LEON AZOULAY .....APPELLANT; 1952

AND *May 21, 22
*Nov. 4

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Criminal law—Abortion—Jury trial—No review of evidence by trial judge.

The appellant, charged with having unlawfully used instruments or other means on the deceased woman with intent to procure her miscarriage, was found guilty of manslaughter. His conviction was affirmed by a majority in the Court of Appeal for Quebec, the dissenting judgment holding that the evidence did not warrant a conviction and that the trial judge failed to instruct properly the jury, by omitting to review the evidence.

Held (Rand and Fauteux JJ. dissenting), that the appeal should be allowed and a new trial directed.

Per Rinfret C.J., Taschereau and Estey JJ.: As a general rule, in the course of his charge a trial judge should review the substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. Where, as here, the evidence was technical and somewhat involved, it was particularly important to strip it of the non-essentials, and to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and by the defence. Unfortunately, this was not done here, and the explanations and grounds of defence were not adequately put before the jury. There was evidence upon which a jury, properly instructed, could have found the accused guilty, but since it cannot be said that the verdict would necessarily have been the same if the proper instructions had been given, this was, therefore, not a case for the application of s. 1014 (2) of the *Criminal Code*.

Per Rand J. (dissenting): In a case such as here, where the defence was plain and uncomplicated, the absence of a repetition of the few salient facts had not and could not have had the slightest influence on the minds of the jury in reaching their verdict; there was, therefore, no ground for appeal and a fortiori no substantial wrong had been done.

Per Fauteux J. (dissenting): The practical significance which could be attached to the opinions of the experts called for the defence was more dependent upon than promoting the credibility of the appellant's testimony. The jury disbelieved him. The case for the appellant would have been weakened rather than strengthened if the trial judge had dealt exhaustively with the expert opinions.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Galipeault C.J.A. dissenting, the jury's verdict of manslaughter.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.

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J. J. Robinette Q.C. and P. B. C. Pepper for the appellant. The issue narrowed down to the proper inference to be drawn from the medical testimony. There is no doubt that the dissent was on a question of law, but should there be, it should be resolved in favour of the accused.

The trial judge having failed to review the evidence for the jury in such a way that they could clearly appreciate the issues involved and the evidence bearing upon each issue, this was a serious non direction amounting to misdirection. *Rex* v. *Boak* (1), *Rex* v. *Hughes* (2), *Rex* v. *Hill* (3), *Rex* v. *Stephen* (4) and *Rex* v. *Arnold* (5).

The trial judge's charge did not, as it should have, adequately put before the jury the accused's explanations and grounds of defence and the evidence in support thereof. Moreover, he should also show the weakness in the Crown's case. *Rex* v. *Kirk* (6), *Brooks* v. *Rex* (7), *Rex* v. *Scott* (8), *Markadonis* v. *Rex* (9), *Wu* v. *Rex* (10), *Rex* v. *West* (11), *Rex* v. *Harms* (12) and *Rex* v. *Gouin* (13).

The circumstantial evidence was far from being inconsistent with any other rational conclusion than that the accused was the guilty person within the rule in *Odge's* case. *Lizotte* v. *The King* (14), *Rienblatt* v. *The King* (15) and *Fraser* v. *The King* (16).

The trial judge erred in admitting gynecological instruments not pertaining to the issues in the case, to the prejudice of the accused. *Rex* v. *Picken* (17).

Henri Masson-Loranger Q.C. for the respondent. In view of the very simple issue involved in this case, namely, was the haemorrhage spontaneous or caused by the appellant, there was no need for the trial judge to review the evidence. The doctors on both sides were in accord. No objection to the charge was made. It would have weakened the appellant's case rather than strengthened it had he

(1) 44 Can. C.C. 225.
(2) 78 Can. C.C. 1.
(3) 82 Can. C.C. 213.
(4) [1944] O.R. 339.
(5) [1947] O.R. 147.
(6) [1934] O.R. 443.
(7) [1927] S.C.R. 633.
(8) [1932] 2 W.W.R. 124.
(9) [1935] S.C.R. 657.
(10) [1934] S.C.R. 609.
(11) 57 O.L.R. 446.
(12) 66 Can. C.C. 134.
(13) Q.R. 41 K.B. 157.
(14) [1951] S.C.R. 115.
(15) [1933] S.C.R. 694.
(16) [1936] S.C.R. 296.
(17) 69 Can. C.C. 61.

done so. There was therefore no prejudice. The jurisprudence cited by the appellant must be distinguished as those were all cases where it was essential to relate the facts to a principle of law i.e., conspiracy. But the review is not necessary in a case of simple denial.

There is here no analogy with the case of *Picken,* since here we have a doctor's office regularly organized.

