PATRICK CANNING ..... APPELLANT; 1937

AND

HIS MAJESTY THE KING ..... RESPONDENT.

* April 28.
* June 1.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

Criminal law—Evidence—Charge of conspiracy to distribute drug—Evidence of accomplice—Corroboration.

The appeal was from the affirmance by the Court of Appeal of British Columbia of appellant's conviction for conspiracy to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929,* (Dom.). There was a dissent in the Court of Appeal on the ground of lack of corroborative evidence and misdirection with regard thereto.

The evidence against appellant was almost wholly that of one F., named as a co-conspirator of appellant but who had previously been tried and convicted. F.'s story set out conversations and dealings with appellant as to the sale of morphine and in particular an occasion when he had met him at a certain house and went with him out of a room there where others were gathered, and had a private conversation with him as to delivery of morphine. A police agent gave evidence that he was present on said occasion, that the place was one where dealings in morphine were being carried on by some of those

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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involved in the conspiracy, and that he had seen F. and appellant leave the room together. Appellant in evidence admitted being present at the place at the time, but denied that he had any private conversation with F.

In the course of charging the jury the trial judge stated that, while it is open to a jury to convict upon the uncorroborated testimony of an accomplice, it is dangerous to do so; that "corroboration is such evidence as confirms not only the circumstances of the crime as related by the accomplice, but also the identity of the prisoner; by that I do not mean that it will not be corroboration unless every circumstance is confirmed; it will be corroboration if there is confirmation as to a material circumstance of the crime and of the identity of the prisoner; evidence to amount to corroboration need not be direct evidence that the accused committed the crime, it may amount to corroboration if it is confirmation of a material circumstance and it connects the accused with the crime." Referring to the police agent's evidence, he said it "amounts to only this: it is a confirmation, if you accept it, of F.'s evidence as to the conspiracy on the part of the others outside of [accused]; he does appear to corroborate him on substantial points"; and that "all that amounts to is this: it is proof of a fact, if you accept what F. tells you, that it did occur; if you accept that, then you have [the police agent's] corroboration of nothing more or less than that the conference which F. says occurred, did occur; that is all it corroborates, and the inference there is for you, * * *." He further stated: "If you think that corroboration is necessary then it is for you to say whether you have corroboration which falls within the definition I have given you."

Held (Kerwin J. dissenting): On consideration of the summing up as a whole and in view of all the circumstances, there was no material misdirection or non-direction on the point of corroboration. The appeal should be dismissed.

Per Kerwin J. (dissenting): As the police agent's testimony indicated merely an opportunity on accused's part to discuss with F. the delivery of morphine, the trial judge was wrong in telling the jury that the police agent's evidence, if believed, was corroboration. There were no circumstances surrounding the particular episode that would tend to implicate accused in the commission of the crime charged (the house in question being a boot-legging establishment where those desiring beer, etc., might be served). Opportunity by itself is not sufficient (*Burbury* v. *Jackson*, [1917] 1 K.B. 16).

Kerwin J. criticized as improper the fact that, while F. had pleaded guilty to a charge of conspiracy under the same Act, he had not been sentenced at the time he gave evidence at appellant's trial.

APPEAL from the judgment of the Court of Appeal of British Columbia affirming (Martin J.A. dissenting) the conviction of the appellant (on trial before Manson J. with a jury) for conspiracy with others to commit the indictable offence of distributing a drug (morphine) contrary to s. 4 (*f*) of the *Opium and Narcotic Drug Act, 1929* (Dom.) and amendments thereto. By the judgment now reported the appeal to this Court was dismissed, Kerwin J. dissenting.

L. Clare Moyer K.C. for the appellant.

Gordon S. Wismer K.C. for the respondent.

The judgment of the majority of the Court (Duff C.J. and Rinfret, Davis and Hudson JJ.) was delivered by

HUDSON J.—The appellant Canning was convicted at the trial before Mr. Justice Manson of the Court of King's Bench of British Columbia and a jury, of unlawfully conspiring to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929*. From this decision he appealed to the Court of Appeal of British Columbia and in that court the appeal was dismissed by a majority of 2 to 1. In the formal judgment the reasons for dissent by Mr. Justice Martin are stated to be that

there is no evidence to corroborate the witnesses for the prosecution; and that there was misdirection and non-direction amounting to misdirection respecting said corroboration and also respecting the consequences of the erroneous direction that there was such evidence.

