REGINALD JOHN COLPITTS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1965

*June 2, 3
June 24

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Capital murder—Misdirection by trial judge—Theory of the defence not put to the jury—Canada Evidence Act, R.S.C. 1952, c. 307, s. 12(1)—Criminal Code, 1953-54 (Can.), c. 51, s. 592(1)(b)(iii).

Following the slaying of a guard at a prison where he was an inmate, the appellant was convicted of capital murder. On the morning immediately following the slaying, he called for the mounted police and made a series of statements in which he made a complete and detailed confession of the crime. At the trial, the appellant gave evidence on his own behalf and claimed that the statements made immediately after the crime were false, that they had been made to protect a friend and that he had not killed the guard. His conviction was affirmed by a majority judgment in the Court of Appeal. All the members of the Court were of the opinion that the judge's charge to the jury was inadequate, but the majority was of the opinion that there had been no substantial wrong or miscarriage of justice and applied s. 592(1)(*b*)(iii) of the *Criminal Code*. The appellant appealed to this Court.

Held (Taschereau C.J. and Abbott and Judson JJ. dissenting): The appeal should be allowed and a new trial directed.

Per Cartwright and Hall JJ.: The trial judge failed to present the theory of the defence to the jury, and the verdict could not be upheld by the application of s. 592 (1)(*b*)(iii) of the Code. The onus was upon the Crown to satisfy the Court that the verdict would necessarily have been the same if the errors had not occurred. The construction of s. 592 (1)(*b*)(iii) of the Code contended for by the Crown in this case would transfer from the jury to the Court of Appeal the question whether the evidence established the guilt of the accused beyond a reasonable doubt. It was impossible to affirm from a reading of the written record that the testimony of the accused might not have left a properly instructed jury in a state of doubt.

In this view of the case it was not necessary to consider the ground of appeal which was based on the allegedly improper cross-examination of the accused.

As to the first two grounds of appeal, they were properly rejected by the Court of Appeal.

---

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Judson, Ritchie, Hall and Spence JJ.

1965

COLPITTS v. THE QUEEN

Per Ritchie J.: The trial judge erred in failing to fairly put to the jury the defence made by the accused. It was impossible to say that the verdict would necessarily have been the same if the charge had been correct and, applying the test established in the authorities, this was not a case in which the provisions of s. 592(1)(*b*)(iii) of the Code should be invoked. The errors in this case were not of a minor character.

Per Spence J.: The first ground of appeal that the trial judge erred in allowing the trial while the accused was dressed as a prison inmate, and the second ground that the trial judge should not have admitted in evidence a tape recording, were both properly rejected by the Court of Appeal.

As to the ground that the trial judge had erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences, there had been no prejudice to the accused. Even if the questions put upon cross-examination were inadmissible and prejudicial, the answers resulted in the only evidence being that the accused had never been convicted or charged with a crime in which he carried or wielded a knife.

The ground of appeal that the trial judge failed to fairly put to the jury the defence made by the accused should be upheld. It is the duty of the trial judge to outline to the jury the theory of the defence and to give to the jury matters of evidence essential in arriving at a just conclusion in reference to that defence. The charge in the present case, in its failure to state the theory of the defence, and particularly in the partial statement of it accompanied by the inferential disbelief of it and not accompanied by any reference to evidence which bore upon it, was a failure to properly instruct the jury and was prejudicial to the accused.

Under s. 592(1)(*b*)(iii) of the *Criminal Code,* the onus was on the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than to find the appellant guilty. This Court could not place itself in the position of a jury and weigh the various pieces of evidence which it was the duty of the trial judge to submit to the jury and which he failed to do. There was a possibility that the jury, properly charged, would have had a reasonable doubt as to the guilt of the accused. Therefore, this Court could not apply the provisions of s. 592 (1)(*b*)(iii) to affirm the conviction.

Per Taschereau C.J. and Abbott and Judson JJ., *dissenting*: The charge to the jury was adequate in the circumstances of this case. The defence which was merely that the accused had lied in his confessions and had told the truth at the trial, was put to the jury and they were fully instructed on the subject of reasonable doubt. Such error as there may have been in the conduct of the trial was of a minor character, and the Court of Appeal was justified in applying s. 592 (1)(*b*)(iii) of the Code.

