[HIGH COURT OF AUSTRALIA.]

BRENNAN . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA.

H. C. OF A. 1936.

SYDNEY, *May* 4.

MELBOURNE, *June* 9.

Starke, Dixon and Evatt JJ.

Criminal Law—Principal in second degree—Common design—Evidence—Commission of unlawful purpose—Probable consequences—Liability of aider and abettor—Direction to jury—Criminal Code (W.A.) (No. 28 of 1913), secs. 7, 8, 277-280.

The *Criminal Code* (W.A.) provides, by sec. 7, that "when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—(*a*) every person who actually does the act . . . which constitutes the offence; (*b*) every person who does . . . any act for the purpose of enabling or aiding another person to commit the offence; (*c*) every person who aids another person in committing the offence." Sec. 8 provides that "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The applicant and two other persons were charged on an indictment for wilful murder. The other two persons had broken into a jeweller's shop and stolen jewellery therefrom, and, in the course of committing that crime, had brought about the caretaker's death. The applicant remained outside the shop on watch. The trial Judge directed the jury that if they were satisfied that the applicant was a party to the robbery it necessarily followed that he was guilty of the offence, either murder or manslaughter, found against the other two persons. The jury returned a verdict of manslaughter against the three accused.

H. C. OF A. 1936. BRENNAN v. THE KING.

Held that it did not follow as a matter of law that, if the applicant aided and abetted the shopbreaking by keeping watch outside, he was criminally responsible for the homicide committed by his confederates within. Whether it followed from the facts was a question for the jury, depending on the conclusion they drew as to the nature of the plan to which he lent his aid and as to his knowledge of his confederates' intention. The jury had been misdirected, and the conviction of the applicant should be quashed. But on the evidence the conclusion was open that the applicant aided and abetted the other two persons in a criminal enterprise which he knew included the use of some force upon the person of the caretaker to prevent his giving the alarm or obstructing the commission of the theft, and therefore there should be a new trial of the applicant for manslaughter.

Decision of the Court of Criminal Appeal of Western Australia reversed.

APPLICATION for special leave to appeal, and APPEAL, from the Court of Criminal Appeal of Western Australia.

This was an application by Cyril Thomas Brennan for special leave to appeal against a judgment of the Court of Criminal Appeal of Western Australia dismissing his appeal against a conviction for manslaughter and a sentence of ten years' imprisonment.

Brennan was tried with three other persons on an indictment for wilful murder, upon which, however, the Crown pressed for a conviction of murder only. He and two others were convicted of manslaughter and the fourth was acquitted. It was established that the two other prisoners who were convicted had broken into a jeweller's shop in Perth, and, in the course of committing that crime, had brought about the death of the caretaker. The case made against Brennan was that he aided and abetted by remaining outside the shop on watch.

In his application to the High Court, Brennan's principal ground was that the trial Judge misdirected the jury.

Further material facts, relevant portions of the summing up and the relevant sections of the *Criminal Code* (W.A.) are sufficiently set forth in the judgments hereunder.

Barwick, for the applicant. The verdict is an inconsistent one and should not be allowed to stand. A verdict of manslaughter against the other two accused should, following the direction to the jury and having regard to the provisions of sec. 8 of the *Criminal*

Code, have resulted in a verdict of acquittal for the applicant. That section is much more favourable to an accused than is the common law. Under the common law where several persons engage in the pursuit of a common unlawful object and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing that object, all are guilty (*Russell* on *Crimes and Misdemeanours*, 7th ed. (1909), vol. 1, p. 114). The real issue raised by sec. 8 was not put to the jury. The jury negatived the fact that the caretaker's death was the probable result of a common design. So far as sec. 279 (2) of the *Criminal Code* is concerned, the jury, by bringing in a finding of manslaughter, must have found the element of accident, that is, that the death did not result from any act on the part of the other two accused likely to endanger human life. Sec. 8 is the whole basis of the applicant's liability. The summing up does not make clear the two types of liability. Although it was suggested that the applicant's part was to keep watch, there was not any evidence that he kept watch ; the only evidence is to the contrary. The facts alleged against the applicant are capable of an innocent interpretation. This was not pointed out to the jury. Those facts are as consistent with his innocence as with his guilt. It is a misdirection to fail to point out to the jury that an alternative innocent interpretation may be put on the proved facts (*R.* v. *Vassileva* (1)). The summing up was inadequate in that the jury was not warned to keep distinct the accused, and not allow evidence admissible against one accused, sway them in respect to another accused. Although in his summing up the trial Judge dealt with the question of reasonable doubt, he did not warn the jury about circumstantial evidence (*Peacock* v. *The King* (2)). There is no evidence that the applicant knew there was a caretaker, or that the caretaker would need to be overpowered. The offence to which the applicant was sought to be made a principal was an offence of manslaughter, not an offence of robbery. Apart from secs. 7 and 8, in order to make him a principal at law, either he must have had in mind the commission of that offence which was committed, or he must have agreed with the others to aid such an unlawful object as had, as its result, the

