

The deceased on October 14th, 1907, offered the furs for sale at a price greatly under their value to McFarlane, another merchant tailor, who suspected that they were stolen, and arranged with the deceased to come to the shop the next morning to get his money, and then informed the police. The accused had been informed of the theft of the furs and of the circumstances under which they had been stolen, and the next morning went to McFarlane's shop and waited there expecting that the deceased would come for his money. On the arrival of the deceased at McFarlane's shop on the morning of the 15th of October, he caught sight of the accused and immediately bolted out of the door and ran away. The accused followed him in an endeavour to effect his arrest and fired several shots from his revolver in an effort to frighten the deceased into stopping, but without avail, and the deceased increased his lead until the accused came to the conclusion that the only way of preventing the escape of the deceased at the time was to wound him in the leg. He accordingly aimed at the man's leg for that purpose, but the bullet struck the deceased in the head killing him instantly.

In charging the jury upon the evidence the learned trial judge left two questions to them, first, under section 30 of the Criminal Code, as to whether the accused, on reasonable and probable grounds, believed that an offence for which the offender may be arrested without warrant had been committed and that the fugitive had committed that offence. In discussing this point the jury were told that, if a person opens a door leading to a shop or store by lifting the latch or turning a knob and enters the store, although during business hours, with the intention of stealing something in the store, he may be convicted of shop breaking, so that if the accused believed, on reasonable and probable grounds, that the fugitive had in that manner entered the shop from which the furs had been stolen, he would be justified in believing that the fugitive had committed the offence of shop breaking and theft, for which offence he might have been arrested without a warrant, although not for simple theft out of a store. The jury were also told that if they found that the accused, on reasonable and probable grounds, believed that an offence for which the fugitive might have been arrested without warrant had been committed, and that the fugitive had committed that offence, they would further have to consider the question, arising under section 41 of the Criminal Code, whether the force used by the accused to prevent the escape of the fugitive by such flight was necessary for that purpose, and whether