded as untrustworthy because of his desire “to purchase lenient treatment for himself at the expense of the accused by co-operating with the authorities”.

I have, therefore, concluded as part of my ratio decidendi in this appeal that the learned trial judge erred in not leaving to the jury the question of whether Carl Taylor was an accessory after the fact and warning them that if they so found it would be dangerous to convict the appellant on the uncorroborated evidence of such accessory after the fact.

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Again, this does not end the matter. There is no logical reason why it should be determined that the provisions of s. 613(1)(b)(iii) should not be invoked. Limerick J.A. did so in his reasons for the Appeal Division applying the section without expressly referring to it, in the last paragraph of his reasons. MacKinnon J.A., as he then was, adopted the same course in French when he said at p. 216:

The jury were left in no doubt as to the danger of convicting on the uncorroborated evidence of Miss Deveau. The warning given by the trial Judge satisfied the requirements of justice and there was no substantial wrong or miscarriage of justice in his failing to leave to the jury the question of whether Miss Deveau was an accessory after the fact.

I therefore turn to consider whether the failure I have found in the charge resulted in any miscarriage of justice.

Carl Taylor was amply demonstrated to be the most unreliable witness. There is some significance in the fact that the witness upon whom the Crown relied to testify to the cruel and senseless beating inflicted upon the deceased over many hours was only called as the twenty-seventh witness for the Crown after two hundred and fifty-three foolscap pages of evidence had been given. In his examination it was shown that Carl Taylor came directly from an alcoholics' rehabilitation institution accompanied by an attendant and that he had a criminal record. The cross-examination reveals page after page of contradictions, hesitations and frequent resort to the reply of "I don't remember", which might well reflect his own intoxication during the critical period. All of these features of Taylor's testimony were the subject of very strong comments in the defence counsel's address to the jury.

Although as the learned trial judge asks in his charge "Did the blows described by Taylor and that is the only evidence of the serious blows, cause a rupture of the sagittal vein...?" (the underlining is my own), there was a great deal of other direct and circumstantial evidence of well nigh continuous beating of the deceased by the accused

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during this long and terrible night. Moreover, evidence was given by one witness that the accused in the tavern the next morning admitted "I beat her up and I don't know whether she's alive or dead".

These matters were all before the jury on the evidence which they heard. But the importance of the rule requiring the judge to give the accomplice warning is just that it comes from the judge. So in French, supra, MacKinnon J.A., as he then was, sought something in the trial judge's charge which could compensate for the absence of the necessary formal warning as to the evidence of an accomplice, having included an accessory after the fact in that classification. He quoted the trial judge as follows at pp. 211-212:

The Crown's case rests on the foundation provided by Nadine Deveau's evidence. She is a self-confessed persistent liar, thief and drug addict, who originally gave the police an alibi for Tom French, and only many months later, in suspicious circumstances, accused Tom French. Because of her character and her propensity to lie, and because of her involvement in crime, it would be dangerous to convict on her evidence. No one who knows her would believe her under oath, and in any event, look to the evidence as regards the story of the original plot to murder Ken Landers; she is supported by no one, and contradicted by Mrs. Landers.

As regards the meeting outside the City Hotel, she is supported by no one and contradicted by two guards, Mr. Eriksen and Mr. Holbrook and by Bill Buck and Brian Holtzhauer. As regards the conversation over at Adam Hanson's barber shop, she is supported by no one and contradicted by Don Morrison.

There are a number of witnesses that you have heard testify that they would not believe Nadine Deveau under oath, and I should tell you that in the last resort it is for you to decide whether you would believe Nadine Deveau under oath. These witnesses knew her, they say they knew her and knew her reputation, and they said that they would not believe her under oath. You have to judge their credibility.

...

