ACHILLE PROVENCHER .....APPELLANT;

1955

*Nov. 21
*Nov. 21

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

*Criminal law—Accomplice—Misdirection—Corroboration—Improper statement of Crown counsel.*

The appellant was convicted by a jury of having broken and entered a garage and stolen property therein. His appeal was dismissed by the Court of Appeal.

The Crown's case rested chiefly on the evidence of an accomplice whom, according to the Crown's theory, the appellant had agreed to drive to the locality of the crime for the purpose, known to the appellant, of committing the crime. It is conceded that the accomplice did himself commit the crime. The appellant's case was that he had driven the accomplice without any knowledge of his guilty purpose, had left him at his destination and had returned home alone. There was some evidence which was capable of being regarded as corroboration of the evidence of the accomplice.

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

It was misdirection for the trial judge to charge the jury with words from which they would normally understand that there lay an onus on the appellant to satisfy them of his innocence.

The trial judge failed also to direct the jury adequately as to the danger of convicting on the uncorroborated evidence of an accomplice and as to what constitutes corroboration; and particularly failed to explain that facts although independently proved could not be regarded as corroborative of the accomplice's evidence if they were equally consistent with the truth of the appellant's evidence.

The trial judge failed also to point out to the jury what was the theory of the defence and to tell them that they should acquit if, on all the evidence, they entertained a reasonable doubt of the appellant's guilt.

The statement of Crown counsel in the presence of the jury that he was going to have the appellant arrested for perjury on the following morning or that afternoon, was improper and could scarcely fail to prejudice the fair trial of the appellant.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, affirming the conviction of the appellant.

*J. Vernier* for the appellant.

*G. Normandin, Q.C.* for the respondent.

*PRESENT: Taschereau, Kellock, Cartwright, Fauteux and Abbott JJ.

1955

PROVENCHER v. THE QUEEN

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—The appellant was convicted at his trial before Rhéaume J. and a jury of having, during the night of October 26 to 27, 1953, broken and entered the garage of Gaétan Poisson at Rougemont and stolen therein property of the said Gaétan Poisson of the value of about $125. His appeal to the Court of Queen's Bench, Appeal Side, was dismissed by a unanimous judgment for which no written reasons were given.

Pursuant to section 1025 (1) of the *Criminal Code* leave was granted to the appellant to appeal to this Court on the following questions of law:—

1. Did the learned trial judge err in failing to direct the jury correctly with reference to the burden resting upon the Crown to prove the guilt of the appellant beyond any reasonable doubt?

2. Did the learned trial judge err (*a*) in failing to direct the jury as to the danger of convicting on the uncorroborated evidence of an accomplice? (*b*) in failing to direct the jury that the Crown witness Chaput was an accomplice or as to what, in law, constitutes an accomplice? (*c*) in failing to direct the jury as to what constitutes corroboration? (*d*) in failing to direct the jury that evidence which is equally consistent with the evidence of an accomplice and that of the accused is corroborative of neither?

3. Did the learned trial judge err in failing to place the theory of the defence fully and fairly before the jury?

4. Did the learned trial judge err in failing to explain to the jury the application of the law to the facts?

5. Was the appellant deprived of a trial according to law by reason of the fact that at the conclusion of the evidence given by the appellant in his defence the Crown counsel stated in the presence of the jury that he was going to have the appellant arrested for perjury either on the following morning or that afternoon?

At the conclusion of the hearing the Court gave judgment allowing the appeal, quashing the conviction and directing a new trial and stated that written reasons would be delivered in due course.

As there is to be a new trial I will refer to the facts and the evidence only so far as is necessary to make clear what is involved in the questions submitted for decision.

The case for the Crown was that the accused had agreed with one René Chaput to drive the latter from Montreal to Rougemont for the purpose, made known to the accused at the time of the agreement, of committing the crime charged and which it is conceded that Chaput did himself commit. It is not suggested that the accused entered the garage or ever had possession of any of the stolen articles. His alleged

participation in the commission of the offence consisted in driving Chaput to Rougemont with guilty knowledge of his purpose. No doubt such participation would, if proved, be sufficient, under the provisions of s. 69 (1) (*b*) of the *Criminal Code,* to render the appellant guilty of the offence committed by Chaput. Driving Chaput under such circumstances would be doing an act for the purpose of aiding him to commit the offence.