Droit criminel—Meurtre qualifié—Mauvaise direction par le juge au procès—Théorie de la défense non présentée au jury—Loi sur la Preuve au Canada, S.R.C. 1952, c. 307, s. 12(1)—Code Criminel, 1953-54 (Can.), c. 51, art. 592(1)(b)(iii).

A la suite du meurtre d'un gardien de la prison où l'appelant était détenu, ce dernier fut trouvé coupable de meurtre qualifié. Le matin immédiatement après le meurtre, il a demandé à voir la police et a fait plusieurs déclarations avouant le crime d'une façon complète et détaillée. Lors du procès, l'appelant a témoigné en sa propre faveur, et a allégué que les déclarations qu'il avait faites immédiatement après le crime étaient fausses, qu'il les avait faites pour protéger un ami et qu'il n'avait pas tué le gardien. Le verdict de culpabilité fut confirmé par un jugement majoritaire de la Cour d'Appel. Tous les membres de la Cour furent d'opinion que l'adresse du juge au jury avait été inadéquate, mais la majorité fut d'opinion qu'il n'y avait eu aucun tort important ou erreur judiciaire grave et appliquèrent l'art. 592(1)(*b*)(iii) du *Code criminel*. L'appelant en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et un nouveau procès doit être ordonné, le Juge en Chef Taschereau et les Juges Abbott et Judson étant dissidents.

Les Juges Cartwright et Hall: Le juge au procès n'a pas présenté au jury la théorie de la défense, et le verdict ne pouvait pas être maintenu en appliquant l'art. 592(1)(*b*)(iii) du *Code criminel*. La Couronne avait le fardeau de satisfaire la Cour que le verdict aurait été nécessairement le même si des erreurs n'avaient pas été commises. L'interprétation que la Couronne veut donner à l'art. 592 (1)(*b*)(iii) du Code aurait pour effet de transférer du jury à la Cour d'Appel la question de savoir si la preuve établit la culpabilité de l'accusé hors de tout doute raisonnable. Il était impossible d'affirmer à la lecture du dossier que le témoignage de l'accusé n'aurait pas laissé un jury, régulièrement instruit, dans un état de doute, et en conséquence le verdict devait être mis de côté.

Dans ces vues, il n'était pas nécessaire de considérer le grief d'appel qui était basé sur le contre-interrogatoire illégal de l'accusé.

Quant aux deux premiers griefs d'appel, ils avaient été correctement rejetés par la Cour d'Appel.

Le Juge Ritchie: Le juge au procès a erré en n'exposant pas équitablement au jury la défense soumise par l'accusé. Il était impossible de dire que le verdict aurait été nécessairement le même si l'adresse du juge avait été équitable et, appliquant le critère établi par les autorités, cette cause n'était pas de celles où les dispositions de l'art. 592 (1)(*b*)(iii) du Code devaient être invoquées. Les erreurs dans cette cause n'avaient pas un caractère mineur.

Le Juge Spence: La Cour d'Appel a eu raison de rejeter le premier grief d'appel à l'effet que le juge au procès avait erré en permettant le procès alors que l'accusé était habillé comme un détenu de prison

1965

COLPITTS v. THE QUEEN

et le second grief que le juge au procès n'aurait pas dû permettre la preuve d'un enregistrement sur magnétophone.

Quant au grief que le juge au procès a erré en permettant l'introduction, sur contre-interrogatoire de l'accusé, d'une preuve de sa conduite et de ses offenses criminelles antérieures, il n'y a eu aucun préjudice pour l'accusé. Même si les questions posées en contre-interrogatoire n'étaient pas admissibles et étaient préjudiciables, la seule preuve qui a résulté de ces réponses fut que l'accusé n'avait jamais été trouvé coupable ou accusé d'un crime pour lequel il aurait porté ou manié un couteau.

Le grief d'appel que le juge au procès n'a pas mis adéquatement devant le jury la défense faite par l'accusé doit être maintenu. Il est du devoir du juge au procès d'exposer au jury la théorie de la défense et de donner au jury tous les extraits de la preuve qui sont essentiels pour arriver à un conclusion juste concernant cette défense. L'adresse du juge dans la présente cause, dans son défaut d'énumérer la théorie de la défense et particulièrement dans son exposé partiel accompagné d'une inférence d'incrédibilité et non accompagné des références à la preuve portant sur cette défense, a été un manque d'instruire régulièrement le jury et a été préjudiciable à l'accusé.