The fact is, members of the Jury, she is, as I have said the most crucial witness in this case; and even if she were an independent person, I would direct you in strong terms that you must scrutinize her evidence most care-

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fully, but because she is a person with a criminal record and of ill repute, admittedly ill repute, then you should be even more careful in weighing her evidence which is uncorroborated or unsupported so far as the statements to her are concerned.

and concluded, as I have already quoted, that the jury was left in no doubt. However, in the present case when one turns to the trial judge's charge, there is no such emphasis on the frailties of Carl Taylor's evidence. Taylor's intoxication is referred to; it is said that he was "trying to help himself" but that is in reference to his submission to treatment for alcoholism not to his possible seeking of leniency from the authorities. Once the learned trial judge used the expression "Carl Taylor goes out if you believe him", I am of the opinion that these slight references to the character of the testimony given by Carl Taylor can afford no justification for the application of s. 613(1)(b)(iii) of the Code. I cannot say that a jury properly charged, and particularly that a jury

given the required accomplice warning as to the evidence of Carl Taylor, could not, acting judicially, have failed to convict the appellant. This is especially true in light of the matters to which I shall refer hereafter. Therefore, I cannot find the certainty of no miscarriage of justice which would permit the application of s. 613(1)(b)(iii) of the Code. Upon this ground, the appeal must be allowed and a new trial directed.

The third ground of appeal argued in this Court as I have set out above deals with the defence of intoxication in reference to the ability of the accused to form the required specific intent to commit the crime of murder. In view of the direction for a new trial which I believe is necessary as a result of the second ground of appeal, it is not necessary to deal with the third ground. However, I am of the opinion that the issue should be clarified so that the trial judge upon the new trial may properly instruct the jury. Further, with respect, I am of the opinion that the decisions of the Judicial Committee and of this Court do not

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support the views expressed in his reasons of Limerick J.A., who said:

Ground (e). There was evidence upon which the jury could find as they did and as they are the exclusive judges of the facts this Court, in the absence of error in law on the part of the trial Judge, cannot interfere with the finding of the jury. Lack of knowledge, due to intoxication, that the bodily harm inflicted was likely to cause death is not a defence to a charge of murder. A person cannot escape liability by pleading he voluntarily consumed so much alcohol that he was unable to appreciate the probable consequences of his actions. See the judgment of Lord Denning in *Attorney-General for Northern Ireland v. Gallagher* [1963] A.C. 349 at p. 380 approved by the Supreme Court of Canada in *Perrault v. R.* [1971] S.C.R. 196 at p. 203.

...

The trial judge adequately and properly instructed the jury as to the effect of drunkenness in relation to the charge of murder and the facts of the case and, indeed, he instructed the jury that he very much doubted if the appellant was able to form the necessary intent to commit the crime of murder on account of his intoxicated condition. There was, however, evidence including that of expert witnesses which, if believed, on which the jury could find the appellant had the ability to form the intent to inflict bodily harm which he should have known was likely to cause death and was reckless whether death ensued or not, and this court cannot substitute its opinion for that of the jury on this question of fact.

It is true that in *Attorney General for Northern Ireland v. Gallagher*[16], Lord Denning said at p. 380:

- (a) It may impair a man's powers of perception so that he may not be able to foresee or measure the consequences of his actions as he would if he were sober. Nevertheless he is not allowed to set up his self-induced want of perception as a defence. Even if he did not himself appreciate that what he was doing was dangerous, nevertheless if a reasonable man in his place who was not befuddled with drink would have appreciated it, he is guilty: see *Rex v. Meade*, [1909] 1 K.B. 895; 25 T.L.R. 359; 2 Cr. App. R. 54, C.C.A., as explained in

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Director of Public Prosecutions v. Beard, [1920] A.C. 479, 502-504.

But at p. 381, Lord Denning continued:

The general principle which I have enunciated is subject to two exceptions:

1. If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer: see *Beard's case*, [1920] A.C. 479, 501, 504. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (see *Reg. v. Moore* (1852), 3 Car. & Kir. 319), as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (*Gentleman's Magazine*, 1748, p. 570); and where a drunken man thought his friend (lying in his bed) was a theatrical dummy placed there and stabbed him to death ("The Times", January 13, 1951). In each of those cases it would not be murder. But it would be manslaughter.

