CARL SCHWARTZENHAUER..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1935

*May 1, 2.
*June 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Indictment for murder—Conviction of manslaughter—Offence of counselling abortion—Dying declaration—Admissibility—Sections 69 and 303 Cr. C.

The accused was convicted of manslaughter on a charge of murder for having caused the death of V. K. by counselling or procuring G. S. unlawfully to use instruments upon her with intent to procure her miscarriage, contrary to the combined effect of sections 69 and 303 of the Criminal Code. The dying declaration was a lengthy narrative by the deceased which day by day she related to her mother, who wrote down the story; this narrative, which concluded with the words "I wish Carl punished," appeared to have been read over to the deceased shortly before her death and adopted by her at that time as a true statement; a number of questions at the same time were submitted to her by police officers, and her answers with the questions were the subject matter of two separate declarations. The narrative, together with the two short statements containing the questions and answers, were all put before the jury. It was common ground that the case against the accused could not be established without evidence of the dying declaration.

Held, reversing the judgment of the Court of Appeal ([1935] 2 W.W.R. 146) that the dying declaration was inadmissible. Therefore the conviction was quashed and a judgment and verdict of acquittal was directed to be entered.

Per Lamont and Davis JJ.—Assuming that the indictment could properly be said to be one for homicide (it is apparently one for the statutory offence of abortion), a great part of the narrative and the statements was outside the competence of a dying declaration in that many of the facts alleged and the wish expressed by the deceased were irrelevant as no part of the *res gestae,* extending far beyond the immediate circumstances of the death of the declarant, and were most harmful to a fair trial of the accused. Dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived. To permit an entire statement to go to a jury, with instructions from the trial judge to disregard such portions as he might point out to be irrelevant and inadmissible, may in the case of a simple and short statement be proper, but in a statement in the form of a lengthy narrative it would be highly improper to permit the whole statement to go to the jury notwithstanding instructions from the judge as to the portions which he thought incompetent. In spite of instructions, the jury might easily be influenced against the accused.

*PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

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Per Cannon and Crocket JJ.—In order to obtain the conviction of the accused on the indictment as laid, the Crown had to rely on section 69 (*d*) of the Criminal Code and prove first that he had counselled or procured the abortion. In order to prove this essential element and link the accused to the abortion and killing, the statements contained in the dying declaration could not be used. The accused's alleged relations with the woman G. S. is a subject-matter different from that of the immediate circumstances of the death of V. K. The statement of the deceased may perhaps be used to prove the cause of the death and the intervention of the abortionist's instrument, but could not be used as evidence that the accused had anything to do with the abortionist. Even if the dying declaration may have been admissible as a whole against the woman G. S. (which is at least doubtful) it certainly could not be used to prove circumstances, not directly and immediately connected with the fatal application of instruments which finally brought death.

Per Dysart J. (*ad hoc*)—The charge as laid was at most a charge of bringing about the death of V. K. by counselling or procuring G. S. to perform on V. K. an abortion resulting in the death. Under this specific charge, most of the statements contained in the dying declaration, alleging that the accused counselled or procured V. K. herself to bring about or undergo an abortion operation, were irrelevant and therefore inadmissible. The only statement that may have a bearing at all upon the charge as laid could not possibly support a conviction on that charge, and, therefore, ought to have been excluded. Thus all parts of the declaration are shown to have been inadmissible. If, however, any portion of it could be thought to be admissible, the admissible parts should have been placed before the jury, separate and apart from the document.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the conviction of the appellant for manslaughter, in a trial before D. A. McDonald J. and a jury.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

R. L. Maitland K.C. for the appellant.

Gordon McG. Sloan K.C. for the respondent.

The judgment of Lamont and Davis JJ. was delivered by

DAVIS J.—The real question in this appeal is as to the admissibility of a dying declaration. It is common ground that the case against the accused cannot be established without the evidence of the dying declaration.

(1) [1935] 2 W.W.R. 146.

In the words of Byles, J., in *Rex* v. *Jenkins* (1),

> These dying declarations are to be received with scrupulous, I had almost said with superstituous, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected.