En vertu de l'art. 592(1)(*b*)(iii) du *Code criminel,* la Couronne avait le fardeau de satisfaire la Cour que le jury, instruit comme il devait l'être, n'aurait pu, comme hommes raisonnables, faire autre chose que de trouver l'accusé coupable. Cette Cour ne peut pas se placer dans le position du jury et évaluer les différents renvois à la preuve qu'il était du devoir du juge au procès de soumettre au jury et qu'il n'a pas fait. Il y avait une possibilité que le jury régulièrement instruit aurait eu un doute raisonnable sur la culpabilité de l'accusé. En conséquence, cette Cour ne pouvait pas se servir des dispositions de l'art. 592 (1)(*b*)(iii) pour confirmer le verdict.

Le Juge en Chef Taschereau et les Juges Abbott et Judson, *dissidents*: L'adresse au jury était adéquate dans les circonstances. La défense qui était simplement que l'accusé avait menti lorsqu'il avait fait ses aveux et qu'il avait dit la vérité au procès, a été mise devant le jury qui a été instruit complètement sur le doute raisonnable. S'il y avait eu des erreurs dans la conduite du procès ces erreurs avaient un caractère mineur, et la Cour d'Appel était justifiée d'avoir appliqué l'art. 592(1)(*b*)(iii) du Code.

APPEL d'un jugement majoritaire de la Cour suprême du Nouveau-Brunswick, confirmant un verdict de culpabilité pour meurtre qualifié. Appel maintenu, le Juge en Chef Taschereau et les Juges Abbott et Judson étant dissidents.

APPEAL from a judgment of the Supreme Court of New Brunswick, affirming a conviction of capital murder. Appeal

allowed, Taschereau C.J. and Abbott and Judson JJ. dissenting.

P. S. Creaghan, for the appellant.

L. D. D'Arcy, for the respondent.

The judgment of Taschereau C.J. and Abbott and Judson JJ. was delivered by

ABBOTT J. (*dissenting*):—With deference to those who hold the opposite view, in my opinion the charge to the jury was adequate in the circumstances of this case.

The theory of the defence was a simple one. It was merely that the accused had lied in the three confessions made by him and had told the truth in his evidence at the trial. That defence was put to the jury and they were fully instructed on the subject of reasonable doubt.

Such error as there may have been in the conduct of the trial was of a minor character and for the reasons given by Bridges C.J., the Appeal Division of the Supreme Court of New Brunswick, in my opinion, was justified in applying the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code.*

I would dismiss the appeal.

The judgment of Cartwright and Hall JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the course of the proceedings in the courts below are set out in the reasons of my brother Spence. I agree with his conclusion that the learned trial judge failed to present the theory of the defence to the jury and with his reasons for reaching that conclusion; but since we are differing from the opinion of the majority in the Court of Appeal I propose to set out shortly in my own words my reasons for holding that in this case the verdict of guilty cannot be upheld by the application of s. 592(1)(*b*)(iii) of the *Criminal Code.*

Section 592(1)(*a*)(ii) of the *Criminal Code* reads:

592 (1) On the hearing of an appeal against a conviction, the court of appeal

1965

COLPITTS v. THE QUEEN

CartwrightJ.

(*a*) may allow the appeal where it is of the opinion that . . . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or . . . .

Section 592(1)(b)(iii) reads:

(*b*) may dismiss the appeal where . . . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

A number of authorities which should guide the Court of Appeal in deciding whether, misdirection having been shewn, it can safely be affirmed that no substantial wrong or miscarriage of justice has occurred are quoted in the reasons of my brother Spence. Upon reading these it will be observed that, once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred. The satisfaction of this onus is a condition precedent to the right of the Appellate Court to apply the terms of the subsection at all. The Court is not bound to apply the subsection merely because this onus is discharged.

