JAMES LAIRD NORTHEY, PAUL MALCOLM NORTHEY, ARCHIBALD JOHN NORTHEY..... APPELLANTS;

1948
*Feb. 3, 4, 5
*Mar. 23

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conspiring to defraud—Effect of reception of inadmissible evidence—Appeal from conviction—Onus on Crown under section 1014 (2) of Criminal Code—Trial by judge alone—Trial judge's report under section 1020 of Criminal Code—Substantial wrong and miscarriage of justice—New trial—Section 444 of Criminal Code—Department of Munitions and Supply Act, 1940 Statutes of Canada, c. 31—Interpretation Act, R.S.C. 1927, c. 1.

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) (1919) A.C. 935 at 942.

(2) [1948] S.C.R. 28.

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The three appellants were convicted on a charge of conspiring to defraud the Crown contrary to section 444 of the Criminal Code. The charge was that they had entered into an unlawful agreement to evade payment of income tax. At the trial, the Crown introduced statements made by the accused at an inquiry held under the provisions of the Department of Munitions and Supply Act, section 19 of which prohibited their disclosure as was unanimously decided by the Court of Appeal. The majority of the Court of Appeal held that there had been no miscarriage of justice notwithstanding the improper reception of the statements. The accused appealed from this judgment.

Held: reversing the judgment appealed from ([1947] 2 W.W.R. 289), Kerwin J. dissenting, that the onus of the Crown to satisfy the Court that there would without doubt have been a conviction had the illegal evidence been excluded, has not been discharged.

Per Kerwin J. (dissenting):—The appellants had a fair trial even though the inadmissible evidence was introduced and the trial judge could not have failed to convict on the admissible evidence.

APPEAL and Cross-Appeal from the judgment of the Court of Appeal for British Columbia (1), affirming (Sloan C.J. and Robertson J.A. dissenting) the conviction of the appellants on a charge of conspiring to defraud His Majesty the King in the right of the Dominion of Canada, contrary to section 444 of the Criminal Code.

Hon. J. W. deB. Farris, K.C. and *John L. Farris* for the appellants.

G. L. Fraser, K.C. for the respondent.

KERWIN J. (dissenting):—While relying upon the dissenting judgment of the Chief Justice of British Columbia (1), Mr. Farris preferred to state his proposition in a wider form and to treat the cases referred to by the Chief Justice as mere examples. His argument was that if the Wilson evidence, which the Court of Appeal (1) unanimously held to be inadmissible, is put aside, the accused never really had a fair trial because his counsel was in effect prevented from cross-examining upon the balance of the evidence. I am unable to assent to that contention because in circumstances such as are present here, counsel have to take the responsibility as to cross-examination upon all the evidence adduced by the Crown in respect of the charge.

(1) [1947] 2 W.W.R. 289.

On the point as to whether there was a miscarriage of justice, I have come to a conclusion without regard to the report made by the trial judge although I am unable to say, as the Court found it possible to decide in *Baron* v. *The King* (1), that this was not a report within *section 1020* of the *Criminal Code*. No report had been made by the trial judge and it was only after the case had been argued for two days, and after the Court of Appeal (2) had unanimously decided that the Wilson evidence had been improperly admitted, that the Court (2), at the request of counsel for the accused, requested the trial judge to send in his report. Some of the provisions of *section 1020* may be considered archaic as in practically all cases the evidence is now taken down and transcribed by a short-hand reporter so that the direction in the section that the trial judge shall furnish in the Court of Appeal his notes of the trial appears to be meaningless. I quite agree that the proper time to comply with the section is before any appeal from the judgment is heard but it seems rather strange that, after the report had been furnished at the time and in the manner I have indicated, complaint is now made to its reception and its contents.

In jury cases, the test is the same where inadmissible evidence has been allowed as in cases of misdirection; that is, could a reasonable jury have failed to convict on the remainder of the evidence? I have not overlooked the decision in *Allen* v. *The King* (3), but each case must depend on its own facts. The present case was tried by a judge without a jury and in my opinion he could not have failed to convict each of the appellants on what the Court of Appeal decided was admissible evidence and the appeal should be dismissed. The Criminal Code limits the cases in which an Attorney-General or accused may come to this Court and there was therefore no authority for the cross-appeal by the Crown, which is dismissed.

TASCHEREAU J.:—The appellants were found guilty by His Honour Judge Lennox on a charge of conspiring together, by deceit or falsehood or other fraudulent means, to defraud the Crown contrary to *section 444* of the *Criminal*

(1) [1930] S.C.R. 194.
(2) [1947] 2 W.W.R. 289.
(3) (1911) 44 S.C.R. 331.