(1) (1911) 6 Cr. App. R. 228. (2) (1911) 13 C.L.R. 619.

H. C. OF A. 1936.

BRENNAN v. THE KING.

particular offence of manslaughter, that is, to make him a principal in the first degree. To make him a principal in the second degree he would have had to be actually present at the commission of the offence of manslaughter, either in the room or where he could render assistance. The facts necessary to establish these positions have not been proved in evidence. The jury should have been directed on the nature of the common enterprise, and to what extent, if at all, the enterprise was common (*R.* v. *Pearce* (1)). There is a total absence of evidence that there was an agreement to commit robbery with violence and overcome resistance. The applicant was prejudiced by the fact that he was not tried separately from the other accused.

Gibson, for the respondent. No application was made by or on behalf of the applicant, either before or at the trial, that he should be tried separately from the other accused. The trial Judge was right in confining himself to sec. 7 of the *Criminal Code*, to the exclusion of sec. 8, because the offence was really common assault which did, as it happens, result in death, and, because it resulted in death, it was called manslaughter. The jury held that it was not of such a nature as to indicate murder, and they returned a verdict of manslaughter, which meant common assault which resulted in death. The jury found that the applicant was a party to that scheme; therefore he was a party to the assault within the meaning of sec. 7. The scheme was to commit a burglary, and, for that purpose, to overpower the caretaker with such force as might be necessary, using therefor the equipment taken for the purpose. The jury's finding is fully supported by the evidence. Even if the matter should have been put to the jury under sec. 8, there has been no miscarriage of justice. It is clear on the evidence that the applicant and the other two prisoners formed a common intention to commit a burglary. The caretaker's death was the probable consequence of that common intention, because any caretaker might be expected to resist, a resistance which, in order to give effect to the common intention, must be overcome. The evidence clearly establishes an intention to deal with the caretaker, that the applicant had full knowledge of what was proposed to be done,

(1) (1929) 21 Cr. App. R. 79.

and that he took part in the common enterprise. Even if he withdrew at the last moment and allowed his confederates to believe that he was keeping watch, he would be just as liable as if he actually kept watch.

Barwick, in reply. The trial Judge did not put to the jury a scheme of breaking and entering, and the use of violence. There was no reference to an agreement to use violence if necessary. It is not established by the evidence that the applicant had any knowledge that violence would, or might, be used.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

STARKE J. Motion on the part of Cyril Thomas Brennan for special leave to appeal against a judgment of the Court of Criminal Appeal in Western Australia, dismissing his appeal against a conviction for manslaughter and a sentence of ten years' imprisonment.

The prisoner was charged, with three other men, with the wilful murder of one Whitfield. The Crown, however, did not press for a finding of wilful murder, but for one of murder only. The jury found a verdict of manslaughter against the prisoner and two of the other persons charged. Under the *Criminal Code* of Western Australia (1913, No. 28), any person who unlawfully kills another is guilty of a crime which is called wilful murder, murder, or manslaughter, according to the circumstances (sec. 277). A person who unlawfully kills another intending to cause his death, or that of some other person, is guilty of wilful murder (sec. 278). A person who unlawfully kills another under certain circumstances, one of which is if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger life, is guilty of murder (sec. 279). A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter (sec. 280). The case for the prosecution was that the persons charged arranged to break and enter a jeweller's shop in Perth, steal jewellery therein, overpower the caretaker Whitfield if he resisted, gag him and tie

H. C. OF A. 1936.

BRENNAN v. THE KING.