Under our system of law a man on trial for his life is entitled to the verdict of a jury which has been accurately and adequately instructed as to the law. The construction of s. 592(1)(*b*)(iii) contended for by the Crown in this case would transfer from the jury to the Court of Appeal the question whether the evidence established the guilt of the accused beyond a reasonable doubt. To adapt the words of Lord Herschell in *Makin v. Attorney General for New South Wales*[1], the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

[1] [1894] A.C. 57 at 70.

In the case at bar every judge in the Court of Appeal was of the same opinion as my brother Spence that the charge of the learned trial judge to the jury was inadequate. The evidence of the accused given at the trial, if it were believed by the jury, established his innocence; if it left the jury in a state of doubt it necessitated his acquittal. I find it impossible to affirm from a reading of the written record that the testimony of the accused might not have left a properly instructed jury in a state of doubt, and consequently, in my view, the verdict must be set aside.

The conclusion at which I have arrived on this ground of appeal renders it unnecessary for me to consider the fourth ground of appeal, which was based on the allegedly improper cross-examination of the accused, and I express no opinion upon it.

I agree with my brother Spence that grounds (1) and (2), set out at the commencement of his reasons, were properly rejected.

I would dispose of the appeal as proposed by my brother Spence.

RITCHIE J.:—I have had the benefit of reading the reasons for judgment of my brothers Cartwright and Spence and I agree with them that this appeal should be allowed on the ground that "the learned trial judge erred in failing to fairly put to the jury the defence made by the accused".

Even if it be conceded to be improbable that the decision of any juror was affected by the errors which all the judges of the court of appeal have found to have existed in the charge of the learned trial judge, I am nevertheless unable to say that the verdict would *necessarily* have been the same if the charge had been correct and, applying the test established in the authorities referred to by my brother Spence, I do not consider this to be a case in which the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code* should be invoked. I do not share the view that the errors referred to were of a minor character.

1965

COLPITTS v. THE QUEEN

I would accordingly dispose of this appeal as proposed by my brother Spence.

SPENCE J.:—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick which, by a majority of two to one, dismissed the appeal of the appellant from his conviction upon a charge of capital murder. The appellant in this Court submitted in his notice of appeal five grounds as follows:

(1) The learned Trial Judge erred in allowing the Trial to commence and proceed while the accused was present before the Jury attired and identifiable as a convicted criminal or a person of bad repute.

(2) The learned Trial Judge erred in allowing to be admitted in evidence a tape recording allegedly reproducing a confession made by the accused and solicited by the police.

(3) The learned Trial Judge erred in failing to fairly put to the Jury the defence made by the accused.

(4) The learned Trial Judge erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences.

(5) The Supreme Court of New Brunswick, Appeal Division, erred in dismissing the appeal by the appellant herein to that Honourable Court.

The first four of those grounds were presented to the Appeal Division of the Supreme Court of New Brunswick. As to grounds 1 and 2, the judgment of Limerick J.A., although dissenting on other grounds, was adopted by the majority of the Court, and I am of the opinion that I need not add anything to the very convincing reasons delivered by the learned justice in appeal in reference to those grounds.

I turn next to consider ground 4, i.e.:

The learned Trial Judge erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences.

The appellant's objection is to his cross-examination. Since it is very short, it is my intention to quote it completely:

Q. Now how long have you been in the — how many times have you been in the — an inmate at the penitentiary? A. This is the second time.

Q. The second time? A. Yes.

Q. And what are you in for this time? A. Armed robbery.

Q. Armed robbery? A. Right.

Q. And how were you armed on that occasion? A. With a gun.

Q. And what was the first time you served penitentiary — what was that for? A. For escaping gaol, car theft, and breaking and enter.

Q. And had you served any sentence besides penitentiary? A. Yes.

Q. And where did you serve these? A. County Gaol.

Q. When did you first serve time in the County Gaol? A. 1962.

* * *

Q. Did you use a knife in any offence before? A. No.

Q. Were you not involved in the Friar's hold-up? A. Mmmm.

Q. Was not a knife used there? A. Prove I used it.

Q. Pardon? A. Prove I used it. I didn't use it.

Q. Did you have a knife? A. No.

Q. What weapon did you have? A. I had nothing.

Q. Did you plead guilty to a charge of armed robbery? A. Mmmm, but I didn't plead guilty to having a knife.

Q. What were you armed with? A. I was armed with nothing. My accomplice was armed.

The *Canada Evidence Act*, R.S.C. 1952, c. 307, provides in s. 12(1):

A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

Here counsel for the Crown went much farther.