The circumstantial evidence leads indubitably to the guilt of the accused and to no other conclusion, and this beyond any reasonable doubt.

There was ample evidence to support the verdict and the medical evidence was not contradictory. At the very least, this is a case for the application of s. 1014 (2) of the *Criminal Code.*

The judgment of the Chief Justice and of Taschereau J. was delivered by

TASCHEREAU J.—The accused was charged with the murder of Blanche Lepire, and was found guilty of manslaughter. It is the contention of the Crown that the appellant, for the unlawful purpose of procuring the miscarriage of the deceased woman, used on her instruments, which eventually caused her death. The Court of Appeal (1) confirmed the verdict, Chief Justice Galipeault dissenting. He reached the conclusion that the evidence did not warrant a conviction, and that the trial judge failed to instruct properly the jury, in omitting to review the evidence, so that they could clearly appreciate the issues involved.

As I have come to the conclusion that there should be a new trial, I do not intend to deal with all the details of the evidence. It will be sufficient to say that I do not agree with the learned dissenting judge, that the verdict was unreasonable and unjustified. There was, I think, evidence upon which a jury could convict or acquit, whether they accepted the theory of the Crown, or were left in doubt when the defence rested its case.

On the second point, I agree with the Chief Justice of the Court of King's Bench. The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it

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would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. (*Spencer* v. *Alaska Parkers* (1)). As Kellock J.A. (as he then was) said in *Rex* v. *Stephen et al* (2): "It is not sufficient that the whole evidence be left to the jury *in bulk for valuation.*" The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. Of course, it is not necessary that the trial judge should review all the facts, and that his charge be a minute record of the evidence adduced, but as Rivard, J.A. said in *Vincent* v. *Regem* (3):

> Il faut admettre que l'adresse du juge est plutôt brève et que, tant sur les faits que sur les questions de droit, il n'a dit oue l'essentiel, sans développement. Mais la question n'est pas de savoir si le juge a été court; il faut rechercher plutôt *s'il a omis le nécessaire.*

In *Wu* v. *The King* (4), Mr. Justice Lamont speaking for this Court expressed his views as follows:—

> There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. *Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto.*

More recently, Mr. Justice Kerwin in *Forsythe* v. *The King* (5), also said:—

> However, while the general statement of the law of conspiracy made by the trial judge may be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to Carson's activities was concerned.

In *Rex* v. *Arnold* (6), the Court of Appeal of Ontario ordered a new trial, and Mr. Justice Laidlaw, giving the unanimous judgment of the Court restated the law as follows:—

> An accused is entitled to have a trial judge give the theory of the defence to the jury, and it is difficult to conceive of a case where, in doing so, he can refrain from making at least some reference to the

(1) (1905) 35 Can. S.C.R. 362.
(2) [1944] O.R. 339 at 352.
(3) Q.R. (1932) 52 K.B. 38 at 46.
(4) [1934] S.C.R. 609 at 616.
(5) [1943] S.C.R. 98 at 102.
(6) [1947] O.R. 147 at 149.

evidence. Here, I am thoroughly satisfied that there was misdirection to the jury on the subject of consent, and apart from that misdirection I think it was incumbent upon the learned trial judge to do more than simply say to the jury that it was for them to decide whom they believed, without making any reference to the evidence at all.

If any other authority is needed, see *Brooks* v. *The King* (1), *Markadonis* v. *The King* (2), *Rex* v. *Hill et al* (3).

In the present case, the trial judge, after having explained the law to the jury, said:—

> Now, as to facts. I will not comment on them. Both parties have elaborated before you all the arguments for and against the guilt or the innocence of the accused, and of course it is up to you to say, not for me.

He then recapitulated in a few words what the Crown Attorney and Counsel for the defence had said in their addresses, and concluded by saying:—

> Both points of view have been well elaborated by the Defence and the Crown and I shall say no more on facts.

I do not think that this is sufficient. This trial lasted one week, twenty-four witnesses were heard of which twelve for the defence. Three experts, two of which were called by the appellant, gave very elaborate explanations on medical matters, and their respective opinions on the result of the autopsy that was performed on the body of the deceased woman. It was, I think, the duty of the trial judge, in summing up this highly technical and conflicting evidence, to strip it of the non-essentials, and as O'Halloran, J.A. said in *Rex* v. *Hughes* (4) to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permitted. Unfortunately, this has not been done, and the explanations and grounds of defence have not adequately been put before the jury.

I am of opinion that the jury was left in a state of confusion, and I cannot say that after the judge's address, they were in a position to fully appreciate the *value and effect* of the evidence. As I do not think that the verdict would have necessarily been the same if the proper instructions had been given, I believe that 1014 (2) has no application.

I would direct a new trial.