Starke J.

him up. Evidence was given that two of the persons charged, Flynn and Walsh, broke and entered the shop, seized the caretaker Whitfield, who struggled, and was killed during the struggle, and stole a considerable quantity of jewellery. One of the men, Flynn, gave evidence that he discussed raiding the shop with Walsh, and that it was arranged to overpower the caretaker, gag him and tie him up, and he also deposed that some rope and a black cloth were taken to the shop for the purpose. But he denied that Brennan was any party to the arrangement. The conclusion was, however, open, on the evidence given in the case, that the prisoner Brennan was a party to the scheme to break and enter the shop and overpower the caretaker if resistance were offered, and to steal. (See *R.* v. *Dunn* (1); *R.* v. *Kalinowski* (2).) His part was to keep watch outside the shop in order to prevent surprise, or to be ready to give assistance, whilst the other men were in the shop stealing the jewellery. The learned Chief Justice of the Supreme Court of Western Australia, who presided at the trial, thus directed the jury :—" First you have to consider the case of Flynn and Walsh, and the only question for your consideration in that matter is whether they were guilty of murder or manslaughter. If you come to the conclusion that the death of Whitfield was caused by the act or acts of Flynn or Walsh, or either of them, that were likely to endanger human life, then they are guilty of murder. If, on the other hand, you come to the conclusion that the death was the result of a fall without any such act on the part of Flynn or Walsh, then they are guilty of manslaughter only. Having decided that, the next question for you to consider is whether you are satisfied that Brennan was a party to the robbery from Caris Brothers' establishment. If the Crown has failed to satisfy you on that point, then Brennan must be acquitted. If, however, you come to the conclusion that Brennan was a party to the breaking and entering, then your verdict will be that Brennan is guilty of the offence which you have found against Walsh and Flynn. If you bring a verdict against Walsh and Flynn of murder, then your verdict against Brennan must be murder. On the other hand, if you say that Walsh and Flynn are guilty of manslaughter

(1) (1930) 30 S.R. (N.S.W.) 210; 47 W.N. (N.S.W.) 79.

(2) (1930) 31 S.R. (N.S.W.) 377; 48 W.N. (N.S.W.) 97.

then your verdict against Brennan will also be manslaughter." The jury found Flynn, Walsh and Brennan guilty of manslaughter, and the fourth man "not guilty." Brennan appealed against his conviction to the Court of Criminal Appeal. It was there contended and is now contended in this Court, that the charge was a misdirection in law so far as the prisoner Brennan is concerned. The learned Judges of the Court of Criminal Appeal thus deal with the matter: —"The third point on this appeal is that the killing of the deceased man Whitfield was not the probable consequence of the conspiracy and consequent robbery with which" Brennan "was alleged to be mixed up. It must be abundantly clear that from the evidence advanced on behalf of the prosecution, the jury must have come to the conclusion that Brennan, Walsh and Flynn conspired or agreed to commit a robbery on the premises of Caris Brothers on the 6th February, and moreover, in the exercise or pursuit of that purpose they were prepared and did intend to use such violence to the caretaker of the premises as might be necessary to effect their purpose. Any other conclusion but that they did intend to use violence would be almost impossible, as they knew that Whitfield was employed there as caretaker, and clearly he had to be silenced in some manner before they could carry out the crime they were entering on. It may be and probably is the case that when they planned the robbery they did not intend that robbery to result in his death. But there is no doubt that violence was intended to be used to carry their purpose into effect. In those circumstances Brennan was equally a party to the committing of a crime of violence as to robbery; and such violence resulted in the death of Whitfield."

Aiders and abettors are only liable, according to English law, for such crimes committed by principals in the first degree as are done in execution of their common purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories, unless they actually instigate or assist in its commission. The reasons of the learned Judges in the Court of Criminal Appeal recognize this principle, but they do not, I think, meet the objection taken to the charge of the Chief Justice, which is that it did not so explain the law to the jury, but was to the effect that if Brennan were a party

H. C. OF A. 1936.

BRENNAN v. THE KING.

