

CANADA / JUDGMENT

R. v. Vasil

[1981] 1 SCR 469

COURT

Supreme Court of Canada

DECIDED

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R. v. Vasil

Collection

Supreme Court Judgments

Date

1981-03-02

Report

[1981] 1 SCR 469

Judges

Martland, Ronald; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

R. v. Vasil, [1981] 1 S.C.R. 469

Date: 1981-03-02

Her Majesty The Queen (Plaintiff) Appellant;

and

George Edward Vasil (Defendant) Respondent.

1980: May 13; 1981: March 2.

Present: Martland, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Murder—“Unlawful object”—Defence of drunkenness—Reference to *Hansard*—Previous Court decision not to be followed—Criminal Code, ss. 205(5)(a), 212(a)(i), 212(a)(ii), 212(c).

The respondent, a chronic alcoholic, had set fire to the house where he lived with a friend and her two children. The children died. In his charge, the trial judge instructed the jury that in view of the facts adduced in evidence a verdict of murder could, subject to certain factual determinations by them, be grounded upon ss. 212 (a)(i), 212(a)(ii) or 212(c) of the Criminal Code. The respondent was convicted of murder. The Court of Appeal for Ontario found no misdirection in law by the judge with respect to the application of the first two sections but found that the trial judge had erred in his charge with respect to s. 212(c) in that he did not relate the defence of drunkenness to the issue of the respondent's knowledge of the surrounding circumstances at the time he did the act and in that he failed to charge the jury with respect to the onus of proof and the degree of proof as to the defence of drunkenness. A new trial was ordered.

Held: The appeal should be dismissed.

Per Martland, Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: The first issue turns upon the determination of the nature, and thereby the delimitation, of what may constitute an “unlawful object” within the meaning of s. 212(c). The other two issues are whether drunkenness may be a defence in relation to an accused's knowledge of the surrounding circumstances at the time he did the act in furtherance of the unlawful object and, if so, the onus and degree of proof of such a defence.

With respect to the first issue, having regard to the common law as it existed in 1892 and as it is expressed in the English Draft Code of 1878 which was, subject to few changes, adopted in 1892: (1) in a prosecution under s. 212(c), the element of unlawfulness necessary to qualify a homicide as culpable under s. 205(5)(a) is that which is the result of the prosecution of the unlawful object by the act which is dangerous to life; (2) there is no requirement that the dangerous act be itself unlawful; (3) when the dangerous act is unlawful, the jury must be told, as he was here, that there must be the prosecution of a further unlawful object clearly distinct from the immediate object of the dangerous act; (4) the words “unlawful object” mean the object of conduct which, if prosecuted fully, would amount to a serious crime, i.e. an indictable offence requiring mens rea.

With respect to the other two issues: (1) whilst the test under s. 212(c) is objective and the behaviour of the accused is to be measured by that of the reasonable man, such a test must nevertheless be applied having regard, not to the knowledge a reasonable man would have had of the surrounding circumstances that allegedly made the accused's conduct dangerous to life, but

to the knowledge the accused had of those circumstances; (2) drunkenness, though not relevant in the determination of what a reasonable man, with the knowledge the accused had of those circumstances, would have anticipated, is relevant in the determination of the knowledge which the accused had of those circumstances. The decision in *Graves v. The King* (1913), 47 S.C.R. 568 is no longer to be followed.

Per Beetz J.: The Court of Appeal did not err in holding that the trial judge erred in not relating drunkenness to the question of whether the appellant had actual knowledge of the surrounding circumstances which made his conduct likely to cause death.

Graves v. The King (1913), 47 S.C.R. 568, not followed; *R. v. Hughes et al.*, [1942] S.C.R. 517, distinguished; *R. v. Tennant and Naccarato* (1975), 23 C.C.C. (2d) 80; *R. v. DeWolfe* (1976), 31 C.C.C. (2d) 23; *Downey v. The Queen*, [1971] N.Z.L.R. 97; *Larkin v. The King* (1942), 29 Cr. App. R. 18; *D.P.P. v. Newbury (H.L.)*, [1976] 2 All E.R. 365; *R. v. Serné and another* (1887), 16 Cox C.C. 311; *Gralewicz et al. v. The Queen*, [1980] 2 S.C.R. 493; *R. v. Upton and Gutteridge* (1851), 5 Cox C.C. 298; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Dunbar v. The King*, [1936] 4 D.L.R. 737; *Paquette v. The Queen*, [1977] 2 S.C.R. 189, referred to. APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing the appeal by the accused from his conviction and ordering a new trial. Appeal dismissed.

Murray Segal, for the appellant.

Marc Rosenberg, for the respondent.

The judgment of Martland, Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

LAMER J.—Though s. 212(c) of the Criminal Code (R.S.C. 1970, c. C-34) has been with us since codification in 1892 (it was then s. 221(d)), the more serious questions as to its meaning and scope have, save a few exceptions, been raised in the courts below only recently. We have been told that this may well be explained by the fact that, on an indictment for murder, counsel for the Crown are more frequently than in the past, and quite properly so, requesting, when the factual basis of the case so justifies, that the judge instruct the jury as to the application of this section in lieu of or subsidiarily to the other murder sections.

Only two cases are to be found in the law reports where this Court has dealt with the meaning and purview of s. 212(c) of the Criminal Code: over 65 years ago, in the case of *Graves v. The King*[2] and almost 40 years ago in the case of *R. v. Hughes et al.*[3]

The three issues raised in this appeal not only afford but, in my respectful opinion, strongly suggest a reconsideration of how this Court dealt with those issues in the *Graves* case.

Section 212(c) reads as follows:

Culpable homicide is murder

(a)...

(b)...

- (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

The first issue in this appeal turns upon the determination of the nature, and thereby the delimitation, of what may constitute an “unlawful object” within the meaning of s. 212(c).

The other two issues are whether drunkenness may be a defence in relation to an accused’s knowledge of the surrounding circumstances at the time he did the act in furtherance of the unlawful object and, if so, the onus and degree of proof of such a defence. In fact, drunkenness raises the more fundamental issue as to whether the test applicable to the knowledge of the surrounding circumstances is objective (that of the reasonable man) or subjective.

Respondent was tried and convicted at Hamilton in the Province of Ontario by a jury on both counts of the following indictment:

1. That he on or about the 14th day of March, 1976, at the City of Hamilton, in the Judicial District of Hamilton-Wentworth did kill Lorna Gilchrist and did thereby commit murder punishable by imprisonment for life contrary to the provisions of the Criminal Code of Canada.
2. That he on or about the 14th day of March, 1976, at the City of Hamilton, in the Judicial District of Hamilton-Wentworth did kill Allan Gilchrist and did thereby commit murder punishable by imprisonment for life contrary to the provisions of the Criminal Code of Canada.

