

And the question submitted is, was this part of the charge a misdirection?

Upon the evidence of Pollikofskey, taken in connection with the evidence of Manzetto to which reference has been made, it was quite open to the jury, if they credited it, to conclude that the prisoner was not the person by whom the fatal blow was struck. Manzetto had sworn that there were present when the stabbing took place, himself, the prisoner, and another Italian, and that the latter inflicted the wound. And according to Pollikofskey there was in the vicinity of some of the parties present an Italian with a knife displayed, who was neither Manzetto nor the prisoner. It is true that he says the Italian he saw with the knife was 20 or 25 feet away from where the others were standing, and that he did not see Hoban, but there is no question as to Hoban being there at the time, and there was ample time for the Italian to have come over to where the others were and struck the blow and got away before Pollikofskey emerged from the tavern. It must be borne in mind that, when last seen by Pollikofskey, the Italian was advancing towards the group of which Hoban was no doubt one, with the knife in his hand, and using words of hostility towards some one.

There was enough in his attitude, actions, and language, when Pollikofskey last saw him very shortly before he saw the wounded man, to render it of great importance to the prisoner that the testimony with regard to it should not have been withdrawn from their consideration.

It cannot be correctly said that, because Pollikofskey knew nothing about Hoban, and that it appeared to him that the knife was drawn against Brown, it follows that, so far as the prisoner is concerned, the evidence should be eliminated.

He was entitled to have the jury consider whether, in view of the evidence that the prisoner was not one of the persons with whom knives were seen, it might not have been the man whom Pollikofskey saw advancing that Manzetto saw use his knife on Hoban, and to have the benefit of their deliberations on that point, and of any doubt it might have created as to the prisoner's guilt.

The second question should, therefore, be answered in the affirmative.

The third question submitted raises for consideration a point which, in view of the answer to the second question,