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Code. It is suggested that the appellants entered this alleged unlawful agreement for the express purpose of evading the payment of income and excess profit taxes.

In 1942, the West Coast Shipbuilders Limited was engaged in building at Vancouver for the Dominion Government, fifty-five 10,000 ton ships. The J. L. Northey & Sons Limited, of which the principal officers and shareholders were the three appellants, contracted for the construction of the ships' furniture, and during the same year, this contract was assigned by J. L. Northey & Sons Company Limited, to a newly formed company known as the Millwork Industries Limited, and of which the appellants were also the only directors and shareholders.

It was the contention of the Crown at the trial, that the appellants attempted to defraud the Dominion Government by means of falsification of invoices. Each of the appellants had other companies in which they were interested and which they owned and controlled. For instance, appellant J. L. Northey, father of the two other appellants, was particularly interested in J. L. Northey Company Limited and in Millout Homes & Lumber Company. An other appellant, Paul Northey, was president of Paul Northey Homes Limited, and the third appellant, Archibald Northey, was the owner of Northey Construction Company Limited. These three companies were indebted to other companies for merchandise sold.

It is the Crown's submission that the appellants paid some of their personal accounts and also some of the accounts of the companies they controlled out of the funds of the Millwork Industries Limited. Invoices would be falsified so that in the books of the Millwork Industries Limited, the amounts of the cheques were charged to the costs of the operation of that company. As a result of this procedure, the debts of the other companies would be reduced and the profits of Millwork Industries Limited would be diminished, with the result that the Crown would lose income and excess profit taxes.

Before the charges were laid against the appellants, a Dominion investigator, Mr. James C. Wilson, conducted an inquiry under the provisions of the *Department of Munitions and Supply Act—1940, Statutes of Canada,*

chap. 31. He interviewed the three appellants, and the statements made by them were introduced at the trial before His Honour Judge Lennox. The Court of Appeal (1), the Chief Justice and Mr. Justice Robertson dissenting, dismissed the appeal, but during the hearing, the Court unanimously decided that the "Wilson evidence" had been improperly received by the trial judge, because of the prohibition against its disclosure found in *section 19* of the *Department of Munitions and Supply Act.* Notwithstanding the fact that this evidence was ruled out, the majority of the Court held in effect that there had been no miscarriage of justice, affirmed the conviction and denied to the accused a new trial.

The dissent of the Chief Justice, in which Mr. Justice Robertson concurred, is based on the ground that the improper reception of the "Wilson evidence" was so prejudicial, that the accused did not have a fair trial. They held that with the evidence that was left, it was not for the Court of Appeal to determine the guilt or innocence of the appellants, and that it would be to assume the role which is reserved to the jury or to the trial judge, if they attempted to weigh that evidence and to come to any conclusion.

During the argument before this Court, Mr. G. L. Fraser, K.C., counsel for His Majesty the King, who has filed a cross-appeal, argued that the Court of Appeal (1), was wrong in excluding the evidence given by Mr. Wilson. It seems quite unnecessary to deal with the right which the Crown may have to cross-appeal, or with its right to ask without cross-appeal that the judgment of the learned trial judge be affirmed, even for reasons other than those given by the Court of Appeal, as I come to the conclusion that on this point, the decision of the Court below was sound.

Section 19 of the *Department of Munitions and Supply Act, as amended by section 12 of Chap. 31, Statutes of Canada, 1940,* says:—

19. (1) No information with respect to an individual business which has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business:—

(1) [1947] 2 W.W.R. 289.

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Provided that nothing in this subsection shall apply to the disclosure of any information—

(a) to a government department, or any person authorized by a government department, requiring such information for the purpose of the discharge of the functions of that department; or

(b) for the purposes of any prosecution for an offence under this Act, or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.

(2) If any person discloses any information in contravention of this section, he shall be guilty of an offence under this Act.

As the present prosecution is under *section 444* of the *Cr. Code* and not under the *Department of Munitions and Supply Act,* the proviso contained in *section 1 (b)* does not apply.

Moreover, the contention of the Crown is that the power of the Minister of Munitions and Supply, to direct that an inquiry be held, was not given until 1943, when the *Department of Munitions and Supply Act* was amended to so provide. Therefore the prohibition against disclosure of information would apply only to information obtained under the provision of the *Act* as it was enacted in 1940, and not to information obtained at an inquiry held by virtue of the 1943 amendment.

I believe that this proposition is unsound in view of the provisions of *section 22* of the *Interpretation Act of 1927, R.S.C. Chap. 1.* This section is as follows:—

22. An amending Act shall, so far as is consistent with the tenor thereof, be construed as one with the Act which it amends.