Cartwright J. in *Lizotte v. The King*[1], quoted with approval the judgment of the Judicial Committee in *Noor Mohamed v. The King*[2], as follows:

In *Makin v. Attorney General for New South Wales* (1894) A.C. 57, 65, Lord Herschell L.C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his

[1] [1951] S.C.R. 115 at 126, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.
[2] [1949] A.C. 182 at 190, 1 All E.R. 365.

1965

COLPITTS v. THE QUEEN

Spence J.

criminal conduct or character to have committed the offence for which he is being tried". In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country". (*Maxwell v. The Director of Public Prosecutions* [1935] A.C. 309, 317, 320.)

That statement, however, was made in reference to cross-examination by the Crown counsel of a defence witness who was not the accused person.

In *Rex v. MacDonald*[1], the Ontario Court of Appeal was considering an appeal from the conviction of the appellant for murder. Objection was made to the Crown's examination-in-chief of a Crown witness who was a person closely associated with the accused and who had, after the accused was alleged to have committed the crime, given the accused shelter in his residence. It was objected that such examination was irrelevant and that it was harmful to the appellant in that it tended to show that the appellant was associated with confirmed criminals. Robertson C.J.O. said at pp. 196-7:

> With respect to all the evidence of the kind objected to, the rules are well established. On the trial of a criminal charge the character and record in general of the accused are not matters in issue, and are not proper subjects of evidence against him. If evidence of good character is given on behalf of the accused, then certain evidence of bad character may be given, but that is not of importance in this case for the appellant offered no evidence of good character.
>
> Further, if the accused becomes a witness, as he has the right to do, he may be cross-examined as to any previous conviction, and if he does not admit it, it may be proved against him. As a witness, the accused is also subject to cross-examination as to matters affecting his credibility in the same way as another witness. Except for this, the character and record of the accused are not proper subjects of attack by the Crown, and it is clearly improper for the Crown to adduce evidence, by cross-examination or otherwise, with a view to putting it before the jury that the accused has been "associated with others in a long and serious criminal career". The accused person is to be convicted, if at all, upon evidence relevant to the crime with which he is charged, and not upon his character or past record.

It must be noted that this statement was made not upon an occasion when the cross-examination of the accused

[1] (1939) 72 C.C.C. 182, [1939] O.R. 606.

person was being considered but rather when the examination-in-chief of a Crown witness was being considered and, with respect, I view the learned Chief Justice's inclusion of the former situation by his words "by cross-examination or otherwise" as being obiter. I am further of the opinion that a cross-examination of an accused person which indicated that he had been "associated with others in a long and serious criminal career" would be perfectly admissible cross-examination upon the issue of the credibility of that accused person. However, I am of the opinion that permission to cross-examine the accused person as to his character on the issue of the accused person's credibility is within the discretion of the trial judge and the trial judge should exercise that discretion with caution and should exclude evidence, even if it were relevant upon the credibility of the accused, if its prejudicial effect far outweighs its probative value.

I am further of the opinion that in the particular case the issue does not arise for the reason that even if the questions put upon cross-examination by the Crown counsel were inadmissible and prejudicial the answers resulted in the only evidence being that the accused man had never been convicted or charged with a crime in which he carried or wielded a knife and, further, the accused man invited the Crown to prove otherwise, an invitation which the Crown did not deem it advisable to accept. There was, therefore, in the particular case, no prejudice to the accused.