And when Fauteux C.J.C. cited this decision with approval in *Perrault v. The Queen*[17], at p. 203, he continued with the words:

Lord Denning then indicated that the general principle of English law as to drunkenness, illustrated as above in (a), (b) and (c), is subject to two exceptions which, in my opinion, in view of the finding of facts in this case, have no application in this instance.

Therefore, I am of the opinion that the jury must determine whether the accused was so affected by intoxication as to "render him incapable of forming that intention": *Attorney General v. Gallagher*, supra. If the jury has any reasonable doubt that the Crown has failed to prove that the accused, despite his intoxication, had the ability to form such a specific intent they must acquit him of murder, though they should convict him of manslaughter. A careful reading of the learned trial judge's charge convinces me that it was quite accurate in this respect. I, therefore, do not criticize the charge but only the inferences which may be drawn from Limerick J.A.'s statements in respect to the defence of intoxication. The appel-

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lant's third ground of complaint does not refer to the charge but to the duty of a court of appeal under s. 613(1)(a)(i) of the Criminal Code which provides:

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, 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,

I have quoted above Limerick J.A.'s disposition of the question. In my respectful opinion, it is not sufficient to say:

There was evidence upon which the jury could find as they did and as they are the exclusive judges of the facts, this Court, in the absence of error in law on the part of the trial Judge, cannot interfere with the finding of the jury.

The task of the Appellate Court was outlined by Pigeon J. giving the majority judgment in *Corbett v. The Queen*[18] when he said at pp. 278-9:

Of course, if the judges of the majority had held that their function was only to decide whether there was evidence, this would be reversible error. The Code expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is "unreasonable" not "unjustified". The jurors are the triers of the facts and their finding is not to be set aside because the judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no twelve reasonable men could possibly have reached it acting judicially.

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As Limerick J.A. pointed out, the learned trial judge was highly doubtful that the jury could find that the appellant could have formed the necessary specific intent. Therefore, as Pigeon J. said, the Appeal Division must satisfy itself not that there was evidence but that the weight of such evidence was not so weak as to make the verdict of the jury unreasonable. This requirement certainly does not go to the extent of requiring the Appeal Division to substitute its opinion for that of the jury but it does call upon the Appeal Division to determine whether any twelve reasonable men could possibly have reached that verdict. In view of all the evidence as to gross intoxication of the appellant and the very evident doubt expressed by the learned trial judge as to the appellant's ability to form the necessary intent, the prosecuting authorities might well consider whether the new trial which is directed in these reasons might not be upon the charge of manslaughter.

For the reasons set out above, I would allow the appeal and direct a new trial.

The judgment of Martland, Ritchie, Pigeon, Beetz and Pratte JJ. was delivered by

RITCHIE J.—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal of the Province of New Brunswick affirming the conviction of the appellant at his trial for murder punishable by life imprisonment before Barr J. sitting with a jury.

I think it desirable to observe at the outset that this appeal is concerned with the second trial of the appellant on the same charge, his conviction at an earlier trial having been set aside and a new trial directed by the Court of Appeal of New Brunswick, for the reasons which are now reported in (1976), 29 C.C.C. (2d) at p. 540.

The following grounds of appeal are now raised by the Notice of Appeal to this Court:

That the Court of Appeal erred in law in holding that the learned trial court judge did not err in law

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1. In not holding a voir dire for various statements allegedly made by the accused appellant;
2. In not instructing the jury that the evidence of Carl Taylor a Crown witness should be treated as the evidence of an accomplice;
3. In finding that lack of knowledge, due to intoxication, that bodily harm inflicted by any person is likely to cause death is not a “defence” to a charge of murder, and therefore erred in not holding that the evidence of drunkenness in this case should have reduced the verdict to manslaughter.