Here the indictment in my opinion is not one for homicide but for the statutory offence of abortion (sections 69 and 303 of the Criminal Code). The sections of our statute which define and prescribe a punishment for abortion do not make the death of the woman one of the constituent elements of the offence. Where, however, as in some of the United States, the statutes provide for the punishment of abortions resulting in death, 1 Corpus Juris, p. 326, the woman's dying declarations have been admitted upon the ground that the death is an essential ingredient of the offence and the subject of the charge.

As early as 1824, in *The King* v. *Mead* (2) Abbott C.J. stated the general rule that evidence of dying declarations is only admissible where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration. In a footnote to the report of that case, *Rex* v. *Hutchinson,* tried before Bayley, J., at the Durham Spring Assizes, 1822, is referred to. There the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of enquiry. Then in *Regina* v. *Hind* (3), the accused was tried and convicted upon an indictment charging him with feloniously and unlawfully using certain instruments upon the person of one Mary Woolford, deceased, with intent to procure the miscarriage of the said Mary Woolford. On the trial, a dying declaration of the said Mary Woolford was tendered in evidence on the part of the prosecution and objected to on the part of the prisoner, upon the ground that the death of Mary

(1) (1869) 11 Cox's Cr. C. 250. (2) (1824) 2 Barn. & Cres. 605.
(3) (1860) 8 Cox's Cr. C. 300.

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Woolford was not the subject of the enquiry. Pollock, C.B., in delivering the judgment of the Court of Criminal Appeal, said:

> In this case we are all of opinion that the dying declaration of the woman was improperly received in evidence. The rule we are disposed to adhere to, is to be found laid down in *Rex* v. *Mead* (1). There Abbott C.J. said, "The general rule is, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." Speaking for myself, I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England, which I think ought not to be extended.

The conviction was quashed.

If the indictment here can properly be said to be one for homicide (though I do not think it can) the dying declaration is in fact a lengthy narrative by the deceased which day by day she related to her mother, who wrote down the story. This narrative, which concludes with the words "I wish Carl punished," appears to have been read over to the deceased shortly before her death and adopted by her at that time as a true statement. A number of questions at the same time were submitted to her by police officers, and her answers with the questions were the subject matter of two separate declarations. The narrative, together with the two short statements containing the questions and answers, were all put before the jury. Upon any view of the matter, much of the narrative and the statements was plainly outside the competence of a dying declaration in that many of the facts alleged and the wish expressed by the deceased were irrelevant as no part of the *res gestae,* extending far beyond the immediate circumstances of the death of the declarant, and were most harmful to a fair trial of the accused. Clearly, dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived. To permit an entire statement to go to a jury, with instructions from the trial judge to disregard such portions as he might point out to be irrelevant and inadmissible, may in the case of a simple and short statement be proper, but in a statement in the form of a lengthy narrative it would be highly improper in my view to permit the whole statement to go to the jury notwithstanding instructions from

(1) (1824) 2 Barn. & Cres. 605.

the judge as to the portions which he thought incompetent. In spite of instructions, the jury might easily be influenced against the accused. There is authority, on the other hand, for the Court entirely excluding such portions of the declaration as the judge might consider irrelevant and inadmissible, but in the case of a lengthy statement in the nature of a narrative (most of which is irrelevant and inadmissible) it would be difficult if not impossible to pick out certain sentences here and there to submit to a jury without altering the meaning which the same bore with the remainder in its orignal context, and such a course is too dangerous to adopt.

There being plainly no evidence upon which a conviction could properly be sustained without the admission of the dying declaration, the appeal must be allowed and the conviction quashed, and pursuant to section 1014 (3) (*a*) and section 1024 of the Criminal Code, a judgment and verdict of acquittal directed to be entered.

The judgment of Cannon and Crocket JJ. was delivered by

CANNON J.—The appellant was found guilty of manslaughter, with a strong recommendation to mercy, and sentenced to five years' imprisonment on the following indictment:

That he did unlawfully between the twenty-ninth day of August, in the year of our Lord one thousand nine hundred and thirty-four, and the sixteenth day of September one thousand nine hundred and thirty-four, at or near Greenwood, or Grand Forks, in the said county of Yale, counsel or procure a certain person, to wit, Grietje Sundquest, to commit an indictable offence, namely, to use unlawfully on the person of Veronica Kuva an instrument or instruments with intent to procure a miscarriage of Veronica Kuva, which offence the said Grietje Sundquest did commit and did thereby kill and slay the said Veronica Kuva against the form of the statute in such case made and provided and against the peace of our Lord the King, his Crown and Dignity.