(1) [1927] S.C.R. 633 at 635.
(2) [1935] S.C.R. 657 at 665.
(3) 82 Can. C.C. 213 at 217.
(4) 78 Can. C.C. 1.

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RAND J. (dissenting):—The defence here was plain and uncomplicated: it was that at the moment the accused was about to examine the woman internally for fibromas, a spontaneous process of miscarriage started causing a severance of the placenta from the wall of the uterus and leading to a fatal hemorrhage. The issue was simply whether the rupture was natural or had been provoked artificially by the accused with the intent of bringing about an abortion.

The facts were largely undisputed: only those at the critical moments leading to the severance were in controversy. Four items of internal evidence were considered by the Crown to point to an artificially induced dilatation of the cervix: an abrasion of the cervix; dilation of the cervical canal; the presence of muscular fibre on the detached placenta; and the existence of a burrow along the canal. What was said against this was that, in the presence of fibromas, these conditions could possibly arise in the natural course of dilatation. There were, in addition, surrounding circumstances, presented in large part by the accused, on which little doubt or question could arise.

Behind that facade of conditions and actions was concealed the intent or purpose: was it legitimate or criminal? With what "theory" can we dignify such a simple situation? The trial took a full week and there was much examination of the medical testimony: but in the end, that of the defence reduced itself to what I have mentioned. What could the repetition of the four items have added to the knowledge or appreciation of that issue by the jury? They had listened to a proliferation of questions about them almost at nauseam. They would, most probably, have received a further reference to them from the court with secret impatience; and I have no doubt that the absence of such a repetition had not and could not have had the slightest influence on their minds in reaching their verdict. In such an uncomplicated question, to speak of a "theory" or to require as, virtually, an absolute rule, the recounting of the few salient facts would be to add an artificiality of no value to the machinery of trial. The rule cannot be taken to be absolute in requiring such an exposition; it depends upon the circumstances of each case.

Lazure J., who presided, has had a long and distinguished experience in criminal trials, and in the situation as I conceive it, I must decline to disregard his judgment that the narrow issues and significant facts, with all their implications, were fully and intelligently appreciated by the jury. No objection to the charge was made by the able counsel representing the accused nor was the ground urged here taken in the notice of appeal to the King's Bench.

The rule arises from the necessity that the jury be fully apprised of every aspect of the case; their judgment otherwise would be vitiated. But once that essential condition is satisfied, anything further of the nature suggested here would be a useless impediment. Its value is as a safeguard against misjudging the jury's grasp of the issues and in the impartial examination of controverted, involved or complex matters and their significance. But there are situations in which it can be said with judicial certainty that reiteration is unnecessary; in such cases the verdict is given in disregard of its presence or absence. I take the condition of the rule to be that the statement required must be such that its omission might have affected the verdict: if, as here, it could not have done so, there is no ground for appeal and a fortiori no substantial wrong has been done.

I would dismiss the appeal.

ESTEY, J.:—The appellant, charged with the murder of Mrs. P., was found guilty of manslaughter. His conviction was affirmed in the Court of Queen's Bench, Appeal Side, in the Province of Quebec (1), Chief Justice Galipeault dissenting.

Mrs. P., on August 20, 1947, went to the office of the appellant, a medical practitioner in Montreal, where, because of a haemorrhage caused by the separation of the placenta from the uterine wall, she died.

The Crown contends that the haemorrhage resulted from an attempt on the appellant's part to effect an abortion. The appellant contends that the separation and consequent haemorrhage were due to natural causes.

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The Crown called evidence as to events and conversations leading to the examination, the manner in which Mrs. P. was prepared therefor and the circumstances at the office. A pathologist was also called who made a post mortem on the afternoon of the death. He found the cervical canal abnormally dilated in relation to the length of the cervix, abrasions on the cervix, a burrow or groove on the cervical canal and fibres on the placenta, which came from the uterine wall. These factors, viewed as a whole, together with his negative observations in his opinion justified the conclusion that there had been an attempted abortion.

The appellant admitted making an examination of the lungs, heart and abdomen and the taking of a haemoglobin test; that before he had made any internal examination she had commenced to haemorrhage; that in the course of his efforts to stop the haemorrhage he used a speculum, a tenaculum and did some packing. He also gave her Pituitrin and Vitamin K.

The medical evidence is all to the effect that Mrs. P. had been pregnant between five and six months. It is also clear that she had several fibroids upon the wall of her uterus which, because of their size and condition, had been there some time. The appellant was of the opinion that Mrs. P. was in labour when she consulted him on the 20th and that because of the fibroids and consequently diseased and weakened condition of the tissues this separation of the placenta occurred in the course of labour. Moreover, he stated that the fact that she was in labour explained the dilatation of the cervical canal.