I have had the benefit of reading the reasons for judgment prepared for delivery by my brother Spence who deals exhaustively with these three grounds of appeal and after a comprehensive review of the fact concludes that the appeal should be allowed and a new trial should be granted on both the second and third grounds. Although I find myself in disagreement with my brother Spence in the result, I am nevertheless satisfied that he has accurately summarized the relevant evidence, which was also reviewed by Limerick J.A. in the Court of Appeal whose reasons for judgment are now conveniently reported in (1977), 18 N.B.R. (2d) at p. 523 et seq.

There can be little doubt that the deceased came to her death as a result of a vicious beating administered by the appellant during the night and early morning of January 4 and 5, 1974, and the appellant is in fact reported to have made the observation in a tavern at noon on the 5th that: “I beat her up; I don’t know if she is alive or dead.”

The first ground of error alleged by the appellant has to do with statements made by him in the presence of two police officers who came to the hotel or rooming house where he resided with the deceased. The officers had been alerted by a radio call from their headquarters which had in turn been occasioned by the fact that one Carl Taylor, who lives in the house and had been with the appellant while the brutal beating was being administered to the deceased, had telephoned to the hospital because of the girl’s condition.

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When the two police constables arrived at the rooming house they were directed to the appellant's bedroom (No. 25), and upon entering they found the appellant standing by the bed on which the victim was lying in an unconscious condition, with Carl Taylor sitting beside her. Constable Arbour described the condition of the victim at this time in the following passage:

Q. Would you describe her, please, as you saw her?

A. She was lying crossways on the bed, her feet dangling to the floor, but they weren't touching the floor. She was unconscious. Her eyes were half shut, she was breathing heavily, and it appeared that she was snoring. She made snoring sounds. She was dressed in a sweater and slacks. Mr. Carl Taylor, who testified earlier, he was sitting on the bed on Miss Hitchcock's righthand side, and Mr. Morris would be on her lefthand side near the bed standing up beside her. When I entered the room, I asked who had called the ambulance. Mr. Morris replied, 'I did', and I then asked what the problem was, and Mr. Morris replied she had been drinking all night and she had fallen down the stairs on her way to the bathroom. At this time, Mr. Taylor spoke up and said, 'Oh, she's all right, she's just sleeping'. I then asked who she was, and Mr. Morris replied, 'My wife', and I asked another question, when she had fallen down the stairs. Again Mr. Morris replied, 'About an hour ago'.

I agree with my brother Spence that in the particular circumstances of this case, the learned trial judge was in error in admitting the statements made by the appellant on this occasion without the holding of a voir dire. The police officers were in uniform and the girl's condition must have made it obvious that they were investigating a serious case of assault to say the least. I am, however, also in agreement with my brother Spence for the reasons which he has stated, that the conduct of the proceedings by appellant's counsel who made no objection to the introduction of this evidence notwithstanding the fact that a voir dire had been held in respect to it at the first trial, when taken in conjunction with the mass of evidence from the various occupants of the rooming house where the assault took place, made the error in admitting in evidence the brief exculpatory statement made by

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the appellant to the police one which occasioned no substantial wrong or miscarriage of justice and that this is an appropriate area in which to invoke the provisions of s. 613(1)(b)(iii) of the Criminal Code.

The second ground of appeal is directed to the question of whether or not the evidence justified the conclusion that Carl Taylor was an accomplice and whether the learned trial judge erred in failing to give the appropriate warning to the jury that it would be dangerous to convict on his uncorroborated evidence.

The role played by Taylor in relation to the sordid events of the night and early morning during which the beatings were administered to the deceased can be summarized as follows: Taylor spent the earlier part of the evening drinking with the appellant and after the rough treatment of

the girl at the hands of the appellant had started, she was brought by the appellant to Taylor's room where further assaults of a violent and vicious character took place. It was not until the early morning of the 5th that the appellant dragged the now unconscious girl by her hair from Taylor's apartment to his own. These were the circumstances under which Taylor made his call to the hospital which ultimately resulted in the arrival of the police.