The Court of Appeal of British Columbia dismissed his appeal on the 23rd of January, 1935 (1), and the formal judgment sets out that the Honourable Mr. Justice McPhillips dissented on the grounds in law that:

(1) The dying declaration of Veronica Kuva was wrongfully admitted in evidence; or wrongfully admitted as to counselling; and

(2) that the learned trial judge misdirected the jury respecting the said evidence of the said Veronica Kuva.

(1) [1935] 2 W.W.R. 146.

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All agree that if the dying declaration be inadmissible, there is no evidence upon which a jury could find against the appellant.

The learned dissenting judge first says that it is by no means clear that the dying girl made the declaration when in extremity and at the point of death. We are not in a position to decide this point, in view of the fact that the evidence of the circumstances surrounding the making and taking of the alleged dying declarations is not before us; moreover, the question whether the deceased had such a belief of impending death as to make her declaration admissible as a dying declaration was for the judge and not for the jury. We are unable from the record to say that the circumstances were such that the judge's decision to admit the statement of the deceased as a dying declaration was against the law.

The learned dissenting judge adds the following:

If it could be said successfully that the dying declaration is receivable in evidence all reference to counselling should be excluded from the declaration—see *Regina* v. *Horsford*—referred to in *Regina* v. *Rowland* (1) —further admittedly it is the evidence of an accomplice and whilst it may well be said that the learned trial judge did give at first the proper warning to the jury—he with great respect went on and said this—which to my mind constituted a fatal error—

"If keeping all these things in mind, the dangers, and the law as I have tried to give it to you, you say 'Well, I have thought this over 'carefully, the judge has told us we can do it if we see fit to do it. He 'has warned us of the danger, and warned us we ought not to do it, still 'we think in this case if there ever was a case we ought to convict.' If you feel that way, gentlemen, then it is your duty to convict, but be very, very careful."

This amounted to a direction to the jury that if they believed the evidence of the accomplice although uncorroborated *it was their duty to convict the appellant*. This course of action on the part of the trial judge was in effect to render nugatory the safeguard of the law—that is, he in the end failed to give the proper warning to the jury as to the danger of convicting on the evidence of the accomplice without corroboration in a material particular implicating the appellant—that being the case the conviction should be quashed—*Rex* v. *Tate* (2); *Rex* v. *Baskerville* (3); *Rex.* v. *Charavanamuthu* (4).

Our jurisdiction in this matter is limited to the questions of law raised by the learned dissenting judge as above.

Instead of simply indicting the appellant with murder, or manslaughter, the Crown compounded a charge of coun-

(1) (1898) 62 J.P. 459.
(2) [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 1 Cr. App. R. 39.
(3) [1916] 2 K.B. 658; 12 Cr. App. R. 81.
(4) (1930) 22 Cr. App. R. 1.

selling and procuring, between the 29th day of August and the 16th day of September, 1934, the abortionist to use unlawfully instruments with intent to procure the miscarriage of Veronica Kuva; and the indictment adds that the abortionist did commit the indictable offence charged, viz., the unlawful use of instruments, and did thereby kill and slay the person whose dying declaration was used against the appellant.

It is evident that the person who drew the indictment had in mind, first, section 69 (*d*) of the code and, secondly, used the terms of section 303 of the Criminal Code, which reads as follows:

303. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her any instrument or other means whatsoever with the like intent.

The date of the death of the girl is not mentioned in the indictment. This would seem to be an important ingredient, if the Crown Attorney had in mind a charge of homicide, in view of section 254 of the code:

254. No one is criminally responsible for the killing of another unless the death takes place within a year and a day of the cause of death.

2. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place.

There is no doubt that the charge, which is particularized, does not specify the requirements of section 259 of the code concerning murder. No malice aforethought is alleged. It did not even state that the appellant did counsel or procure an act which he knew or ought to have known to be likely to cause death. The indictment says that he counselled the unlawful use of an instrument with intent to procure a miscarriage; but does not say that he knew or ought to have known that this was likely to cause death.