The third ground of appeal:

> The learned Trial Judge erred in failing to fairly put to the jury the defence made by the accused.

is a much more substantial one. The appellant, on the morning immediately following the slaying of the prison guard for which he was charged with capital murder, had called for the attendance of the Royal Canadian Mounted Police and had made a series of statements, some in his own handwriting, some in answer to questions, and one, the tape recording, which was the subject of ground of appeal no. 2. In these statements, the appellant had made a complete and detailed confession of the crime in such a fashion that if these statements were not explained, they would constitute

1965

COLPITTS v. THE QUEEN

Spence J.

a sound basis for his conviction upon the offence as charged. The appellant gave evidence at trial on his own behalf, under circumstances to which I shall refer hereafter. In that evidence, he admitted the voluntary nature of all the statements aforesaid. But he denied their truth. In reply to questions by his own counsel, he said that he had not killed the guard and that he had given the statements "to protect a friend", and continued, "and that certain friend gave evidence against me and I don't see no reason for protecting him now. I seen that certain person do that. I was standing no more than four feet away from him at the time". In cross-examination, the accused repeated that explanation and gave great detail saying, inter alia, "I was going to protect him even to the point of hanging for him until he tried to hang me".

Although the appellant refused to name that other person, it would appear from his evidence, taken with the other evidence at trial, that it could only have been his fellow inmate Westerberg, who had testified as a Crown witness.

Upon the cross-examination of the appellant having been completed, the trial was adjourned from 5.49 p.m. until 10.00 a.m., the next morning. At that time counsel for the appellant addressed the jury and in a very brief address mentioned that the appellant denied killing the prison guard but would not incriminate others. He failed to make any reference to the appellant's explanation of his confessions to the police. The Crown counsel followed with an address in which he analyzed the evidence in very considerable detail but again I find no reference to the reasons assigned by the appellant in his evidence for what he alleged in that evidence were the false confessions he had given to the police officers.

The learned trial judge in his charge to the jury dealt with the theory of the defence in the following fashion:

> I take it, as one of the theories of the defence anyway, that the accused does not wish you to believe these statements as being true. That is what he said on the stand—he denies them; he said he was not telling the truth when he gave those statements.

And:

In other words all the statements he made, including the tape recording—and this is in the evidence as well—the oral statements that he made to the R.C.M.P., according to the evidence that Colpitts gave yesterday if you believe it,—all this is a pack of lies, according to Colpitts.

Now gentlemen, it is up to you, because you are the sole masters of the facts. You use your good judgment that the Lord gave you, your knowledge of human nature, to say which of the two alternatives is the more logical one, in order to ascertain if Colpitts was lying yesterday on the stand or if he was lying when he made those statements in a continuous operation the very morning after the stabbing of the guard.

And further:

And the Crown prosecutor has asked you—is it logical to believe that, after having called for the Mounted Police, as you know he did—if you believe the evidence—that he would lie, and lie, and lie throughout these written statements, throughout the tape recording, throughout the oral statements, throughout the visit he made to the prison yard when he showed the constables those details of the occurrence. Well, it is for you to say, gentlemen, if it is logical or not. Isn't it more logical that he would have told the truth on that occasion and that after two months of deliberation he would have concocted the story that he insisted on telling you yesterday? I am not going to give you my opinion on it. You are the men to decide which is the more logical of those two alternatives. You are the twelve men who will decide this.

To summarize the above, the learned trial judge put it as the theory of the appellant that he had made a false confession, and never mentioned the reason which the appellant gave in his evidence for having done so, a reason to which the appellant held fast through a vigorous cross-examination. It must be remembered that counsel for the appellant, before calling the appellant as the only witness for the defence, stated to the learned trial judge, in the presence of the jury:

MR. O'NEILL: My Lord, yes, I am going to call one witness for the defence; and that will be Reginald Colpitts, the accused. And, Sir, I must—as a matter of professional ethics—do assert that this is going to happen against my better judgment and counsel. But Mr. Colpitts has decided to take the stand, and I—of couse—will act as examiner.

THE COURT: All right. I understand your position.

As I have pointed out above, the learned trial judge in his charge gave to the jury two conclusions suggesting that they

1965

COLPITTS v. THE QUEEN

Spence J.

choose the more logical, and one of them was framed in the words "and that after two months of deliberation he would have *concocted* the story that he *insisted* on telling you yesterday". I am of the opinion that that portion of the charge, when considered in the light of the remarks of the then counsel for the appellant which I have quoted, could only suggest, and strongly suggest, to the jury that they could place no reliance upon the evidence given by the appellant in his defence. Moreover, the learned trial judge failed to discuss any of the evidence adduced by the Crown which might be related to that defence. As Limerick J.A. in his reasons has referred to the many instances of evidence which are related to the theory of the defence, I need not repeat them. None of these instances were discussed in that light in the charge of the learned trial judge.