It was contended on behalf of the appellant that the fact of his having been present during the terrible events of the night and morning in question, and having taken no steps of any kind to stop the appellant in his actions, was enough of itself to brand Taylor as an accomplice, but I agree with my brother Spence that a person does not become an accomplice merely by witnessing an act and taking no steps to prevent it and that the evidence did not justify a finding that Taylor was an accomplice in the sense of participating in the crime.

It is, however, contended that two statements made by Taylor to the police tended to exonerate the appellant and that in this sense he was an accessory after the fact, and the trial judge should have instructed the jury that his evidence, like that of an accomplice, was such as to make it dangerous to act upon it without corroboration.

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In this latter regard, the only evidence relied on as constituting Taylor an accessory after the fact is the following: (i) the statement to the police to which I have referred when he said "Oh, she's all right, she's just sleeping" and (ii) the admission made on cross-examination that he had told the police officers that "nothing happened". The context in which the last mentioned statement was allegedly made when the police officers first arrived and Taylor's alleged admission, occurs in the following passage of his cross-examination:

Q. Now, what did you tell the police happened?

A. I told them nothing happened.

Q. You told them nothing happened. You told them nothing happened.

A. I was so damn scared I did not know what to say.

Taylor's explanation of both statements is that he was frightened of the police on his own account because the beatings had taken place in his room, and he feared also that the appellant might do him violence as he had threatened to do in the past. It is significant also that he described his condition at the time that he was talking to the police as "I was in bad shape; I was shook up; I had been drinking—". These latter statements are certainly supported by the evidence.

The history of the development of the concept of "an accessory after the fact" is well described in Crankshaw's Criminal Code of Canada, Seventh Edition, at p. 65:

The third and most important condition is that a person in order to be an accessory after the fact must be shewn to have done some act to assist the principal offender personally: *R. v. Chapple*, 9 C. & P. 355; either to conceal the crime or to evade the pursuit of justice; so that where, for

instance, a person is charged with being an accessory after the fact to murder, the question for the jury is whether such person knowing the murder to have been committed was either assisting the murderer to conceal the death or in any way enabling him to escape being brought to justice: *R. v. Greenacre*, 8 C. & P. 35. See also *R. v. Hansill*, 3 Cox C.C. 397.

Acts intended to destroy or conceal things which may be produced in evidence against a prisoner on his trial make the doer of such acts an accessory after the fact: *R. v. Levy*, 7 Cr. App. Rep. 61, 28 T.L.R. 93.

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One does not become an accessory after the fact by merely neglecting to inform the authorities that a crime has been committed or by forbearing to arrest the offender: 1 Hale 618, 619.

The test of an accessory after the fact seems to be that he renders, to one known by him to have committed a criminal offence, some active personal help to enable him to conceal his offence or hinder his apprehension, trial or punishment, as by concealing him in the house or shutting the door against his pursuers until he should have an opportunity to escape, or by furnishing him with money or food to support him in hiding, or by supplying him with a horse to enable him to fly from his pursuers, or a house or other shelter to conceal him in, or by using open force or violence to protect him, or by taking money from him to allow him to escape, or by bribing his gaoler to let him escape, or by conveying instruments to the principal offender to enable him to break goal.

In the present circumstances it appears to me to be relevant to refer to the reasons for judgment of Lord Denning in *Sykes v. The Director of Public Prosecutions*[19] at p. 561 where he said, in part:

...if the acts of assistance were done, not to hinder the arrest of the felon, but with another motive, such as to avoid arrest himself (see *R. v. Jones*, [1948] 2 All E.R. 964), or to make money for himself without regard to what happened to the felon (as in the present case), he would not be guilty as an accessory after the fact.

In any event, the role of an accessory after the fact is clearly defined in Canada by s. 23(1) of the Criminal Code which reads:

23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence receives, comforts or assists him for the purpose of enabling him to escape.

The two statements above referred to which are relied on as evidence that Taylor was an accessory after the fact, must be read in light of this definition.