Starke J.

to the shop-breaking and theft of jewellery, then he was guilty of whatever offence Flynn and Walsh committed, whether he was a party to the resolution to overpower the caretaker or not. The Chief Justice founded his charge upon the seventh section of the *Criminal Code* :—" When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—(*a*) Every person who actually does the act . . . which constitutes the offence ; (*b*) Every person who does . . . any act for the purpose of enabling or aiding another person to commit the offence ; (*c*) Every person who aids another person in committing the offence." A person commits manslaughter who brings about the death of another by some unlawful act without any intention of killing him or even of hurting him. The death of the caretaker Whitfield was brought about by the unlawful acts of Walsh and Flynn in assaulting and overpowering him in order to carry out the common purpose of stealing from the shop. But so far as the prisoner Brennan was concerned the fatal act must appear to have been committed strictly in prosecution of the purpose for which the party was assaulted. If the persons charged in the present case resolved to overpower the caretaker, should his presence hinder them in stealing from the shop, they all contemplated and intended an unlawful act, namely, an assault upon the caretaker. And if the caretaker were killed in effecting this purpose, then all would be equally guilty, at least of the crime of manslaughter, and probably of murder if the caretaker were killed by violence which was likely to cause death or grievous bodily harm. The scheme involved the commission if necessary of an unlawful act upon the caretaker, and the parties must abide it fully and to the end.

But the provisions of sec. 8 of the *Criminal Code* must be referred to : " When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence." A probable consequence is, I apprehend,

that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act; though it may be that the particular consequence is not intended or foreseen by the actor. This is not a definition, but "only a guide to the exercise of common sense." Now if a person commits manslaughter who brings about the death of another by some unlawful act, then it must be taken, I think, that death is treated in law as a not improbable consequence of such an act, either because of the definition of the crime or because experience has established that such a result ought to be foreseen and expected. Under a proper charge, therefore, a verdict of manslaughter against the prisoner Brennan could upon the evidence be supported. But the charge of the learned Chief Justice did not advert to the principle upon which the responsibility of the prisoner Brennan depended.

Has there been, however, such a grave and substantial miscarriage of justice that this Court ought to intervene and grant a new trial? The defect in the charge is a technical one, and I rather share the opinion of the Court of Criminal Appeal, who know the local surroundings, that if the prisoner Brennan were implicated in the shopbreaking, then he knew and agreed how the caretaker should be dealt with if he hindered the plan. But that is in truth a matter of fact for the jury, and one cannot be sure, on the charge, that their finding involves the necessary conclusion. It is a matter of the gravest consequence to the prisoner, and the charge "tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future" (*Ibrahim* v. *The King* (1)). In all the circumstances I think special leave should be granted, the conviction and sentence set aside, and the prisoner Brennan retried on the charge of manslaughter.

DIXON AND EVATT JJ. This is an application for special leave to appeal from an order of the Supreme Court of Western Australia, sitting as a court of criminal appeal, by which a conviction of manslaughter was confirmed.

The prisoner who seeks special leave was tried with three other persons on an indictment for wilful murder upon which, however,

(1) (1914) A.C. 599, at p. 615.

H. C. OF A. 1936.

BRENNAN v. THE KING.

Dixon J. Evatt J.

the Crown pressed for a conviction of murder only. He and two others were convicted of manslaughter and the fourth was acquitted.

It was established that the two other prisoners who were convicted had broken into a jeweller's shop, and, in the course of committing that crime, had brought about the death of the caretaker. The case made against the present applicant was that he aided and abetted by remaining outside the shop on watch.

Under sec. 277 of the *Criminal Code* 1913 (W.A.) any person who unlawfully kills another is guilty of a crime which is called wilful murder, murder, or manslaughter, according to the circumstances of the case. Sec. 278 provides that, except as thereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder. Sec. 279 defines simple murder. Among the acts which the section specifies as constituting that crime, is that of causing death by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life. Then sec. 280 defines manslaughter as unlawfully killing another under such circumstances as not to constitute wilful murder or murder. It follows that, in convicting the prisoners of manslaughter only and thus impliedly acquitting them of murder, the jury must be taken to have held that, although two of them brought about the death of the caretaker in the prosecution of the unlawful purpose of shopbreaking, the act by which they did so was not proved beyond reasonable doubt to have been of such a nature as to be likely to endanger human life. The evidence given in support of the Crown case might well have been thought to establish that a great degree of violence had been used by the two men upon their victim, but one of them gave evidence on oath to the contrary.

Upon this application we are concerned only with the responsibility of the prisoner who is said to have been posted outside on watch. In law his responsibility depended upon the application of two provisions of the Code to the circumstances, secs. 7 and 8. Sec. 7 contains the following statement :—" When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may

be charged with actually committing it, that is to say :—(*a*) Every person who actually does the act or makes the omission which constitutes the offence ; (*b*) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence ; (*c*) Every person who aids another person in committing the offence ; (*d*) Any person who counsels or procures any other person to commit the offence."