Though the taking of life is always tragic, it is in this case even more so as the victims are innocent young children in no way involved in the events that led to the setting fire to the house where they met death by asphyxiation. Nevertheless, whatever may be the degree of sympathy one entertains for the victims, Vasil’s guilt must be determined not by the degree of the innocence of the victims but by the nature or state of mind which he possessed at the time of the fatal events, which took place during the evening of Saturday the 13th and in the early hours of the morning of the 14th of March, 1976.

Respondent, Vasil, a chronic alcoholic, set fire to the house where he lived with one Mrs. Gilchrist and her two young children. He had been living with her since June of 1975.

Prior to these events life had not always been easy; Vasil, who became unemployed shortly after going to live with Mrs. Gilchrist, had difficulty accepting the role reversal that resulted from the fact that, since Mrs. Gilchrist was working steadily, he was expected to assume many of the domestic responsibilities in the household; furthermore, he was very sensitive of the fact that Mrs. Gilchrist was paying for the living and dining room furniture he had purchased in the autumn of 1975.

Everybody seems to agree that his relationship with the children was very good. Vasil was violently jealous of his companion as is borne out by the unfortunate events of this case.

The following narrative by the Crown of the facts has met, subject to very few qualifications, with the accused's approval:

The respondent and Mrs. Gilchrist were invited to a party at the home of Mr. and Mrs. W., in Hamilton, on the evening of Saturday, March 13th, 1976. The respondent testified that he was not anxious to attend this party, but he acceded to Mrs. Gilchrist's wishes to go. The respondent picked up the babysitter, at 8:00 p.m., and they drove to the party at 8:30 p.m., arriving at approximately 8:45 p.m. A playmate of Allan Gilchrist was present when the babysitter arrived. The respondent testified that before leaving for the party that evening he had between three and five mixed drinks

...

Upon arriving at the W.'s house party, the couple sat around and chatted with other guests who were comprised of married couples. While at the party, the respondent had about 8 or 9 drinks over a period of 3½ to 4½ hours. The drinks contained one to one and one-half ounces of liquor each.

At the party, both Mrs. Gilchrist and the respondent danced with other partners. The respondent became upset with Mrs. Gilchrist through the course of the evening. He asked her to leave a few times but she wished to remain until the food was served. He testified that he saw her dancing very closely with another person on one occasion and was upset because he was unable to locate her from time to time.

At one stage of the party when the respondent wanted to leave he grabbed Mrs. Gilchrist by the arm and when she pulled away he slapped her on the face.

The respondent went upstairs and was followed by Mrs. Gilchrist about five minutes later. He asked her to go home with him but she refused because he was in a foul mood. Mrs. Gilchrist asked for her house keys back and the respondent grabbed her wrist. He left alone.

Approximately one-half hour later, the respondent returned to the party. Mr. Vasil had a cup of coffee with Mr. W. and they talked for about one-half of an hour before the respondent left.

The respondent returned home at 2:10 a.m. and woke the babysitter. He asked the babysitter whether Mrs. Gilchrist had phoned. She had not. He drove her home quickly but in a normal manner. She lived five minutes away by car. The babysitter smelled the odour of alcohol in the

car. Before dropping off the babysitter, the respondent asked her if he had given her enough money. During the evening he called the W's home at least three times, mentioning on one occasion to Mrs. Gilchrist that he had driven the babysitter home. When the respondent asked whether Mr. Gilchrist (sic)[4] would come home, she replied that she would be home shortly. Mrs. Gilchrist feared the respondent that evening.

What then happens is told us by Vasil. Most of what he says is corroborated by the material evidence discovered by the firemen and the investigators, their expert opinion and the results of laboratory tests.

Vasil went to the basement, opened the freezer, disconnected it and poured a can of barbecue fluid on the meat in order to spoil it so that no one else could eat it, for he says he had decided to leave Mrs. Gilchrist. He then went upstairs and did the same to the kitchen refrigerator and to its contents. He then says:

I remember being in the living-room of the house and I had a box of matches in my hand and I thought about the furniture, that the living-room furniture had been quite a sore spot between the two of us. It had come up in quite a few arguments and I figured if I marked it in some way so as if she wants to use it she will have to get it recovered or replaced or whatever rather than just come in and start using it and I was thinking something about when we purchased the chesterfield and chair we had paid extra to have it treated against different things and that the, while looking at the rug I figured it was fire retarded (sic) and fire proofed and the drapes were the type by looking at them, I'm not sure, but by looking at them they looked the type that they were non-flammable and I figured if I threw a match down on the rug I would mark it and would have to be replaced if she wanted to have a rug there.

He denies having poured fluid in the living room before striking the matches. An expert witness from the Fire Marshall's office who found a can of barbecue fluid near the kitchen refrigerator also found a can similar in size and shape in the living room beside the front window. It was totally charred and was without its cap. Though he could not establish whether that can had contained an accelerant of any type he was of the opinion that the fire had definitely originated in the living-room and that an accelerant had been poured on the carpeting and ignited. (See A.C. at p. 226)

Vasil says that the matches he struck did not set fire but that one of them caused, to use his words, "just a little dot". The jury undoubtedly disbelieved him on this point and accepted the expert's version of the setting of the fire. They were, I feel, amply justified in doing so when one considers respondent's subsequent conduct. Indeed, he went back to the party.

...He attracted Mrs. Gilchrist's attention and endorsed his vehicle Transfer Permit over to her. Mrs. W. recalled the respondent saying, "I am going to the police station now". Mrs. Gilchrist said to the respondent, "...you have done something to my children" in a very upset voice. Mr. Vasil did not respond. The respondent called the fire department. Mrs. Gilchrist said to Mrs. W. in the Respondent's presence, "Cam, he's done something, he's called the fire department", to which Mrs. W. responded, "no, he's only trying to scare you into going home". The respondent then said,

“Well! if you don’t come home you won’t have one to go to”, and he walked towards the front door. Mrs. Gilchrist asked Mrs. W. to call a taxi because she wanted to go home, and the respondent said to her, “you rotten bitch, you are too fucking late”. He drove off from the party alone to the police station.

...

The next thing the respondent recalled after leaving the party was being at the intersection of East 23rd and Fennell Streets, from where he could see the fire. He walked into the station at approximately 5:00 a.m., threw his keys onto the counter, and said to Police Constable Patterson, the station duty officer, “I am the guy you are looking for. I lit the fire”. Police Constable Patterson asked, “What?” and the respondent responded, “I lit the fire on East 23rd Street”. At this point Police Constable Balnaves approached the respondent and cautioned him, then escorted him into the Sergeant’s room. Police Constable Balnaves asked if there was anybody at the house and the respondent replied, “Yes, Lorna, 6 years, and Allan, 9 years. I took the babysitter home and went back to the house. I opened the fridge and the freezer and poured barbecue fluid over everything and set it alight. I drove around the block several times to make sure it was going good, that the windows had a red glow”...