No written reasons for dissent appear to have been delivered.

Under section 1023 of the *Criminal Code* our jurisdiction in this case is confined to any question of law in which there has been dissent in the court of appeal. Neither in the language of the formal judgment nor in the notice of appeal is there a clear statement of the point or points of law upon which dissent rests, and it is questionable whether or not there is sufficient to give jurisdiction. However, we have not thought it necessary in the present instance to decide this question.

The evidence against Canning was almost wholly that of a man named Furumoto who was named in the indictment as a co-conspirator of Canning but who had previously been tried separately and convicted. Furumoto gave a detailed story setting out various conversations and dealings with Canning in regard to the sale of morphine and, in particular, that on one occasion in the course of the negotiations he had met him at the house of one Ferraro and while there went out of the room where others were gathered and had a private conversation with Canning in regard to the delivery of a quantity of morphine. A man named Morley Fisher, an agent of the Mounted Police, was called as a witness on behalf of the Crown and stated that he was present on the occasion above mentioned, that the place

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was one where dealings in morphine were being carried on by some of the parties involved in the conspiracy and that he had seen Furumoto there in conversation with Canning and that they had gone out together. Canning was called as a witness on his own behalf and admitted being present at this place on the evening in question but denied that he had any private conversation with Furumoto.

The learned trial judge in his charge to the jury correctly stated the law in regard to the danger of accepting the evidence of an accomplice without corroboration and expressly gave to the jury the necessary warning as stated in the judgment of this Court in the case of *Vigeant* v. *The King* (1). It was contended before us that in this instance the trial judge should not only have stated the law and given the warning as to the danger of accepting the evidence of an accomplice, but also should specifically have charged that the evidence of Fisher put forward on behalf of the Crown did not amount to corroboration.

The learned trial judge in his charge stated:

> Corroboration is such evidence as confirms not only the circumstances of the crime as related by the accomplice, but also the identity of the prisoner. By that, I do not mean that it will not be corroboration unless every circumstance is confirmed. It will be corroboration if there is confirmation as to a material circumstance of the crime and of the identity of the prisoner. Evidence to amount to corroboration need not be direct evidence that the accused committed the crime—it is important to bear that in mind here. Let me repeat it. Evidence to amount to corroboration need not be direct evidence that the accused committed the crime, it may amount to corroboration if it is confirmation of a material circumstance and it connects the accused with the crime. I repeat: while it is open to a jury to convict upon the uncorroborated testimony of an accomplice, it is dangerous to do so.

He further stated:

> Now you will remember what I said about corroboration. Corroboration is always important, whether the question of an accomplice arises or not, particularly when you have a flat contradiction, as you have here. Fisher says he was there on the famous Saturday night. It is urged upon you, and it is something for you to consider, that as Fisher said he did want to get Canning—there is no denying that he said he was the very man he wanted to get—it is suggested to you in the defence that Fisher is not telling the truth. Now how far does Fisher go, taking his own statement: "I knew about this man Canning and wanted to get him." What evidence have you that he wanted to get him? The only evidence he gives is the evidence that on this Saturday night he saw the accused call Furumoto away from the kitchen for a conference. He says they went to the foot of the stairs in the front room, and he said at one point that they went upstairs, but obviously he did not actually see them go

(1) [1930] S.C.R. 396.

upstairs. He perhaps, giving him credit for truthfulness, if you so desire, he probably was giving a conclusion there from what he saw them do, rather than an actual statement of fact, because he says in cross-examination he did not see them go upstairs, although he said so before, and he then said "the living room and the foot of the stairs were out of my range of vision." Furumoto says definitely they did leave the kitchen at the accused's request and did go upstairs. Fisher's evidence amounts to only this: it is a confirmation, if you accept it, of Furumoto's evidence as to the conspiracy on the part of the others outside of Canning. He does appear to corroborate him on substantial points.

At the conclusion of the charge, counsel for the prisoner asked this question:

Did I understand your lordship's instructions to be the jury might consider Morley Fisher's statement that he heard Canning ask Furumoto to go upstairs, to be corroborative evidence—that they might consider it as such?