However that may be, and without deciding whether or not the combination or compound of these elements might constitute a charge of homicide, it is nevertheless true that, *qua* the appellant, the Crown had to rely on section 69 (*d*) and prove first that he had counselled or procured the abortion; otherwise he was not amenable to answer for the happenings subsequent to the 16th of September. In order to prove this essential element and link

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him to the abortion and killing, can the dying declaration be used? His alleged relations with the woman Sundquest is a subject-matter different from that of the immediate circumstances of the death of Veronica Kuva. The statement of the deceased may perhaps be used to prove the cause of the death, the intervention of the abortionist's instrument, but could not be used as evidence that from August to the 16th of September the accused had anything to do with the abortionist. The alleged declarations were heard and taken on the 3rd and 4th of October, 1934, and covered events subsequent to the 16th of September, viz., the illness of the patient and the other facts connected with the fatal result of the abortion—i.e., with the killing. It would be dangerous to allow such an extension of the exception to the law of evidence which admits in cases of homicide only, although hearsay evidence, the unsworn statement of the victim (whose death must be the subject of the charge) although such statement is not made in the presence of the accused and is not tested by cross-examination. Even if the dying declaration may have been admissible as a whole against the woman Sundquest (which is at least doubtful) it certainly could not be used to prove circumstances, not directly and immediately connected with the illegal application of instruments which finally brought death.

In *Rex* v. *Gloster* (1), Charles J., upon an indictment for murder, by performing an illegal operation, statements made by a dying woman, in the absence of the prisoner, were held admissible as to contemporaneous symptoms of her bodily condition but nothing in the nature of a narrative was held admissible *to show who caused them or how they were caused.*

The Court of Appeal in *Rex* v. *Thomson* (2) approved this ruling and Lord Alverstone C.J., Darling and Avory JJ. quoted Charles J. as a great authority. I take this to be the law.

Moreover, it is doubtful whether or not the only part of the declaration implicating the appellant as "having, that night (2nd of September) talked to Mrs. Sundquest" relates to a conversation in the presence of the girl, or is only hearsay as far as she is concerned. If only

(1) (1888) 16 Cox 471.

(2) [1912] 3 K.B. 19, at 22.

hearsay, she would not have been competent to testify about the alleged conversation if sworn in the cause; therefore, her declaration as to this matter would not be admissible.

In view of the above, it is not necessary to determine the second question raised by the dissenting judgment.

We will, therefore, allow the appeal; and, as there is no other evidence available against the appellant, direct a judgment and verdict of acquittal to be entered.

DYSART J. (*ad hoc*)—in dissenting from the majority of the learned judges of the Court of Appeal of British Columbia (1), Mr. Justice McPhillips says: "In my opinion the conviction herein must be quashed. Without the dying declaration *there is no evidence* upon which the jury could found their verdict—and my view is that the dying declaration is inadmissible in law." The reasons for his dissent may be summarized thus: (1) that the declarant was not at the point of death when she made the declaration, or if she was, she did not realize it; (2) that the portions of the declaration relating to counselling are inadmissible in any event; (3) that the jury were not properly warned of the danger of convicting on the uncorroborated evidence of the declarant, who was an accomplice.

This dissent involves several questions of law, any one of which, if the dissenting judge is correct, would be fatal to the conviction. The most important of these is the question of admissibility. While the right of a convicted person to appeal to this Court is confined to "any question of law on which there has been dissent in the Court of Appeal" which affirmed his conviction (section 1023 Cr. C.) this Court is not restricted on such appeal to the grounds or reasons upon which the dissent is based but may deal with the question of law entirely upon its merits.

Dying declarations are admissible in evidence only in cases of homicide, where the death of the deceased is the subject of the charge and where the circumstances of the death are the subject-matter of the declaration: *Reg.* v. *Hind* (2). The first condition of admissibility of such declaration is that the charge laid against the accused, on

(1) [1935] 2 W.W.R. 146.

(2) (1860) 8 Cox C.C. 300.

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whose trial the declaration is tendered, shall be one of homicide. Is that condition satisfied in this case?