A half hour later he made another statement to two police sergeants saying: “What’s to say. I lit it” and then added:

The only way I felt I could get back was to do something physical. I went back to the house from the party and called her several times. She said she would leave when she felt like it. I figured “You bitch. I would fucking well fix you”. I unplugged the fridge and freezer and soaked them with barbecue fluid. I threw a match on it between the hall and the living-room. I left and drove around. I went back to the house where the party was at and talked to her again. Then I went to the Mountain Police Station.

Up till that point he had been cautioned that he was being charged with setting the fire. When at 6 a.m. the police, who by then had found out that two bodies had been discovered in the house, informed him that he was being charged with two counts of murder and cautioned him anew, respondent became visibly upset and said: “I want to die. Tell me it isn’t true. Charge me with murder. Oh my God, no, over a stupid argument. Oh my God, I can’t face Lorna. Please tell me it isn’t true”. He then telephoned his brother to whom he said: “I am charged with murder. I torched the house. Unfortunately the kids were inside”. A while later, one of the sergeants asked him where he had sprinkled the fluid to which he replied: “In the basement, in the freezer and in the living room and on the sofa and rug”.

A little over an hour later, he made a statement which was typed by one of the sergeants and that he then signed. In this statement he said:

...I went back to 375 East 23rd Street called her again and she said the same thing and that’s when I figured I would ruin a couple of things around the house. I unplugged the refrigerator and the freezer so the food would thaw out. I poured the liquid on it so it would spoil and not be used.

Question. What kind of fluid? Answer. Barbecue fluid. Question. Where did you get the fluid? Answer. In the basement. There was a box of matches sitting with the barbecue fluid. I threw a part can in the living-room. I struck a match and threw it. I threw a couple more which both went out. I dropped one on the rug about the size of a dime which did not go out. I left the house and went around the block a few times, then I went back to W.'s and asked her to go home and she said no. I said will you please come home, if you don't come home you won't have a home to go to. She wouldn't go so I left I drove down Fennell looked up 23rd Street and saw the flames, I then drove to the police station on Upper Wellington Street in a hurry. I went in and told an officer I set the fire on 23rd Street. Question. Did you know anyone was in the house when you set the fire? Answer. It never even registered. If I had thought the children were in I never would have done it in the first place. ...

In his charge the judge instructed the jury that in view of the facts adduced in evidence a verdict of murder could, subject to certain factual determinations by them, be grounded upon ss. 212(a) (i), 212(a)(ii) or 212(c) of the Criminal Code. The Court of Appeal for Ontario found no misdirection in law by the judge with respect to the application of ss. 212(a) (i) and (ii) of the Criminal Code but found that the trial judge had erred in his charge with respect to s. 212(c) in two ways, in that he:

did not relate the defence of drunkenness to the issue of the appellant's knowledge of the surrounding circumstances at the time he did the act in furtherance of the unlawful object...

and in that he:

failed to charge the jury with respect to the onus of proof and the degree of proof as to the defence of drunkenness.

The accused had raised before the Ontario Court of Appeal another ground to the effect that in any event, in view of the facts adduced in evidence, the judge should not have left s. 212(c) to the jury as a possible basis for a verdict of murder. The Court of Appeal chose not to deal with the arguments advanced by appellant in support of this ground. Accused, now the respondent, again raises that ground before us.

In my opinion the trial judge was right in leaving the case to the jury on the basis of para. (c) of s. 212; however, since I agree with the Ontario Court of Appeal's disposition of this appeal and would order a new trial, I think it desirable that something be said on the matter.

More specifically, respondent argues that the judge erred when he directed that s. 212(c) could apply to the case at bar, and in saying "that the unlawful object" alleged by the Crown was to "seek revenge and destroy property" and the "unlawful act" was "setting fire to the house...". On this point respondent argues:

1. It is respectfully submitted that the "unlawful act" in s. 205(5)(a) which makes homicide culpable and which is the foundation for murder in s. 212 and the equivalent of the "anything" in s. 212(c) must be distinct from and different than the "unlawful object" in s. 212(c). Otherwise the subjective basis for liability in s. 212(a) is converted, in every case, to

the objective liability of s. 212(c). 2. Further, it is respectfully submitted that the distinction between the unlawful object and the unlawful act should be sufficiently distinct to avoid criminal negligence causing death (manslaughter, Code s. 25(5)(b)) being converted into murder in every case.

3. Finally, it is respectfully submitted that “revenge” could not constitute the unlawful object. Revenge is not itself unlawful it is merely the motive for (sic) commission of the offence and circumstantial evidence from which the requisite intent could be inferred. If revenge were a sufficient unlawful object for the purpose of s. 212(c) then any killing for which the accused had a motive, such as jealousy or revenge, would be murder without necessity of proving the intent required by s. 212(a). This would reserve s. 212(a) for only those extremely rare cases where there was no motive for the killing.

In his charge, the trial judge, who had explained to the jurors what was homicide and what made it culpable, read s. 212(c) and then said:

...With that (sic) object did he light the fire and, secondly, did he know or ought he to have known that it was likely to cause death. With what object did he light the fire; did he know or ought he to have known that it was likely to cause death. Now as to the first, I instruct you that generally it is unlawful to set fire to a building or do anything that is likely to set fire to a building to spite another. In the circumstances here, it is for you to determine that he set the fire with an unlawful object; but the only lawful object that might appear is, if you accept his evidence that all he was doing was marking his own rug and furniture to spite Mrs. Gilchrist, or if you find that such evidence created a reasonable doubt in your mind about his unlawful object. If that is the situation, you cannot find him guilty of murder under Section 212(c). Now it is for you to determine but, I feel I should state my opinion on this issue. I find it hard to come to any conclusion but that he was doing what he did when he threw the fluid and the matches and did the other things in the house that he did, that he was doing it for anything but an unlawful object, but I am leaving it to you and my opinion should not determine yours. After the jury retired, the judge, at the Crown's request, agreed to give further instructions on the matter in the following terms:

...Now I think I should make it clear that the position of the crown and, is this with regard to two important matters involved in murder as it is before you. First, that in this case the unlawful object that the crown points to was to seek revenge and destroy property, and that the unlawful act was setting the fire; and that if you go back to your definitions you come to the proposition that if someone causes the death of another by an unlawful act that is manslaughter; but if they have an unlawful object and ought to have known that what they were doing was causing death then that is murder under Section 212(c). So the unlawful act is necessary to the homicide, and the crown says that is setting the fire; and in almost every case that I can think of, except a very, very narrow one if you choose to find it on the facts, setting the fire is an unlawful act in these circumstances; and the unlawful object to seek revenge and destroy property is what has been put before you in the evidence, and it is that that the crown rely on.

An hour or so later, the jury asked to be instructed anew in regard to s. 212(c). In complying with their request, the judge told them:

Now culpable homicide is causing the death of a human being by means of an unlawful act and this provides that, where the death of a human being has been caused by an unlawful act, which the crown says here was setting fire to the house, that if that were done for an unlawful object, which the crown says here is to seek revenge and to destroy property, then if the accused knows or ought to have known that it was likely to cause death and death is caused, then that is murder...

...