The appellant's case was that he and Chaput were drinking together in a tavern in Montreal on the evening of the crime, that he agreed to drive Chaput to Rougemont for $5 which Chaput paid to him, that he left Chaput at Rougemont and returned alone to Montreal and that he acted throughout without any knowledge of Chaput's guilty purpose.

From this brief statement of the theories of the Crown and of the defence it at once becomes obvious that the Crown's case rested chiefly on the evidence of Chaput who was, on the Crown's theory, clearly an accomplice of the appellant. It will be convenient to first set out all the passages in the charge of the learned trial judge touching on (i) the onus resting upon the prosecution to prove the guilt of the accused and the duty of the jury to give the accused the benefit of any reasonable doubt, (ii) the way in which the jury should approach the evidence of an accomplice, and (iii) the theory of the defence.

The learned trial judge having said that the youth of counsel for the accused at the trial would excuse him for a little exaggeration continued:—

> Je fais allusion à la question du doute, quand il a dit que "si vous avez le moindre doute"; alors, je dis: "Ce n'est pas tout à fait ce que nos tribunaux exigent des jurés, ce n'est pas le moindre doute, c'est un doute sérieux, raisonnable, qui doit être interprété en faveur de l'accusé.

The only other portion of the charge making any reference to the three above matters is as follows:—

> Maintenant, je vais me limiter aux questions de droit. La Couronne a l'obligation de faire la preuve de l'accusation portée contre l'accusé. C'est à vous de l'apprécier. Et là, la question du doute intervient. Si vous avez un doute, un doute sérieux, non pas fantaisiste, mais un doute raisonnable, alors votre devoir est d'en donner le bénéfice à l'accusé qui est dans la boîte.
>
> Maintenant, il est question de la preuve d'un complice, dans cette cause-ci. Comme vous l'a fait remarquer le procureur de la Couronne, il faut accepter le témoignage d'un complice sous réserve. Cependant, la loi reconnaît un tel témoignage s'il est corroboré par des circonstances, d'autres

1955

PROVENCHER
v.
THE QUEEN

Cartwright J.

témoignages et des circonstances. Il vous appartiendra de dire si les circonstances qui ont été placées devant vous rendent vraisemblable la véracité du témoignage du complice en cette cause.

Maintenant, comment apprécier la preuve, je laisse cela à votre entière liberté. Prenez d'abord l'expérience de la vie, vous avez droit de vous en servir, et vous apprécierez la preuve selon les dictées de votre conscience. Vous vous demanderez—il y a certaines questions que vous avez droit de vous demander pour arriver à la vérité—vous vous demanderez si les explications données par l'accusé et par ses témoins vous ont satisfaits; vous vous demanderez pourquoi ce voyage dans la nuit, qu'est-ce qui a motivé ce voyage dans la nuit, et vous vous demanderez si là il n'y a pas une circonstance qui fortifie le témoignage du complice.

As to the first point, it was argued that the learned trial judge erred in using the adjective "sérieux" which he coupled with the adjective "raisonnable" whenever the latter was used. As to this it may be recalled that in the reasons of the majority of the Court in *Boucher* v. *The Queen* (1), the use of the word "sérieux" in place of the word "raisonnable" when describing that doubt the existence of which requires a jury to return a verdict of not guilty was deprecated. However, the misdirection which, on this point, appears to me to be fatal is that contained in the following sentence and particularly in those words which I have italicized:—

. . . vous vous demanderez si les explications données par l'accusé et par ses témoins *vous ont satisfaits;* . . .

From these words the jury would normally understand that there lay an onus on the appellant to satisfy them of his innocence.