At the time when the first statement was made, according to the police officer, the victim was

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unconscious—“Her eyes were half shut, she was breathing heavily, and it appeared that she was snoring”. With all respect to those who hold a different view, I can find no basis for construing Taylor’s statement “Oh, she’s all right, she’s just sleeping” given under these circumstances as justifying the inference that he was an accessory after the fact as above defined, nor do I find it possible to read his admission that he told the police “nothing happened” as referable to anything done or said by him “for the purpose of enabling” the appellant’s escape. I am therefore of opinion that the trial judge did not err in failing to instruct the jury that the evidence of Carl Taylor should be treated as evidence of an accessory after the fact, and accordingly, no question arises in this case as to the necessity of warning the jury of the danger of convicting on the uncorroborated evidence of an accomplice.

It will accordingly be apparent that I am in agreement with Mr. Justice Limerick in the Court of Appeal that there is no evidence that the statements hereinbefore quoted were made by Taylor in receiving, comforting or assisting the appellant “for the purpose of enabling” him to escape.

Finally, the appellant alleges that the Court of Appeal erred in law “in finding that lack of knowledge, due to intoxication, that bodily harm inflicted by any person is likely to cause death is not a defence to a charge of murder, and therefore erred in not holding that the evidence of drunkenness in this case should have reduced the verdict to manslaughter”. In this regard, I agree with my brother Spence, for the reasons which he has stated, that Mr. Justice Limerick, speaking on behalf of the Court of Appeal, was in error when he said: “...lack of knowledge, due to intoxication, that bodily harm inflicted by any person is likely to cause death is not a defence to a charge of murder”. In so stating the law, Mr. Justice Limerick purported to be following the judgment of Lord Denning in *Attorney General for Northern Ireland v. Gallagher*[20], but in so doing he appears to have overlooked what Lord Denning said at p. 381 with respect to offences in which a specific intention is

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essential. His Lordship there said, in part:

1. If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer: see *Beard’s case*, [1920] A.C. 479 at 501 & 504. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing.

While acknowledging the error in Mr. Justice Limerick’s reasons for judgment, I see no justification for the further allegation that he erred in not holding that the evidence of drunkenness in this case should have reduced the verdict to manslaughter.

In the present case, Mr. Justice Spence has made an express finding, with which I agree, that the trial judge correctly instructed the jury in relation to the possible defence of drunkenness, and it is the error which he found in the judgment of Mr. Justice Limerick that appears to have evoked his suggestion that if a new trial is directed the prosecuting authorities might well consider

whether such new trial might be upon the charge of manslaughter. In my view, however, no error made by the Court of Appeal can alter the fact that a properly instructed jury, having heard and seen the witnesses, brought in a verdict of guilty of murder. Here there was no error in the charge of the learned trial judge and no errors made in the Court of Appeal can affect the validity of the verdict rendered in accordance with that charge.

For all these reasons, I would dismiss this appeal.

Appeal dismissed, LASKIN C.J. and SPENCE, DICKSON and ESTEY JJ. dissenting.

Solicitors for the appellant: Campbell, Godfrey & Lewtas, Toronto.

Solicitor for the respondent: Douglas G. Hunt, Toronto.

[1] (1977), 18 N.B.R. (2d) 523.

[2] [1979] 1 S.C.R. 926.

[3] (1974), 27 C.R.N.S. 163.

[4] (1976), 29 C.C.C. (2d) 540.

[5] [1971] S.C.R. 23.

[6] (1971), 1 C.C.C. (2d) 321.

[7] [1912] 1 K.B. 158.

[8] [1962] 3 All E.R. 961 (C.C.A.).

[9] (1978), 37 C.C.C. (2d) 201 (Ont. C.A.).

[10] [1967] S.C.R. 746.

[11] [1954] A.C. 378.

[12] (1971), 5 C.C.C. (2d) 150.

[13] (1975), 26 C.C.C. (2d) 1.

[14] [1942] A.C. 583.

[15] [1978] 1 S.C.R. 264.

[16] [1963] A.C. 349.

[17] [1971] S.C.R. 196.

[18] [1975] 2 S.C.R. 275.

[19] [1962] A.C. 528.

[20] [1963] A.C. 349.

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