The Court:

Yes, I think so. The charge is that this conspiracy was between certain dates, and it is not confined to the sale of these two particular half pounds, if sale there was, by Furumoto to Canning. The charge is not confined to these two particular incidents. It says he did conspire between the 15th day of August, 1934, and the 1st day of March, 1936. Now then if it be that Furumoto and the accused conferred at a time and place within these dates—Fisher does not say, of course, and you know this perfectly well, members of the jury, Fisher does not say he overheard the conversation. He does not know what the conversation was. It might have been as to the weather. All that amounts to is this: it is proof of a fact, if you accept what Furumoto tells you, that it did occur. If you accept that, then you have Fisher's corroboration of nothing more or less than that the conference which Furumoto says occurred, did occur. That is all it corroborates, and the inference there is for you, as I pointed out.

Then, after some further discussion, the learned trial judge said:

I think the best thing I can do for you is to read again what constitutes corroboration. It may be just as well that I should read that to you now so that you will have it fresh. Corroboration is such evidence as confirms not only the circumstances of the crime as related by the accomplice, but also the identity of the prisoner. By that I do not mean that it will not be corroboration unless every circumstance is confirmed. It will be corroboration if there is confirmation as to a material circumstance of the crime and of the identity of the prisoner. Evidence to amount to corroboration need not be direct evidence that the accused committed the crime, it may amount to corroboration if it is confirmation of a material circumstance and it connects the accused with the crime. Then you will remember with what I concluded. I told you it is open to a jury to convict upon the evidence of an accomplice alone if they are so advised—if that is their opinion—but it is dangerous to do so without corroboration. If you think that corroboration is necessary then it is for you to say whether you have corroboration which falls within the definition I have given you.

On consideration of the summing up as a whole and in view of all the circumstances, we do not think that there

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was material misdirection or non-direction on the point of corroboration. The appeal should be dismissed.

KERWIN J. (dissenting)—The appellant was convicted of unlawfully conspiring to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929*. The only direct evidence against him was given by one Furumoto, who testified that on a certain occasion a conversation took place between him and the accused, and that at a subsequent date, in the house of one Ferraro, another conversation occurred between them. It is of this latter date that the witness Fisher, a Mounted Police agent, spoke, and he testified that he saw the two leave Ferraro's kitchen together. Furumoto's evidence was that they went upstairs and that it was there a conversation occurred in regard to the delivery of a quantity of morphine. Fisher, of course, could not, and did not, attempt to speak of what transpired between Furumoto and the accused.

The learned trial judge told the jury that Fisher's evidence, if believed, was corroboration within the meaning of the rule. With this I cannot agree, as Fisher's testimony indicated merely an opportunity on the part of the accused to discuss with Furumoto the delivery of morphine. There were no circumstances surrounding the particular episode that would tend to implicate the accused in the commission of the crime charged, as Ferraro conducted a boot-legging establishment, according to all the evidence, where those who desired to obtain beer and other refreshments might be served.

Opportunity by itself is not sufficient. *Burbury* v. *Jackson* (1). The main judgment in that case was delivered by Lord Reading, who had delivered the judgment of the Court of Criminal Appeal in *The King* v. *Baskerville* (2). At page 18 of the *Burbury* case (1), the Lord Chief Justice states:

> The evidence here shows nothing more than that it was possible to have committed the misconduct at the material date. That is not enough. The evidence must show that the misconduct was probable. If the parties were seen in the neighbourhood of a wood or other dark place where they had no occasion to be, that might possibly be corroborative evidence. So in the case cited of *Harvey* v. *Anning* (3) the fact of persons of different social positions being seen together in lanes was held enough.

(1) [1917] 1 K.B. 16. (2) [1916] 2 K.B. 658.
(3) (1902) 87 L.T. 687.

Whether there was other evidence in which the jury could, if properly directed, find corroboration, is immaterial as the trial judge did not refer to it in his charge but on the contrary directed the jury that Fisher's evidence, if believed, was corroboration. *Hubin* v. *The King* (1).

While not open on this appeal, there is a matter that should, I think, be referred to. That is, that while Furumoto had pleaded guilty to a charge of conspiracy, under the same Act, he had not been sentenced at the time he gave evidence at the trial of the present applicant. This is a practice that should not be tolerated.

In my opinion, the appeal should be allowed and a new trial directed.

Appeal dismissed.

Solicitor for the appellant: *William J. Murdock.*

Solicitor for the respondent: *Gordon S. Wismer.*