Under this provision the applicant was liable to conviction for manslaughter if it was established that the plan on which his confederates acted included some physical interference with the caretaker amounting to an assault, that in fact death resulted from such an assault, and that he remained on watch for the purpose of aiding them in carrying out that plan and so commit the assault, or that he counselled them to do so.

Sec. 8 provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. The section appears to be based in some respects upon the often cited statement of Sir *Michael Foster* in reference to accessories before the fact, viz. : " So where the principal goeth beyond the terms of the solicitation, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be accessory to that felony " (*Foster, Crown Law* (1809), p. 370 ; *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 36). But it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered (Cf., per Lord *Herschell*, *Bank of England* v. *Vagliano Brothers* (1)).

The expression " offence . . . of such a nature that its commission was a probable consequence of the prosecution of such purpose "

(1) (1891) A.C. 107, at pp. 144, 145.

H. C. OF A. 1936.

BRENNAN v. THE KING.

Dixon J. Evatt J.

fixes on the purpose which there is a common intention to prosecute. It then takes the nature of the offence actually committed. It makes guilty complicity in that offence depend upon the connection between the prosecution of the purpose and the nature of the offence. The required connection is that the nature of the offence must be such that its commission is a probable consequence of the prosecution of the purpose.

Manslaughter is a form of homicide. It cannot be committed unless death is caused and by an unlawful act. Thus, to establish under sec. 8 that the applicant was guilty of manslaughter, it must appear that among the probable consequences of prosecuting the unlawful purpose upon which the prisoners had resolved was the death of the caretaker, or of a person chancing to be in their way. It is evident that, in applying this requirement to the facts, a difficulty arises from the refusal of the jury to convict the prisoners of murder. For the verdict must imply that the jury were not satisfied that the violence used, although in the event actually proving fatal, was of such a nature as to be antecedently likely to cause death. It therefore raises the question whether the death which ensued from the force employed can without inconsistency be considered as a probable consequence of carrying out the unlawful purpose in which the applicant is taken to have participated. Our answer to this question is that, notwithstanding the implications of the verdict, the death can be considered the probable consequence of the prosecution of the purpose if the purpose in which the applicant concurred made it likely that his confederates would, if necessary, use violence and such a kind or degree of violence as would probably cause death. The fact that, according to the verdict, they must be taken to have used an amount of force less than might have been contemplated by them, would not make the death, which ordinarily would not, but actually did, result from such a use of force, too remote a consequence for the prosecution of the purpose. But, although this may be the legal answer to the question raised upon sec. 8 by the jury's verdict, yet the answer must mean that upon the facts of such a case as the present, sec. 8 adds little or nothing to sec. 7. For, under sec. 7, the confederate posted on watch would be guilty of manslaughter if he knew that the plan

which he was aiding and abetting involved any assault upon the caretaker, or other person within the building. While, under sec. 8, he would be guilty of manslaughter only if the plan was of such a nature that the use of enough violence to cause death appeared a probable consequence of carrying it out. The practical result is that the applicant would not be guilty of manslaughter unless he knew that his confederates whom he was aiding and abetting intended to commit at least a common assault upon the caretaker or, supposing that they had not that actual intention, then unless he foresaw that to carry out the plan of shopbreaking they would probably so injure him that death might be likely to result. Upon the jury's being satisfied beyond reasonable doubt that the applicant did keep watch as a confederate of the two prisoners who broke and entered the shop, the question would arise for the consideration of the jury whether these conditions of responsibility, or either of them, were proved. At the trial, however, no such question was submitted to the jury. In the Judge's charge the case was put to the jury as if it necessarily followed from the applicant's joining in the shopbreaking that he was guilty of the homicide, the murder or the manslaughter as the jury might hold it to have been. This was repeatedly stated in the course of the summing up. But it is enough to quote the final direction which the jury received at the end of the charge after the question had been dealt with whether the crime of the other two prisoners, whose names were Walsh and Flynn, was murder or manslaughter. The summing up goes on :— "Having decided that, the next question for you to consider is whether you are satisfied that Brennan" (the applicant) "was a party to the robbery from Caris Brothers' establishment" (the jeweller's shop). "If the Crown has failed to satisfy you on that point, then Brennan must be acquitted. If, however, you come to the conclusion that Brennan was a party to the breaking and entering, then your verdict will be that Brennan is guilty of the offence which you have found against Walsh and Flynn. If you bring a verdict against Walsh and Flynn of murder, then your verdict against Brennan must be murder. On the other hand, if you say that Walsh and Flynn are guilty of manslaughter, then your verdict against Brennan will also be manslaughter."