...And, if here you find that there was an unlawful object, and there was an unlawful act that caused death but you are in doubt as to whether he knew or ought to have known that it was likely to cause death, then you should find him guilty of manslaughter; ...

Sections 205 and 212 of the Criminal Code read as follows: 205. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

- (2) Homicide is culpable or not culpable.
 - (3) Homicide that is not culpable is not an offence.
 - (4) Culpable homicide is murder or manslaughter or infanticide.
 - (5) A person commits culpable homicide when he causes the death of a human being,
 - (a) by means of an unlawful act,
 - (b) by criminal negligence,
 - (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or
 - (d) by wilfully frightening that human being, in the case of a child or sick person.
 - (6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.
- 1953-54, c. 51, s. 194.

212. Culpable homicide is murder

- (a) where the person who causes the death of a human being
 - (i) means to cause his death, or
 - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

- (b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
 - (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.
- 1953-54, c. 51, s. 201. It is argued that the trial judge left the jury with the impression that “seeking revenge” could be an “unlawful object”, or part thereof, as that expression is meant in s. 212(c). True he did not directly tell them so; but not having clearly told them what he thought could be an unlawful object, he then said that, according to the Crown, seeking revenge and destroying property could be such an unlawful object. This, in my opinion, does not, given the circumstances of this case, amount to a misdirection which would warrant the ordering of a new trial. Before giving my reasons for this conclusion, I think it appropriate that a digression be made to deal with what appears to be a misinterpretation of the relation between ss. 212(c) and 205(5)(a) which, though of little consequence in this case given its particular set of facts, could in others become the source of great confusion.

In his charge to the jury the trial judge said that, in order to comply with the requirement of an unlawful act so that the homicide be culpable under s. 205(5)(a), there must be under s. 212(c) an unlawful act causing death and a further unlawful object. This interpretation of the law appears to have been shared by appellant and respondent. This is, in my opinion, wrong.

Section 205(5) contains within its four corners by virtue of subs. (4) all possible forms of murder, manslaughter and infanticide, and is not merely a definition of manslaughter. When considering s. 205(5)(a), it appears that what distinguishes murder from manslaughter is the nature of the unlawful act causing death and the circumstances under which that unlawful act was committed. True those circumstances may well amount to the commission of other unlawful acts; however, it is not the unlawfulness of those acts that makes that culpable homicide murder, but the aggravated nature of the mental element those acts import into the events.

Under s. 212(c), there is no requirement that the dangerous act be itself unlawful, though, because it is dangerous to life, it usually is. The unlawful act that must be found under s. 212(c) in order to meet the requisite unlawfulness to qualify that homicide as being culpable under s. 205(5)(a) is that which is the result of the prosecution of the unlawful object by the dangerous act. To require an unlawful act to meet the requirement of s. 205(5)(a) and then a further unlawful object so that that culpable homicide be murder is wrong. I agree that if de facto the dangerous act is itself unlawful, as in the case at bar, the jury must then be told, as the trial judge did, that there must be the prosecution of a further unlawful object, clearly distinct from the immediate object of the dangerous (unlawful) act; but this is so not because the latter is the unlawful act of s. 205(5)(a) and the former the unlawful object of s. 212(c), as suggested by the trial judge, but because dangerous conduct causing death to become the basis for a finding of murder must meet the test set out in ss. 212(a) or (b) and not merely that of s. 212(c). This is not to say that the usual

unlawfulness of the dangerous act cannot be the unlawful act of s. 205(5)(a) that renders that homicide culpable when considering manslaughter, but only that the unlawfulness of its object, since all acts have an object, cannot be the “unlawful object” when seeking to apply s. 212(c) to a set of facts. (See the opinions of Martin J.A. in the case of *R. v. Tennant and Naccarato*[5]; Zuber J.A. in *R. v. DeWolfe*[6] and those of North P. J.A. in *Downey v. The Queen*[7].

In the case at bar, when considering the charge as a whole, it appears that in view of the unlawfulness of the alleged dangerous conduct (which I discuss later on) the jury was properly directed as to the requirement of a distinct unlawful object though wrongly so as to the reasons for that requirement. But as I said, given the facts of this case, this misdirection as to the unlawful act of s. 205(5)(a) was in my opinion of no practical or meaningful consequence. Now to return to the judge’s charge relating to the meaning of “unlawful object” as that is contained in s. 212(c).

Let it be said right now that, in my opinion the “unlawful object” contemplated by Parliament in that section is that which, if prosecuted fully, would amount to an indictable offence requiring mens rea.

At the time Canada enacted its first Criminal Code (1892), both murder and manslaughter were the killing of a person by, amongst other means, an unlawful act, and this was codified in s. 220, now s. 205(5)(a). Murder and manslaughter were, because of the unlawful act, both culpable homicides. What made one but manslaughter and aggravated the other to make it murder was the presence or absence of malice aforethought on the part of him who committed that unlawful act. Culpable homicide, i.e. the killing by an unlawful act, without malice aforethought was manslaughter, but, done with malice aforethought, was murder. Malice aforethought was either express or implied by law. Express malice was present when the purpose of the accused was to deprive another (not necessarily the actual victim) of life or to cause grievous bodily harm to that person. Sections 212 (a) and (b) of today’s Criminal Code are a codification of what was then the common law as it related to express malice aforethought. As for implied malice aforethought, Halsbury’s Laws of England, vol. 9, (1st ed.), 1909, describes it as follows (at p. 573):

1163. Malice aforethought is implied by law (1) where the person killed is an officer of the law legally arresting or imprisoning the accused or executing other process of law in a legal manner; (2) where, although there may have been provocation, such provocation has not been sufficient to reduce the offence to manslaughter; (3) where the killing has been caused by the accused while he was committing some other felony. [The underlining is mine]

Then in section 1171 (at p. 579):

1171. Where a person whilst committing or attempting to commit a felony does an act which is known to be dangerous to life and likely in itself to cause death, and the death of another person results as a consequence of that act though not intended by the person committing it, the law implies malice aforethought, and the person causing the death is guilty of murder. [The underlining is mine]

A reading of these passages would quite naturally suggest that there had to exist the commission of, or an attempt to commit, an offence which in itself was a felony and that that be so without the import of any unlawfulness that the dangerous act might offer. But doubt is cast on this interpretation when one reads Humphreys J.'s description of the common law in *Larkin v. The King*[8], which was subsequently referred to and approved by the House of Lords in *D.P.P. v. Newbury*[9] (H.L.), as being "an admirably clear statement of the law", where Humphreys J. said (at p. 23 et seq.):

Perhaps it is well once more to state the proposition of law which has been stated by Judges for generations and, so far as we are aware, never disputed or doubted. If a person is engaged in doing a lawful act, and in the course of doing that lawful act behaves so negligently as to cause the death of some other person, then it is for the jury to say, upon a consideration of the whole of the facts of the case, whether the negligence proved against the accused person amounts to manslaughter, and it is the duty of the presiding Judge to tell them that it will not amount to manslaughter unless the negligence is of a very high degree. The expression most commonly used is "unless it shows the accused person to have been reckless as to the consequences of the act". That is the law where the act is lawful. Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter. If, in doing that dangerous and unlawful act, he is doing an act which amounts to a felony, he is guilty of murder and he is equally guilty of murder if he does the act with the intention of causing grievous bodily harm to the person whom in fact he kills.... [The underlining is mine]

Thus it would appear that, under the common law, the felony could be the result of the aggravation of an unlawful, but less than felonious, act by the dangerous conduct.