The charge, which is set out verbatim in the reasons of Mr. Justice Cannon, need not be repeated here. It contains a direct allegation, and a statement of facts and consequences. The direct allegation is that the accused did

> counsel or procure * * * Grietje Sundquest to commit an indictable offence, namely, to use unlawfully on the person of Veronica Kuva an instrument or instruments with intent to procure a miscarriage of Veronica Kuva.

Then follows

> which offence the said Grietje Sundquest did commit and did thereby kill and slay the said Veronica Kuva. * * *

Is the direct allegation of counselling or procuring sufficiently strengthened or buttressed by the succeeding words to constitute a charge of homicide? Every charge must be clear and unmistakable. Although section 852 of the Criminal Code dispenses with the need of technical language and unnecessary matter in charges, it does not dispense with the necessity of specifying the offence in "words sufficient to give the accused notice of the offence with which he is charged." The offence so specified is the only one on which the accused can properly be tried, and the prosecution must confine itself strictly within the terms of the specifications. The specifying of the offence is equivalent to, or analogous with, the giving of particulars, and restricts the field of the prosecution. Where evidence is tendered which is outside of the confines of the specified charge, it is inadmissible for irrelevancy, and even though not objected to by counsel, should be excluded by the trial judge whose duty and responsibility it is to see that nothing but properly admissible evidence is placed before the jury. Although the charge, as here laid, seems to contain all the elements or factors of a charge of homicide, that alone is not enough to satisfy the requirements of such a charge.

Assuming, without deciding, that the charge might be considered one of homicide, the most that can be said for it is that it is homicide by the specified means of counselling or procuring Mrs. Sundquest to commit the crime, thereby making the accused a principal party under s. 69. On this view any evidence tending to prove that the accused committed homicide by means other than the *counselling or procuring of Mrs. Sundquest* is irrelevant and inadmissible.

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The dying declaration, which is in writing, contains much matter which could not on any view be regarded as relevant to the circumstances of the death. These portions may or may not have been prejudicial to the accused on his trial. If they were, they should have been excluded, and the exclusion of them would exclude the written declaration as a whole. Then there are statements lying nearer the circumstances of the death, but these have to do almost exclusively with transactions between the accused and the declarant herself. The efforts of the accused in counselling or procuring the declarant to undergo the illegal operation are therefore inadmissible on the grounds above stated. These statements are to the effect that the accused was responsible for the declarant's pregnancy; that after he had tried unsuccessfully to bring about miscarriage by counselling or procuring her to take certain pills, which she did take with intent to bring about miscarriage, he counselled her to go to Grietje Sundquest "to get rid of the baby"; that he handed her $20 to give to Mrs. Sundquest and said that if the sum were not enough he would give her more later; that he on one occasion conveyed her to the vicinity of Mrs. Sundquest's premises, and on other occasions supplied her with carfare for transportation to the same place. These and other such statements were inadmissible because irrelevant, and in as much as their effect upon the jury must have been prejudicial to the accused, ought not to have been admitted. Their exclusion would exclude the document as a whole.

The only statement contained in the declaration that bears at all upon the charge as laid is that the accused on the night of September 2 "spoke to Mrs. Sundquest." It is not shown whether the declarant stated this from personal knowledge or from hearsay, nor is the subject of the conversation between the accused and Mrs. Sundquest mentioned. There is nothing to indicate that he at that time counselled or urged Mrs. Sundquest to bring about miscarriage. The inference is that the subject was not mentioned, as shown by another statement in the declaration, that the declarant when she first visited Mrs. Sundquest said "my boy friend sent me"—a statement to which Mrs. Sundquest is not reported to have replied, and which suggests that the accused had not previously

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spoken to Mrs. Sundquest on the subject. Apart from these statements there is nothing in the dying declaration to show the accused had ever directly or indirectly communicated with Mrs. Sundquest. These statements could not possibly support a conviction on the charge as laid and, therefore, ought to have been excluded.

Thus all parts of the declaration are shown to have been inadmissible. If, however, any portion of it could be thought to be admissible, the admissible parts should have been placed before the jury, separate and apart from the document. This might have been done by witnesses using the document to refresh recollection and putting in the relevant or admissible portions in that form: *Thiffault* v. *The King* (1).

It is unnecessary to deal with the other questions raised on the dissent. The appeal should be allowed and a verdict of acquittal should be entered.

Appeal allowed.