H. C. OF A. 1936.

BRENNAN v. THE KING.

Dixon J. Evatt J.

Such a direction cannot, in our opinion, be supported. It withdraws from the consideration of the jury a question of fact upon which the guilt of the applicant depended. It does not follow as a matter of law that, if the applicant aided and abetted the shopbreaking by keeping watch outside, he was criminally responsible for the homicide committed by his confederates within. Whether it followed from the facts was a question for the jury depending on the conclusion they drew as to the nature of the plan to which he lent his aid and as to his knowledge of his confederates' intentions.

Dwyer J., in the judgment which he delivered on behalf of the Supreme Court, adopted the view that the inference was inevitable that a common intention existed to use such violence upon the caretaker as might be necessary to carry out the crime of shopbreaking. But that is a question upon which the applicant was entitled to the opinion of the jury. It is the constitutional tribunal which alone can find an issue of fact against a prisoner and this particular issue was never submitted to the jury for its decision. We are, therefore, of opinion that the Supreme Court, sitting as a court of criminal appeal, ought not to have allowed the applicant's conviction to stand. The error is of a sufficiently serious character to call upon this Court to intervene by granting special leave to appeal.

But the conclusion that the conviction should be quashed does not dispose of the matter. The question arises whether or not a new trial should be ordered. On behalf of the applicant, it is contended that the evidence admissible against him does not warrant a further trial and, indeed, was insufficient to sustain the verdict that he was guilty of manslaughter. This contention does not, in our opinion, survive an examination of the notes of evidence. The Crown case contained evidence of circumstances implicating the applicant sufficiently to carry the case against him to the jury. A few further facts which might be added to the circumstances implicating him appeared in the course of the evidence of the prisoner Flynn and of the applicant himself. Although the exculpatory matters contained in the evidence were rejected as untrue, these further inculpatory facts might be relied upon as strengthening a little the circumstantial evidence of guilt. But, on the question

whether there should be a new trial, we ought not, perhaps, to go beyond the evidence called and likely to be called by the prosecution.

From that evidence it appears that the crime was committed at about twenty minutes past ten on the night of 5th February 1935. The caretaker usually went on duty at six o'clock and during the course of the evening cleaned the shop, using a vacuum cleaner. At about eleven o'clock, or perhaps half an hour earlier, he would remove rings and jewellery from the shop window where they were displayed. He could be seen doing so from the street. At the back of the shop, looking out upon a lane, he had a room with a bed in it. Flynn and Walsh entered the shop through the window of this room and it was there the caretaker was killed. At twenty-two minutes past ten, Walsh was seen by a passer-by removing the jewellery from the shop window.

Evidence was given of the movements of the prisoners on the evening of the crime before and after its commission. They all three were often in each other's company and frequented a billiard saloon situated not far from the jeweller's shop. They were at the billiard room on the evening of the crime. Shortly after nine o'clock they were all three seen at the mouth of the lane leading to the rear of the shop and to the caretaker's window. Not long afterwards they were seated together on the running board of a motor car outside the billiard saloon. They came into the saloon and, after a time, Flynn and the applicant were seen to leave it together. Walsh, of course, must have left it at latest a few minutes before twenty minutes past ten. At a time fixed somewhat indefinitely but which might be considered to be about twenty-five minutes to eleven, Flynn and the applicant were seen together in the same street. At five minutes to eleven, the police received a telephone call from a man giving a name that cannot be traced saying that a crash had been heard at the jeweller's shop and something was happening there. At eleven o'clock, Walsh and the applicant were together at a corner not far from where one of them might have telephoned. They then went to the house where Walsh lived. The applicant was seen standing at the door of Walsh's room while Walsh was at the table. They went out together but parted at

H. C. OF A. 1936.

BRENNAN v. THE KING.