It is trite law that it is the duty of the trial judge to outline to the jury the theory of the defence and that even in cases where the accused person does not give evidence on his own behalf: *Kelsey v. The Queen*[1], where it was held that the trial judge had done so; *Derek Clayton-Wright*[2], per Goddard L.C.J. at 29.

Recent decisions in this Court and elsewhere have also emphasized the duty of the trial judge in his charge to go further and to not only outline the theory of the defence but to give to the jury matters of evidence essential in arriving at a just conclusion in reference to that defence.

In *Lizotte v. The King*[3], Cartwright J., giving judgment for the Court, said at p. 131:

> I do respectfully venture to suggest that in this case it would have been well to follow the usual practice of indicating to the jury the nature of the evidence put forward in support of the alibi and telling them that, even if they are not satisfied that the alibi has been proved, if the evidence in support of it raises in their minds a reasonable doubt of the appellant's guilt, it is their duty to acquit him.

In *Azoulay v. The Queen*[4], the present Chief Justice of this Court said:

[1] [1953] 1 S.C.R. 220, 16 C.R. 119, 105 C.C.C. 97.
[2] (1948), 33 Cr. App. R. 22 at 29.
[3] [1951] S.C.R. 115, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.
[4] [1952] 2 S.C.R. 495, at 497, 15 C.R. 181, 104 C.C.C. 97.

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 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.

In *Lizotte v. The Queen*[1], the present Chief Justice of this Court said:

> Au cours de sa charge aux jurés, le juge présidant au procès, après avoir récité certains faits saillants de cette triste aventure, semble avoir omis quelques éléments de preuve, essentiels pour arriver à une juste conclusion. Sans doute, il n'est pas impératif que le juge décrive en détail toutes et chacune des circonstances qui ont entouré un crime, mais encore faut-il qu'il place devant le jury tout ce qui est révélé par les témoignages, soit de la Couronne ou de la défense, qui peut être un moyen sérieux de disculper l'accusé. (*Le Roi v. Azoulay,* [1952] 2 S.C.R. 495); (*Le Roi v. Kelsey,* [1953] 1 S.C.R. 220); (Vide Lord Goddard in *Dereck Clayton-Wright* (1948), 33 C.A.R. 22 at 29.)

In *Regina v. Hladiy*[2], Pickup C.J.O. said:

> The learned trial judge then went on to discuss the evidence as to motive and also discussed the statements made by the accused, but nowhere in his charge, in discussing that evidence, did he put it plainly to the jury that, in considering the statements made by the accused, or such of them as the jury believed, they should consider whether they had any reasonable doubt as to whether or not what actually took place that night before the body was thrown into the water was murder.

In *Markadonis v. The King*[3], Davis J. said at p. 665:

> Moreover, I cannot escape from the view that the charge of the learned trial judge did not present certain aspects of the case in favour of the accused that should have been dealt with and considered.

In the light of these authorities, I agree with the contention of counsel for the appellant that the charge by the learned trial judge, in its failure to state the theory of the defence, and particularly in the partial statement of it accompanied by the inferential disbelief of it and not accompanied by any reference to evidence which bore upon it, was a failure to properly instruct the jury and was prejudicial to the accused. All the members of the Supreme

[1] [1953] 1 S.C.R. 411 at 414, 16 C.R. 281, 106 C.C.C. 1.
[2] (1952), 15 C.R. 255 at 260, [1952] O.R. 879, 104 C.C.C. 235.
[3] [1935] S.C.R. 657, 64 C.C.C. 41, 3 D.L.R. 424.

1965

COLPITTS v. THE QUEEN

Spence J.

Court of New Brunswick, Appeal Side, were of the same view. Bridges C.J., said:

> The instructions which the learned judge gave to the jury to use their good judgment in deciding which of two alternatives was the more logical, namely, whether the defendant told the truth in his statements and on the tape recording or in his evidence at the trial, did not put the defence properly before the jury as such direction did not make it clear to them that if they were in doubt or believed the testimony of the defendant might reasonably be true they should acquit him.

Ritchie J.A. said:

> I also am of the opinion the theory of the defence as expressed in the appellant's evidence at trial was not adequately put to the jury . . .

