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*June 13.
*June 17.

JOSEPH SANKEY .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Evidence—Unsworn testimony of child of tender years—Necessity of inquiry by trial judge before admitting evidence—Admission in evidence of statement by accused—Proof of its voluntary character—Questioning of accused by police—Necessity of disclosure of process leading to accused's statement.

Before receiving the unsworn testimony of a child of tender years, under s. 16 of the *Canada Evidence Act*, the presiding judge should ascertain by appropriate methods whether or not the child understands

(1) (1875) L.R. 19 Eq. 233.
(2) (1882) 10 L.R. Ir. 313.
(3) [1910] 1 Ch. 188.
(4) (1874) L.R. 18 Eq. 11, at p. 15.
(5) (1862) 4 D.F. & J. 264, at p. 274.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

the nature of an oath; to do this is quite as much his duty as it is to satisfy himself of the child's intelligence and appreciation of the duty of speaking the truth; on both points alike he is required to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath. A very brief inquiry may suffice to satisfy the judge on the point. But some inquiry is indispensable.

The Court (reversing judgment of the Court of Appeal of British Columbia [1927] 2 W.W.R. 265) quashed a conviction for murder and granted a new trial, on the ground that the unsworn testimony of a child ten years old was improperly received (*Allen* v. *The King* 44 Can. S.C.R. 331 cited), there being no material before the judge on which he could properly base an opinion that the child did not understand the nature of an oath.

Questioning of an accused by police, if properly conducted and after warning duly given, will not *per se* render the accused's statement inadmissible. But the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from accused while under arrest was voluntary, always rests with the Crown (*The King* v. *Bellos,* [1927] S.C.R. 258; *Prosko* v. *The King,* 63 Can. S.C.R. 226). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer who obtained it, that it was made freely and voluntarily; what took place in the process by which the statement was ultimately obtained should be fully disclosed; and, with all the facts before him, the judge should form his own opinion that the tendered statement was indeed free and voluntary, before admitting it in evidence.

APPEAL from the judgment of the Court of Appeal of British Columbia (1) sustaining, by a majority, the conviction of the appellant, on his trial before D. A. McDonald J. and a jury, on a charge of murder. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the judgment now reported. The appeal was allowed; the conviction was quashed, and a new trial ordered.

O. M. Biggar K.C. and *J. Edward Bird* for the appellant.

J. A. Ritchie K.C. and *A. M. Johnson K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The defendant appeals to this Court from the judgment of the Court of Appeal of British Columbia dismissing his appeal from a conviction for murder.

(1) [1927] 2 W.W.R. 265.

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The opinion of the majority of the court (Macdonald C.J.A., Galliher and Macdonald JJ.A.) was delivered by the Chief Justice. A direction given by the court, pursuant to ss. 5 of s. 1013 of the *Criminal Code*, allowing the delivery of separate judgments, is embodied in the formal judgment dismissing the appeal. Dissenting opinions were accordingly delivered by Martin and McPhillips JJ.A., who would have directed a new trial.

Five distinct grounds of appeal, based on the judgment of McPhillips J.A., were taken by the appellant:

1. Insufficiency of the evidence to warrant a conviction;
2. Mis-direction of the jury by the learned trial judge;
3. Rejection by the Court of Appeal of a motion by the defendant for the reception of further evidence;
4. Wrongful admission of the unsworn testimony of Haldis Sandahl, a child aged ten years;
5. Wrongful admission of a statement procured by the police from the accused while under arrest, because its voluntary character had not been established.

Mr. Justice Martin's dissent rests solely on the ground last mentioned.

When the child, Sandahl, was called as a witness the record shews what occurred as follows:

HALDIS SANDAHL, a witness called on behalf of the Crown, testified as follows:

Mr. JOHNSON: I think that if you put her in a chair in the box; we haven't a high chair. This child, my lord, is of tender years, nine years old and I tender her evidence under the provisions of section 16 of the Canada Evidence Act.

Mr. PATMORE: I understand that this is because this child does not understand the nature of an oath.

Mr. JOHNSON: That is for the judge to satisfy himself.

The COURT: Q. Where do you live, Haldis?—A. Port Essington.

Q. See how loudly you can speak. How old are you?—A. Eight—ten.

Q. And what is your daddy's name?—A. Mr. Sandahl.

Q. What does he do, does he live up there?—A. Yes.

Q. And your mother, does she live with you too?—A. Yes.

Q. You go to school?—A. Yes.

Q. Can you read a little bit?—A. Yes.

Q. And write your own name?—A. Yes.

Q. Do you know that it is very bad for little girls to tell lies?—A. Yes.

Q. Did they tell you that little girls must never tell stories? Do you understand that?—A. Yes.

Q. You must always tell the truth?—A. Yes.

Q. We want you to answer the questions these men ask you and be sure to tell the truth.

The witness then proceeded to give unsworn testimony, which covered ground as to identification most vital to the interest of the defendant.

S. 16 of the *Canada Evidence Act* reads as follows:

16. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice, or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given on oath, if, in the opinion of the judge, justice, or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

The only light thrown by the record on the view taken by the learned trial judge as to the scope of his function in regard to determining whether the girl, Sandahl, understood the nature of an oath is found in his charge to the jury when he said:

The little girl Haldis Sandahl, she was ten years old last February, and as you noticed when the question came up the law provides that if a child is called as a witness in any case, if the judge thinks the child is not old enough to understand the nature of an oath she can give evidence. Then when it is given, that evidence has exactly the same weight as any other evidence, subject to this, and then provides that on that evidence alone you must have other evidence with it. * * *

The learned judge made no inquiry as to the capacity or education of the girl in regard to her comprehension of the meaning, effect and sanction of an oath, presumably because, from her appearance, he thought her "not old enough to understand the nature of an oath." She was tendered by the Crown as a witness whose evidence could be received under s. 16 of the *Canada Evidence Act;* and, apparently because no objection was taken by counsel for the prisoner, she was allowed to give her evidence unsworn, the learned trial judge having first satisfied himself by apt questions that "she (was) possessed of sufficient intelligence to justify the reception of her evidence and (understood) the duty of speaking the truth."

Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of

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such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime. *Crim. Code,* sections 17-18. A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable. The opinion of the judge, so formed, that the child does not understand the nature of an oath is made by the statute a pre-requisite to the reception in evidence of his unsworn testimony. With the utmost respect, in our opinion there was, in this instance, no material before the judge on which he could properly base such an opinion. He apparently misconceived the duty in this regard imposed upon him by the statute.

The unsworn testimony of Haldis Sandahl was, we think, improperly received. Its importance is not questioned. It may well have been the deciding factor which led the jury to the conclusion that identification of the defendant as the person guilty of the murder in question was sufficiently established. The case falls clearly within the decision of this Court in *Allen* v. *The King* (1).

The conviction must, therefore, be quashed and a new trial ordered.

We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. That statement, put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subjected on the day following his arrest. Three previous attempts to lead him to "talk" had apparently proved abortive—why, we are left to surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous "interviews"; and but meagre details are

(1) (1911) 44 Can. S.C.R. 331.

given of the process by which the written statement ultimately signed by the appellant was obtained. We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner; and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely."

It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *The King* v. *Bellos* (1); *Prosko* v. *The King* (2). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The place at which the next trial shall be held is in the discretion of the Supreme Court of British Columbia, to which, if so advised, the accused may make application for a change of venue.

Appeal allowed, and new trial ordered.

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(1) [1927] S.C.R. 258. (2) (1922) 63 Can. S.C.R. 226.