Dixon J. Evatt J.

the gate. On the following day the applicant was asked by a police officer to give an account of his movements during the evening. He said he had left the billiard saloon at ten o'clock and walked to a point where he caught a tram to his home. He said he knew nothing of the crime.

On 18th May 1935, the booty, or some of it, was sent to Melbourne for disposal by Walsh who had already gone there. It was sent by post with the assistance of the fourth prisoner, who was acquitted of the manslaughter, Silverman by name. There was evidence that Flynn and the applicant were together on that day. On 11th April, the applicant and Silverman had been seen together at about half-past ten at night talking with a third man in darkness outside the latter's dwelling.

Walsh was arrested in Melbourne on 22nd June. On 24th June, the applicant was in custody on a charge of vagrancy. He said to detectives then that he knew nothing about the crime at the jeweller's shop. But, on 4th July, he took another stand in reference to his complicity. A detective sergeant, named Nisbet, gave the following evidence :—" I saw him in Inspector Purdue's office " (at the detective office). " He " (the inspector) " said to Brennan—' You wanted to see me, Brennan, what about ? ' He said ' I wanted to see you. I want to clear myself.' Purdue said —' We are in possession of certain facts about your part in the affair. You had your opportunity some time ago, but did not avail yourself of it. For instance, we knew that you did not kill the old man, but we knew that you knew the diamonds were going to be stolen. We also knew that that night Walsh, Flynn and yourself were down at Musgrove's Lane ' " (the lane leading to the back of the shop), " ' that you went up to Hay Street in front of Caris Brothers, and kept a look out whilst Flynn and Walsh were inside. We also know that afterwards you went to Walsh's place and had in your possession the diamonds from the place where the unfortunate old man was murdered. So you see, Brennan, we have some knowledge as to your part in the affair, and if you have come to make a statement you can do so, but please yourself. You can see either Sergeant Cowie or Sergeant Nisbet here.' Brennan said—' I don't

deny I know something about the affair, but I did not actually do the job.' I took him to another room. I said—'What is this statement you wish to make, Brennan?' He said—'If I make a statement, will it clear me?' I said—'I am afraid it is too late to clear yourself; you can see Sergeant Cowie.'"

The applicant accordingly saw Sergeant Cowie, who gave the following account of the interview:—"I said—'I believe you want to see me, what do you want to say?' He said—'I want to clear myself.' I said—'Clear yourself of what?' He said—'I don't know anything about the Caris Brothers murder.' I said—'That being so, you can have nothing to clear yourself of!' He said—'If I can clear myself, will it be all right?' I said—'We are in possession of evidence which shows that you were implicated in the Caris Brothers' job to such an extent that I believe you may be charged with the full crime and I have here a warrant for your arrest on a charge of wilful murder.' I then read the warrant and said—'You are now under arrest, and anything you may say will be written down and used as evidence.' He said—'That is a terrible charge, I want to clear myself.' I said—'I do not say you were inside, but you were keeping nit in Hay Street whilst Walsh and Flynn were doing the job and you afterwards assisted to dispose of the stolen property.' He said—'I would not hurt a fly.' I said—'All right, do you want to make a statement?' He said—'If I make a statement, will that clear me?' I said—'You are now charged. I can't make you any promise, but any statement you make will be written down and will be produced in Court at your trial.' He said—'I do not wish to say anything further.'"

On the whole of the evidence which we have summarized we think there was a case fit to be submitted to a jury disclosing circumstances from which an inference might be drawn, if the jury thought proper, that the applicant aided and abetted the two prisoners who entered the shop in a criminal enterprise which he knew included the use of some force upon the person of the caretaker to prevent his giving the alarm, or obstructing the commission of the theft.

We therefore think there should be a new trial of the applicant for manslaughter.

H. C. OF A. 1936.

BRENNAN v. THE KING.

The new trial may take place on a fresh indictment if that is thought more convenient by the prosecution.

Allow prisoner Brennan special leave to appeal. Allow his appeal. Quash his conviction for manslaughter. Direct a new trial on that charge before the Supreme Court of Western Australia. Direct that prisoner Brennan remain in safe custody pending his retrial unless bailed by the Supreme Court of Western Australia. Remit matter to the Supreme Court of Western Australia.

Solicitor for the applicant, *R. D. Lane*, Perth, by *H. J. Bartier*.

Solicitor for the respondent, *J. L. Walker*, Crown Solicitor for Western Australia, by *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.