Turning now to the second ground of appeal, it is obvious that on the Crown's theory Chaput was an accomplice. There is to be found in the record some evidence which, if they believed it, the jury might regard as corroboration of that of Chaput. Under the circumstances of this case it was the duty of the learned trial judge; (i) to tell the jury that it is always dangerous to convict an accused on the uncorroborated evidence of an accomplice, although it is within their legal province to do so; (ii) to tell them that Chaput was an accomplice; while in doubtful cases the Judge will instruct the jury as to what in law constitutes an accomplice and leave it to them to say whether a particular witness is or is not an accomplice, in the case at bar this point was not in issue; (iii) to explain to the jury what is meant by

(1) [1955] S.C.R. 16.

the term corroboration; the classic statement as to this is found in the judgment of the Court of Criminal Appeal in *Rex* v. *Baskerville* (1):

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, "implicates the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

This statement has been repeatedly approved in this Court. See, for example, *Hubin* v. *The King* (2), *Thomas* v. *The Queen* (3) and *Manos* v. *The Queen* (4). The learned trial judge should have directed the jury in the sense of this passage and particularly should have made it plain to them that facts although independently proved could not be regarded as corroborative of Chaput's evidence if they were equally consistent with the truth of the evidence of the appellant. As to the first of these requirements the direction of the learned judge:—"il faut accepter le témoignage d'un complice sous réserve." was inadequate; as to the remaining two nothing was said. The concluding sentence from the portions of the charge quoted above:—"Vous vous demanderez pourquoi ce voyage dans la nuit, qu'est-ce qui a motivé ce voyage dans la nuit, et vous vous demanderez si là il n'y a pas une circonstance qui fortifie le témoignage du complice." is not helpful. It was common ground that the journey to Rougemont was made in the night and that admitted fact was equally consistent with the theory of the Crown and with that of the defence.

(1) (1916) 2 K.B. 658 at 667.
(2) [1927] S.C.R. 442 at 444.
(3) [1952] 2 S.C.R. 344 at 353.
(4) [1953] 1 S.C.R. 91 at 92.

1955

PROVENCHER v. THE QUEEN

Cartwright J.

The third and fourth grounds of appeal may be dealt with together. The theory of the defence was simple enough and no elaborate direction was called for; it was however incumbent on the learned trial judge to point out to the jury that this theory was that the appellant drove Chaput to Rougemont because he was asked and paid to do so and that he was ignorant of Chaput's guilty purpose, and to tell them that they should acquit if, on all the evidence, they entertained a reasonable doubt of the appellant's guilt.

As to the fifth ground of appeal, the record shews that at the conclusion of the appellant's cross-examination he was being questioned as to the number of occasions during the night in question on which he had been stopped and questioned by the police. The police officers had testified that there were three such occasions and the appellant that there were only two, one on the way to Rougemont and one on his return journey. The cross-examination concluded as follows:—

D Mais, vous les avez vus une deuxième fois en revenant, arrêté dans une petite rue à Marieville?

R Non, ils m'ont arrêté seulement une fois en descendant.

D Et là, on vous aurait demandé qu'est-ce que vous faisiez dans ce bout-là, qu'est-ce que vous cherchiez?

R Non, il n'a pas été question de ça.

D Vous leur auriez répondu: "Je cherche mon chum qui est débarqué dans une rue, je ne le trouve pas"?

R Il n'a pas été question de ça.

D Vous jurez que c'est faux?

R Je jure ça.

D Deux officiers de police sont venus jurer, cet avant-midi, et vous jurez que c'est faux?

R Moi, je dis que je les ai vus seulement une fois en descendant.

D Je vais vous faire arrêter pour parjure, demain matin.

R C'est correct.

D Peut-être cet après-midi.

It will be observed that the last two "questions" by the learned counsel for the Crown are not questions at all; they are threats or statements of his intention, which it was improper for him to make, and the making of which before the jury could scarcely fail to prejudice the fair trial of the accused.

For the above reasons, I would allow the appeal, quash the conviction and direct a new trial.

*Appeal allowed; new trial directed.*

Solicitor for the appellant: *R. Daoust.*

Solicitor for the respondent: *G. Sylvestre.*