Be that as it may, it appears that s. 174(d) of the English Draft Code was, save the doing away with the reference to "a felony", an attempt at codifying, if not the common law of the day, at least what Stephen J. said it was (which was different from what he thought it should be—see his *History of the Criminal Law*, vol. III, 1883, at pp. 23-87 and his *Digest*) and what Halsbury says was the modern rule at the time (see Halsbury, *The Laws of England*, vol. 9, (1st ed.), 1909, at p. 579 [fn. (h)]) and which he explained to the jury in the *Serné* case (*R. v. Serné and another*[10]), in the following way (at p. 313):

"I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder. [The underlining is mine]"

Indeed s. 174(d) of the English Draft Code reads:

174. Culpable homicide is murder in each of the following cases:

(a)...

(b)...

(c)...

- (d) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one. Reference to *Hansard* is not usually advisable. However, as Canada has, at the time of codification, subject to few changes, adopted the English Draft Code of 1878, it is relevant to know whether Canada did so in relation to the various sections for the reasons advanced by the English Commissioners or for reasons of its own.

Indeed, a reading of Sir John Thompson's comments in *Hansard* of April 12, 1892, (House of Commons Debates, Dominion of Canada, Session 1892, vol. I, at pp. 1378-85) very clearly confirms that all that relates to murder was taken directly from the English Draft Code of 1878. Sir John Thompson explained the proposed murder sections by frequently quoting verbatim the reasons given by the Royal Commissioners in Great Britain, and it is evident that Canada adopted not only the British Commissioners' proposed sections but also their reasons.

The British Commissioners had suggested doing away with the expression "malice" because, they said, "there is a considerable difference between its popular and its legal meaning" and with "malice aforethought" in reference to murder because it had received, they said, "judicial interpretation which makes its use positively misleading". As for the word "felony", they had this to say (at p. 14):

The distinction between felony and misdemeanour was, in early times, nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable. For a long time past this has ceased to be the case. Most felonies are no longer punishable with death and many misdemeanours are now punishable more severely than many felonies. The great changes which have taken place in our criminal law have made the distinctions nearly if not altogether unmeaning. It is impossible to say on what principle embezzlement should be a felony, and the fraudulent misappropriation of money by an agent or the obtaining of goods by false pretense a mis-demeanour; why bigamy should be a felony, and perjury a misdemeanour; why child-stealing be a felony, and abduction a misdemeanour. The result of this arbitrary classification is that the right to be bailed, the liability to be arrested without warrant, and, to a certain extent, the right of the court to order the payment of the costs of prosecutions vary in a manner equally arbitrary and unreasonable.

It was precisely this passage of the British Commissioners' report that was quoted to Parliament by Sir John Thompson as the reason for abolishing the use of the word "felony" throughout the Code, no other particular reasons being offered for its being abolished in s. 221(d) (now s. 212(c)).

Some have suggested that the meaning of "unlawful object" should be determined in the light of the following passage of what the Commissioners said in their Report:

For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not.

(This passage can be found in Crankshaw's first edition of 1894, *Criminal Code of Canada*, at p. 140.) Some might find in that passage of the report an indication that the Commissioners intended to include, as being an unlawful object for their proposed murder section, endeavours such as those that would qualify as unlawful when considering conspiracy for an unlawful purpose (s. 423(2)) (those words have been recently interpreted in *Gralewicz et al. v. The Queen*[11], where a majority of this Court decided that "unlawful purpose" means contrary to law, that is prohibited by federal or provincial legislation), or, if not to that extent, at least as an indication that the unlawful conduct need not be a crime.

This, I submit, would be overlooking the fact that in 1878 unlawfully obstructing a railway train was very serious, was punishable by two years at hard labour, and, if done maliciously (i.e. an act done mischievously, with an intention to obstruct but without the intention of causing injury, could be malicious—see *R. v. Upton and Gutteridge*[12]) was then a felony punishable by life imprisonment. (See ss. 35 and 36 of *Malicious Damage Act, 1861 (U.K.)*, c. 97.)

If not much can be concluded one way or the other from that reference to railway trains, a great deal more may from the fact that throughout their Report no reference was made by the Commissioners to any sweeping reform of constructive murder such as that resulting from a departure from the requirement of a felonious endeavour to infer malice aforethought to the mere requirement of any unlawfulness, as petty as it may be. Their concern, as the quoted excerpt of their Report indicates, was mainly with doing away with what had become an irrelevant distinction between felonies and misdemeanours, and with the use of the words "malice aforethought"; but it would be, I suggest, unreasonable to conclude from this change of labels that they intended doing away with the need for "malice" itself and that, as a result, a verdict of murder be possible in the absence of "wickedness" or "heinous" conduct on the part of the accused. (See *Kenny's Outlines of Criminal Law, 1902*, at p. 132.)

The requirement for some malice, wickedness or heinous conduct should logically lead to the conclusion that the unlawful object contemplated by Parliament in s. 212(c) is that which is a "malum in se" as distinct from "malum prohibitum". But what would be logical is unfortunately impractical. Indeed, whilst Parliament does consider whether conduct is "malum in se" or not in order to determine whether it should be repressed through and to what degree by the criminal law or otherwise, Parliament has chosen not to label offences in that way. As a result identifying unlawful conduct of s. 212(c) by resorting to that criterion would require difficult moral judgments and import into the criminal justice system, at least for some time, unpredictability that should, whenever possible, be avoided.

Under the circumstances, I think it not unreasonable to recognize that the intent of Parliament in s. 212(c) is best respected by circumscribing the words “unlawful object” when used in that murder section as meaning the object of conduct which, if prosecuted fully, would amount to a serious crime, that is an indictable offence requiring mens rea.

Applying this interpretation of s. 212(c) to the present case, the jury had to be told that, if they believed beyond a reasonable doubt that the accused intended to damage the food and furniture, such an object was an unlawful object; indeed, the fact that Mrs. Gilchrist was sharing in the cost of the furniture is not contested and as a result the wilful destruction, damaging, obstruction, interference with that property is mischief, an indictable mens rea offence. As for the dangerous act, it would have been sufficient that they be told that it could be the resorting to the use of fire as a means of prosecuting the unlawful object (the destruction of the furniture), without any need to refer to the fact that setting the fire under those circumstances was also in itself an unlawful act.