And Limerick J.A. said:

> This would seem to be a very inadequate presentation of the defence as well as a very negative approach thereto. Use of the words "does not wish you to believe" thereby, by inference, implying he, the learned Judge, thought the statements were true constitutes an opinion of guilt not a presentation of the defence.

The first two named justices, however, were of the opinion that the provisions of s. 592(1)(b)(iii) of the Criminal Code should be applied and that there had been "no substantial wrong or miscarriage of justice" and therefore that the appeal should be dismissed.

It is the contention of the appellant in his fifth ground of appeal that that decision was not a correct one. The application of the subsection, as pointed out by the learned justice in appeal, has been considered frequently in this Court and I think it may be said that the decisions in *Allen v. The King*[1], *Gouin v. The King*[2], *Brooks v. The King*[3], *Lizotte v. The King*[4], and *Schmidt v. The King*[5], are authoritative.

The proposition in *Allen v. The King* as stated by Sir Charles Fitzpatrick, C.J., at p. 339, in reference to the section of the Code then if effect, was:

> I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregulari-

[1] (1911), 44 S.C.R. 331.
[2] [1926] S.C.R. 539, 46 C.C.C. 1, 3 D.L.R. 649.
[3] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.
[4] [1951] S.C.R. 115, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754
[5] [1945] S.C.R. 438, 83 C.C.C. 207, 2 D.L.R. 598.

ties are so trivial that it may safely be assumed that the jury was not influenced by it.

That proposition has been considered in subsequent authorities.

In *Brooks v. The King, supra,* in the judgment of the Court at p. 636, it is said:

> Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty.

In *Schmidt v. The King, supra,* Kerwin J., at p. 440, put it this way:

> The meaning of these words has been considered in this Court in several cases, one of which is *Gouin v. The King* [1926] S.C.R. 539, from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence has been improperly admitted.

In *Lizotte v. The King, supra,* Cartwright J. giving the judgment for the Court, held that it was within the jurisdiction of this Court to allow an appeal and refuse to apply the provisions of the present s. 592(1)(*b*)(iii) despite the fact that the Court of Appeal in the province had dismissed the appeal from the conviction upon the application of the said subsection.

Therefore, this Court must apply the test set out in the aforesaid cases and, to quote again from *Brooks v. The King:*

> The onus is upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty.

In an attempt to persuade this Court that upon such a test being applied the Court could not do otherwise than to find that a jury properly charged would hold the appellant guilty, counsel for the respondent cited many pieces of evidence which would tend to show that the appellant had told the truth when he made the statements to the police and had lied when he testified in court. As pointed out by the various learned justices in appeal in the Supreme Court of New Brunswick, this, even if true, would not be sufficient

1965

COLPITTS v. THE QUEEN

Spence J.

because if the evidence of the appellant at trial, although the jury is not convinced of its truth, raises a reasonable doubt in their minds, that reasonable doubt must be resolved in favour of the accused. Moreover, as pointed out by Limerick J.A. in his dissenting judgment in the Supreme Court of New Brunswick, Appeal Division, there are a very considerable number of items of evidence which point toward the possibility that the appellant might be telling the truth in his evidence at trial. In my view, it was the duty of the judge to submit all that evidence, not only that in favour of the accused but that against him, to the jury so that they might weigh it and come to the conclusion whether, on all of the evidence, they had any reasonable doubt of the guilt of the appellant.

I am of the opinion that this Court cannot place itself in the position of a jury and weigh these various pieces of evidence. If there is any possibility that twelve reasonable men, properly charged, would have a reasonable doubt as to the guilt of the accused, then this Court should not apply the provisions of s. 592(1)(*b*)(iii) to affirm a conviction.

I am of the opinion that there is such a possibility and I, therefore, would allow the appeal, set aside the judgment of the Supreme Court of New Brunswick, Appeal Division, and direct a new trial of the appellant upon the charge of capital murder.

Appeal allowed, new trial directed, Taschereau C.J. *and* Abbott *and* Judson JJ. *dissenting.*

Solicitor for the appellant: P. S. Creaghan, Moncton.

Solicitor for the respondent: L. D. D'Arcy, Fredericton.