Two pathologists were called on behalf of the appellant whose evidence lent support to the view that the dilatation of the cervical canal might have happened normally, particularly if she was in labour. They also expressed the view that in the same circumstances, because of the diseased and weakened condition of the tissues of the uterine wall, the fibres might have separated therefrom with, and remained upon the placenta. As to the abrasions on the cervix and the groove on the cervical canal, these did provide evidence of trauma or injury which might have been caused in the course of the packing.

The learned trial judge clearly and appropriately discussed the relevant law, the certainty that must be established where the evidence is circumstantial and that the jury must be satisfied that the evidence establishes the guilt of the accused beyond reasonable doubt before finding him guilty. In the course of his charge the learned judge stated, in part, as follows:

> Now, as to facts. I will not comment on them. Both parties have elaborated before you all the arguments for and against the guilt or the innocence of the accused, and of course it is up to you to say, not for me.

Again he stated:

> Both points of view have been well elaborated by the Defence and the Crown and I shall say no more on facts.

The authorities contemplate that in the course of his charge a trial judge should, as a general rule, explain the relevant law and so relate it to the evidence that the jury may appreciate the issues or questions they must pass upon in order to render a verdict of guilty or not guilty. Where, as here, the evidence is technical and somewhat involved, it is particularly important that he should do so in a manner that will assist the jury in determining its relevancy and what weight or value they will attribute to the respective portions. It is, of course, unnecessary that the jury's attention be directed to all of the evidence, and how far a trial judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial. *Wu* v. *The King* (1); *Brooks* v. *The King* (2); *Picken* v. *The King* (3); *Preston* v. *The King* (4); Blackstone, Vol. 3, ch. 23, p. 375; *The Queen* v. *Coney* (5); *Rex.* v. *Bateman* (6).

Moreover, the defence throughout was that the accused had treated Mrs. P. in a professional and legal manner. This was supported by evidence of the accused as to his own conduct, his professional opinion as to the nature and character of the natural cause of the separation of the placenta and of his efforts to save her life. The evidence of the pathologists, called on his own behalf, somewhat supported his opinion as to the natural cause of the separa-

(1) [1934] S.C.R. 609.
(2) [1927] S.C.R. 633.
(3) [1938] S.C.R. 457.
(4) [1949] S.C.R. 156.
(5) (1882) 8 Q.B.D. 534.
(6) (1909) 2 C.A.R. 197.

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tion of the placenta and the dilatation of the cervical canal. They also expressed their opinions that the abrasions and groove might have been caused by instruments used in the course of packing.

This theory of the defence and the evidence in relation thereto were not placed before the jury in a manner that would assist the jurymen in appreciating the particular facts and circumstances they should consider in determining whether the accused be guilty or not guilty. *Brooks* v. *The King, supra; Rex* v. *Henderson* (1); *Rex* v. *Kirk* (2); *Rex* v. *Arnold* (3).

There was ample evidence upon which a jury, properly instructed, might have found the accused guilty, but it cannot be said that a jury, acting judicially, would necessarily have arrived at that conclusion and, therefore, it is not a case for the application of the provisions of s. 1014 (2) of the *Criminal Code.*

The appeal should be allowed, the conviction quashed and a new trial directed.

FAUTEUX J. (dissenting):—A careful consideration of the record convinced me that the practical significance which the defence expert opinions could have at the end of the case was more dependent upon than promoting the measure of credit the jury would then be ready to attach to the very testimony of the appellant himself. Exonerating possibilities indicated by them could only be of trivial or no value if his relation of the occurrence, considered in the light of the rest of the evidence, was not accepted as truthful. That the jury did disbelieve what he said as to the nature of his intervention is clearly manifested by their verdict. I have reached the conclusion that had the trial Judge dealt with the expert opinions exhaustively, the case for the appellant would have been weakened rather than strengthened. As there will be a new trial, it is not convenient to review the evidence in order to demonstrate the factual premises upon which the above findings are made. One may point out, however, that these conclusions are not inconsistent with but, in some degree, supported by the fact that in the course of his

(1) [1948] S.C.R. 226. (2) 62 Can. C.C. 19.
(3) 87 Can. C.C. 237.

address, the then counsel of the appellant—an able one, as the record shows—rather invited the jury to minimize the value to be attached to expert opinions, the fact that he did not, at the end of the address of the trial Judge, raise any objections as to the omission of the latter to review this or other evidence, the fact that, in the notice of appeal, counsel did not even mention this ground on which the argument before us was centered and which, moreover, is not the one upon which the appeal in the Court below fell virtually to be determined.

I would dismiss the appeal.

Appeal allowed; new trial directed.

Solicitor for the appellant: *P. B. C. Pepper.*

Solicitor for the respondent: *H. Masson-Loranger.*