The trial judge by telling the jury that the destruction of the property that was in the house could be such an unlawful object was not, in view of the circumstances of this case, misdirecting them. The fact that he added “seeking revenge” not as an alternative but in addition to the destruction of property was a misdirection favourable to the accused and cannot be relied on by him to ask for a new trial.

Let us now deal with the Crown’s grounds relating to drunkenness.

As I said earlier, the Court of Appeal for Ontario found misdirection in the trial judge’s charge to the jury as regards drunkenness in that he

1. did not relate drunkenness to the issue of the accused’s knowledge of the surrounding circumstances at the time he did the act in furtherance of the unlawful object;...
2. did not charge the jury with respect to the onus and degree of proof as to the defence of drunkenness.

Appellant says that the Court of Appeal for Ontario erred in so finding.

We need not deal at any length with the latter of those grounds. The judge had charged the jury and then recharged them at counsel’s request. Appellant is not suggesting that the judge adequately charged the jury as to drunkenness in the course of the second charge, but argues that the judge having adequately done so in the course of the main charge, his omission in the course of the recharge did not constitute an error in law. As I have come to the conclusion that a new trial should be ordered for other reasons, the question whether the judge’s main charge to the jury was adequate or not as regards the onus and degree of proof as to the defence of drunkenness, and whether, assuming it were so, he needed or not under the particular circumstances of this case to repeat those instructions to the jury, need not be decided. I think it sufficient to say that, considering my conclusion as to the other ground and assuming that the evidence adduced at that new trial remains substantially the same, the requirement for proper instructions as regards the onus and degree of proof^[13] as to the defence of drunkenness would

be met by, using the words of the Ontario Court of Appeal, telling the jury that:

...if at the end of all of the evidence they had a reasonable doubt as to whether the appellant by reason of his consumption of alcohol had the intention to carry out the unlawful object or had the knowledge of the circumstances which would make his act such that it was likely to cause death, then he was not guilty of murder but guilty of manslaughter. Now, to consider the remaining ground of appeal. In the course of his charge, the judge, dealing with the words “knows or ought to know” of s. 212(c) told the jury the following:

...Now ought to know in this section is judged by the standard of whether a reasonable person with knowledge of the surrounding circumstances which make the situation dangerous to life should have foreseen that it was likely to cause death. What would a reasonable person, which is an ideal person in the community, not necessarily any one of us, but what we think that a reasonable, prudent, responsible person in our society, who knew the surrounding circumstances rendering the situation dangerous, what would they have foreseen. Would they have foreseen that it was likely to cause death. ... [The underlining is mine]

The judge then dealt with the issue of drunkenness in his charge and in his recharge:

...Now the theory of the defence is that the accused's evidence before you is the true version, that it was an accident, that he only meant to mark the rug and furniture, that he was provoked, and that by reason of shock and drunkenness he could not have the intent necessary for his conviction for murder—intent or knowledge necessary for his conviction of murder...

...

Now so far as shock and drunkenness are concerned, they're not a defence, because drunk and shocked people are not at liberty to kill their fellow human beings; but they're only evidence from which you may infer that the accused did not have the necessary intent. If he did not, then what would otherwise be murder is manslaughter and if the deaths were caused—it is manslaughter if the deaths were caused by the accused's unlawful act.

Now the evidence as to drunkenness is only the number of drinks he had at the party. Gary Herlick, the bar tender, said it was approximately eight to nine. Mrs. Gilchrist said he had about four before he hit her and more after. Mrs. W. said he was not intoxicated at all. Mr. W. said he didn't think he was drunk. Herlick thought him sober, as did the police. You are to decide, was he drunk enough not to form the intent to kill or not to have an unlawful object. If you find he was that drunk or have a reasonable doubt of it, he can only be guilty of manslaughter, but I suggest that if you accept the evidence of the police officers you will have very little doubt as to the degree of sobriety, but it is for you alone to decide.

...

Now with regard to drunkenness, I think I should read to you a proposition of law that—I hesitate to say that it explains more clearly what I was trying to say to you, but it explains in other language what I was trying to say to you, the evidence, that evidence of drunkenness falling short

of incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was so affected by drink so that he more readily gave way to some violent passion does not displace or weaken an inference already drawn that he intended the natural consequences of his acts. And my interpretation of that is that it is only, if you find he was drunk on the evidence that is before you, that only affects his criminal liability if you find that he was so incapable that he could not form the intent necessary to constitute the crime. And if you do find that he was drunk, then he is guilty of manslaughter rather than murder. That's all then, if you will return to your jury room. [The underlining is mine]

The fact that the judge did not relate drunkenness to the accused's knowledge of the surrounding circumstances is not in dispute. Though he recognized, rightly so in my opinion, the prerequisite that the reasonable man have knowledge of the surrounding circumstances, a careful reading of his charge leaves it unclear whether he was telling the jury that the behaviour of the accused had to be measured by that of "the reasonable man" in the light of the accused's "knowledge of the surrounding circumstances" or in the light of the knowledge a reasonable man would have had of those circumstances. Be that as it may, it is clear that the judge limited the relevancy of drunkenness to "the intent to kill" and to that of having "an unlawful object".

Whether the trial judge was or was not in error in failing to relate drunkenness to the accused's knowledge of the surrounding circumstances is dependent upon whether the test under s. 212(c) is, given the circumstances of the case at bar, one or the other of the following: did the accused know of the children's presence upstairs and if so, would a reasonable man have known that setting fire was likely to cause their death

or

would a reasonable man (i.e. given the circumstances of this case, a sober man) have known that the children were upstairs and, if so, would he have known that setting the fire was likely to cause their death.

It is clear that, whilst drunkenness of the accused is of no relevance under the latter interpretation of s. 212(c), it is under the former.

A mere reading of s. 212(c) is of little help in determining whether Parliament intended, once a person is prosecuting an unlawful object, that all of that person's behaviour be measured by a purely objective standard or whether that objective standard be restricted to measuring, when considering murder, his morality in relation to a factual situation of which he is conscious. Faced with the problem in the case at bar, the Court of Appeal for Ontario followed one of its previous decisions, that in the case of *R. v. Tennant and Naccarato*, *supra*.

In that case that Court had this to say (at pp. 90-91):

Where the provisions of s. 212(c) are applicable, the words “ought to know” impose liability for murder where death is unlawfully caused by conduct which a reasonable person, with knowledge of the surrounding circumstances which make such conduct dangerous to life, should have foreseen was likely to cause death.

...

...We have already pointed out, however, that even under s. 212(c), the offender’s liability for murder depends upon his knowledge of the surrounding circumstances which make the conduct in question dangerous to life, for example, his knowledge that a pistol which he is brandishing is loaded, or his knowledge of the presence or probable presence of persons in a house to which he sets fire. (Holmes, *The Common Law*, pp. 52-7; *Molleur v. The King* (1948), 93 C.C.C. 36, 6 C.R. 375, (1948) Que. K.B. 406n.)

Where liability is imposed on a subjective basis, what a reasonable man ought to have anticipated is merely evidence from which a conclusion may be drawn that the accused anticipated the same consequences. On the other hand, where the test is objective, what a reasonable man should have anticipated constitutes the basis of liability.

The distinction between the imposition of liability on an objective basis rather than on a subjective basis assumes particular importance under s. 212(c), where the accused by reason of intoxication or even stupidity did not in fact foresee the likelihood that his conduct would cause death.

If the accused had the capacity to form the intent necessary for the unlawful object and had knowledge of the relevant facts which made his conduct such as to be likely to cause death, he is guilty of murder if a reasonable man should have anticipated that such conduct was likely to cause death. What the accused ought to have foreseen is judged under s. 212(c) by the standard of the reasonable man.

It follows that the defence of drunkenness is only relevant under s. 212(c) in relation to whether the accused had the intent necessary to constitute the unlawful purpose alleged and had knowledge of the relevant circumstances. ...

Holmes J. in *The Common Law*, 1881, defined “foresight of consequences” as being (at pp. 45 and 47):

...a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in the relation of effect to cause. Again, we must seek a reduction to lower terms. If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen...

...

But furthermore, on the same principle, the danger which in fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee. Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided. But there is this practical difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is, by general experience. [The underlining is mine]

With this, and with what the Court of Appeal for Ontario said, I agree.[14]

Faced with a text that lends itself to two interpretations one must search for Parliament's intent at the time of its enactment. I take the liberty of repeating that this text is that of a murder section, essentially a crime of intent, of malice aforethought, the result of "wickedness" and "heinous conduct" (Kenny's *Outlines of Criminal Law*—supra). In deciding what would be the more appropriate of the two possible interpretations this I think should be borne in mind. To interpret the section of the Code as is suggested by the Crown could result in a conviction for murder of him whose sole malice would be that of the "unlawful object" coupled to that of getting drunk.

When s. 212(c) includes amongst the guilty even one who "desires to effect his object without causing death or bodily harm to any human being", reference is being made to one who consciously takes a chance with the life of others by choosing a dangerous means to an unlawful end; but Parliament could not, in my opinion, have intended to include one who could not even realize he was taking such a chance with the life of others because he could not, given his ignorance of the surrounding circumstances, even foresee the dangerousness of those means.

Appellant has argued that the question was decided by this Court in two cases: *R. v. Hughes*, supra, and *Graves v. The King*, supra. Hughes was convicted of the murder of someone he shot in the course of a hold up. The shooting took place either during or immediately after a struggle between Hughes and his victim, one Yoshuyuki Uno. The majority of the Court of Appeal for British Columbia had held that it was open to the jury to bring in a verdict of manslaughter if they found that the gun went off by accident. On an appeal by the Crown to this Court, Sir Lyman P. Duff C.J.C. speaking for the Court said (at p. 522):

I think I ought to say now, in the clearest terms, that, in my opinion, even if the jury thought the pistol went off by accident (or were not satisfied that it did not go off in that manner) they might still have properly found a verdict of murder under these sections if they were satisfied that the conduct of the accused was such that he ought to have known it to be likely to induce such a struggle as that which actually occurred, and that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle.

[In] his judgment, delivered on behalf of the majority of the Court, in *Graves v. The King*, [(1913), 9 D.L.R. 589 at p. 597, 21 Can. C.C. 44 at p. 55, 47 S.C.R. 568 at p. 583] Anglin J. (as he then was) says:—"For the purposes of this appeal I assume that under this provision it was not necessary, in

order to bring the charge of culpable homicide within it, that the jury should have found that the acts of the defendants were such as they knew or should have known were likely to cause the very acts to be done or the precise situation to arise which in fact resulted in the homicide, or to cause the death of the person who was killed, but that it would suffice if the jury had found that the accused did an act which they knew or should have known would be likely to induce the doing of anything or to bring about any situation likely to cause the death of some person—the person killed or any other person.”

I think this passage ought to be accepted as stating the law as it is, not merely as it is assumed to be. To repeat, I think the act of Yoshiyuki in attempting to disarm Hughes and the ensuing struggle were so clearly the natural and ordinary consequences of Hughes’ conduct that the jury might well, as reasonable men, have inferred that Hughes ought to have anticipated some such occurrence and the probable involuntary discharge of the pistol as a natural incident of the occurrence;...

I do not find in these comments any foreclosure to my interpretation of s. 212(c). Indeed, Hughes’ gun was loaded, and there is no suggestion that he claimed he did not know it to be so. His knowledge of the surrounding circumstances which made his conduct dangerous to life, that is the use of a loaded gun, was not in issue in that case.

Appellant is on much better ground when relying on this Court’s decision in *Graves*,

Fred, Alfred and Harry Graves trespassed on one Kenneth Lea’s property, caused a disturbance, insulted Lea and twice did not heed his warnings to leave the premises. When Lea then appeared with a gun they rushed him. Lea in using his gun as a club to ward off his attackers accidentally shot himself and died shortly after.

There was evidence of their maltreating him after the discharge of his gun; this raised the issue whether his death was the result of the gun wound, the subsequent maltreatment or the cumulation of both. For the purpose of deciding the case at bar, this aspect of the *Graves* case is of no interest.

The trial judge had told the jury that if the accused were actuated by spite or ill will towards the victim they should as a result of necessity be found guilty of murder. This was evidently much too encompassing an interpretation of the murder sections. As the trial judge had not instructed the jury as to the applicability to the facts of the case of s. 259(d) (now s. 212(c)), Anglin J. speaking for the majority of the Court, having said what Sir Lyman P. Duff C.J.C. quoted in the *Hughes* case (*supra*), then went on to say (at p. 586):

The vital distinction—that, while, to sustain a charge of manslaughter, it would suffice that the acts of the accused, whatever their character, should in fact have aroused in the mind of the deceased a fear of violence which induced him to do that which resulted in his death (section 252(2)), in order that that culpable homicide should amount to murder those acts of the accused must have been such that they knew or should have known that the death of some person would be likely to be caused by them (section 259(d))—was not brought to the attention of the jury.

Whether the acts of the accused were of that character it was for the jury to determine; and the inference which they should draw would depend to a great extent upon whether in their opinion the accused knew or ought to have known that the gun in the hands of the deceased was loaded and whether they knew or should have known that their acts would be likely to lead to the deceased making some use of it which would be likely to cause death. ... [The underlining is mine]

This last passage of his opinion could be argued as suggesting that this Court decided in *Graves* that knowledge of the surrounding circumstances is to be determined by an application of the objective standard, and that, applying this finding to the present case, there would as a result be no place for considering drunkenness in appreciating that knowledge.

If that be the decision, then, with the greatest of deference, and after having given the matter very careful consideration, I would feel compelled not to follow that determination in *Graves*. Whilst it is impossible to know with any degree of certainty what opinion one would have advanced as correct had one had to deal with these questions at the time (1913) they were put to this Court, it is likewise and to the same extent impossible to know what the judges of this Court in the *Graves* case would today decide, offered the same opportunity to interpret s. 212(c). Indeed, over 65 years have since elapsed, and the law, specially the criminal law, and even more so the attitudes of all of those administering it, have greatly evolved. As an illustration one need but consider the concept of “technical guilt”, which having over the years been gradually limited by a series of decisions was finally drastically so by this Court’s decision in *R. v. City of Sault Ste. Marie*[15]; or again consider the evolution of the defense of duress from what this Court decided in *Dunbar v. The King*[16] to its ruling in *Paquette v. The Queen*[17].

For these reasons, I feel that the interpretation of s. 212(c) as it relates to drunkenness adopted by the Court of Appeal for Ontario in this case and in that of *R. v. Tennant and Naccarato* is much more in harmony with the current attitudes of this Court in relation to criminal liability than that adopted by this Court in *Graves*. The order of the Court of Appeal directing a new trial should stand.

I would summarize my conclusions as to the interpretation and application of para. 212(c), as follows:

- (1) In a prosecution under that paragraph, the element of unlawfulness necessary to qualify a homicide as culpable under para. 205(5)(a) is that which is the result of the prosecution of the unlawful object by the act which is dangerous to life;
- (2) There is therefore no requirement that the dangerous act be itself unlawful (though, because it is dangerous to life, it usually is);
- (3) When, as in this case, the dangerous act is unlawful, the jury must be told, as the trial judge did, that there must be the prosecution of a further unlawful object clearly distinct from the immediate object of the dangerous (unlawful) act;

- (4) The words “unlawful object” when used in paragraph 212(c) mean the object of conduct which, if prosecuted fully, would amount to a serious crime, that is an indictable offence requiring mens rea;
- (5) Whilst the test under 212(c) is objective and the behaviour of the accused is to be measured by that of the reasonable man, such a test must nevertheless be applied having regard, not to the knowledge a reasonable man would have had of the surrounding circumstances that allegedly made the accused’s conduct dangerous to life, but to the knowledge the accused had of those circumstances;
- (6) As a result, drunkenness, though not relevant in the determination of what a reasonable man, with the knowledge the accused had of those circumstances, would have anticipated, is relevant in the determination of the knowledge which the accused had of those circumstances.

One last matter must be dealt with.

In its reasons for judgment, the Court of Appeal for Ontario said:

The Crown’s case was put principally on the basis of s. 212(c) of the Criminal Code, although having charged the jury with respect to 212(a)(i) and (ii), the learned trial judge told them in his final remarks that the case really didn’t belong under that section, but rather stood to be decided under s. 212(c). From what we have heard of the facts here, we agree with him.

About an hour and a half after the judge’s recharge, the jury had asked the judge the following question:

JURY FOREMAN: My Lord, would you please re-read the law, especially on Section (c)?... And enlighten the jury as to the definition of that.

The judge told them:

Now culpable homicide is causing the death of a human being by means of an unlawful act and this provides that, where the death of a human being has been caused by an unlawful act, which the crown says here was setting fire to the house, that if that were done for an unlawful object, which the crown says here is to seek revenge and to destroy property, then if the accused knows or ought to have known that it was likely to cause death and death is caused, then that is murder. [The underlining is mine]

I agree with the Court of Appeal for Ontario that the judge more or less told them that the case stood to be decided under s. 212(c). One cannot, however, assume that the jury had in their deliberations set aside as non-applicable on the facts adduced ss. 212(a)(i) and (ii). All one can conclude from their question is that they were unclear as to the law, mainly under s. 212(c).

After a careful examination of the Appeal Case book, I am unable to say that there are no facts upon which it would necessarily be unreasonable for a jury to find guilt of murder under ss. 212(a) (i) or (ii). Respondent set fire to the premises upon returning from driving the babysitter

home; Mrs. Gilchrist says that when she accused respondent when he returned to the party of having done something to her children, he remained silent. At the police station when he reported the fire, the police say that, when asked if there was anyone in the house, he told them: "Yes, Lorna, 6 years, and Allan 9 years." These facts are a matter for the jury to consider when assessing if he knew or not that the children were upstairs at the time of his alleged lighting of the fire and, if they find he did know, what intent he possessed at that time.

I would therefore not comment on the applicability of ss. 212(a)(i) or (ii) one way or the other. In any event the determination of what sections are to be left to the jury will be done by the trial judge as required by the facts adduced in evidence at that new trial.

I would dismiss this appeal.

BEETZ J.—In my opinion, the Court of Appeal for Ontario did not err in holding that the learned trial judge erred in not relating drunkenness to the question of whether the respondent had actual knowledge of the surrounding circumstances which made his conduct likely to cause death pursuant to s. 212(c) of the Criminal Code. In this respect, I agree with my brother Lamer's summarized conclusions (5) and (6) as well as with his approval of the interpretation of s. 212(c), as it relates to drunkenness, adopted by the Court of Appeal for Ontario in *R. v. Tennant and Naccarato*[18].

I also agree that the case was rightly left to the jury on the basis of paras. (a)(i) and (ii) and (c) of s. 212.

Since a new trial has been ordered, it may be appropriate to express a view on certain related questions. As to these, I concur in my brother Lamer's summarized conclusions (1), (2), (3) and (4).

Appeal dismissed. Solicitor for the appellant: Attorney General for Ontario, Toronto.

Solicitors for the respondent: Greenspan & Moldaver, Toronto.

[1] (1977), 37 C.C.C. (2d) 199.

[2] (1913), 47 S.C.R. 568.

[3] [1942] S.C.R. 517.

[4] This is evidently a typing error and should read Mrs. Gilchrist.

[5] (1975), 23 C.C.C. (2d) 80.

[6] (1976), 31 C.C.C. (2d) 23.

[7] [1971] N.Z.L.R. 97.

[8] (1942), 29 Cr. App. R. 18.

[9] [1976] 2 All E.R. 365.

[10] (1887), 16 Cox C.C. 311.

[11] [1980] 2 S.C.R. 493.

[12] (1851), 5 Cox C.C. 298.

[13] The trial judge's charge as it related to the nature of the evidence of drunkenness a jury may and should consider when determining intent is not in issue in this case.

[14] In this case as in *R. v. Tennant and Naccarato* (supra) the judge's instructions to the jury as regards the nature of the evidence of drunkenness a jury may and should consider when determining intent is not in issue. However, in view of the wording used by the Court of Appeal for Ontario in *Tennant and Naccarato* (i.e. "if the accused had the capacity to form the intent necessary for the unlawful object and had the knowledge of the relevant facts...") I should like to mention that my agreement with the reasoning of that Court as to the relevancy of drunkenness need not and for that reason does not, for the purpose of disposing of this appeal, include an endorsement of the proposition that it is sufficient that the accused have "the capacity to form the intent...".

[15] [1978] 2 S.C.R. 1299.

[16] [1936] 4 D.L.R. 737.

[17] [1977] 2 S.C.R. 189.

[18] (1975), 23 C.C.C. (2d) 80.

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