It seems clear, that the prohibition contained in *section 19* against disclosure of information obtained by virtue of the *Act,* applies to all information obtained by virtue of any section of the *Act,* whenever passed.

The grounds of appeal are stated as follows in appellants' factum:—

1. It is submitted that the majority of the Court of Appeal were wrong in refusing a new trial based on the ground that no miscarriage of justice was caused by the wrongful admission of the Wilson evidence because in their Lordships' opinion the remaining admissible evidence conclusively established the guilt of the appellants. It is submitted that the decision has denied to the accused a fair trial because a conviction following improperly admitted evidence of a confession of guilt *is no trial at all,* and a conviction without a trial necessarily constitutes a miscarriage of justice.

2. In the alternative, it is submitted that the majority of the Court of Appeal were wrong in finding that the trial judge was bound to convict on the evidence which remained after excluding the Wilson evidence and the hearsay evidence wrongfully admitted.

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When evidence has been improperly admitted, as in the present case, the Court of Appeal, in view of *section 1014* of the *Criminal Code,* may dismiss the appeal if, notwithstanding that it is of opinion that the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred. This section of the Criminal Code has been examined by the courts in England where the law is similar, and by many courts in this country.

In Allen *v.* Rex (1), Chief Justice Sir Charles Fitzpatrick said at page 336:—

> The underlying principle of both (the English and Canadian Section) is that, while the Court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong and to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here—the existence of previous threats—and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiased verdict of the jury that the accused was entitled to have.

And further (1) at page 339 he also expressed the following views:—

> It was argued that the Section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. 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 irregularities *are so trivial that it may be safely assumed that the jury was not influenced by it.* If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae.* To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused

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

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in a capital case of the benefit of a trial by jury. The law on this express point was laid down by the Privy Council in *Makin* v. *A.G. for New South Wales* (2) (citing therefrom).

And in *Makin* v. *Attorney-General for New South Wales* (1), the Lord Chancellor said at page 69:—

> The point of law involved is, whether where the judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted and that the accused was guilty of the offence with which he was charged.
>
> It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is 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.

And again at page 70, he said:—

> Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at a verdict matters which ought not to have been submitted to them.
>
> In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of the Jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.
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> Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.

The same principles were reaffirmed by this Court in *Gouin* v. *The King* (2), in *Brooks* v. *The King* (3), and recently in *Schmidt* v. *Rex* (4).

It is also a well established principle that the burden is upon 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 had been improperly admitted. (*Schmidt* v. *Rex* (4)).

(1) [1894] A.C. 57.
(2) [1926] S.C.R. 539.
(3) [1927] S.C.R. 633.
(4) [1945] S.C.R. 438.

The principles enunciated in the above cases must be applied and govern the present case. Illegal evidence of a very damaging character was admitted at the trial, which was highly prejudicial to the accused. It is quite problematical to value all the effects of the admission of this illegal evidence, but it may safely be said, I think, that it may have seriously affected the cross-examination of the Crown witnesses, held out other evidence, and possibly changed the whole strategy of the defence. It may also, and this is quite natural and understandable, have seriously influenced the learned trial judge, in the reaching of his conclusions, as it would have undoubtedly impressed unfavourably upon the minds of twelve jurors.

The learned trial judge made his report to the Court of Appeal (1) during the argument, only after the "Wilson Evidence" had been ruled inadmissible. In view of the decision of this Court in *Baron* v. *The King* (2), this report cannot be considered as having been given within the meaning of *section 1020* of the *Cr. Code,* and should therefore be ignored.

It is possible for this Court to dismiss the present appeal, only if the irregularities are so *trivial* that it may be safely assumed that the trial judge was not influenced by them, or as it was said in the *Schmidt case* (3), "that the verdict *would necessarily* have been the same", if the illegal evidence had not been admitted.

With deference, I cannot come to that conclusion without entering the field of hypothesis and conjecture. As there will be a new trial, I shall not attempt to discuss the evidence given, but I may say that it is not sufficiently convincing to allow me to think, that had this evidence not been introduced, the result would have been the same. This Court is not the proper forum where the guilt or the innocence of the appellants is to be determined.

I entirely agree with the following statement of Chief Justice Sloan in his dissenting judgment: (1)

> The function of this Court is not to retry the accused and to decide upon his guilt or innocence. This Court is a Court of Review, and the issue before us, in this case, is not the guilt or innocence of the accused, but whether or not the accused has had a fair trial on proper evidence.

(1) [1947] 2 W.W.R. 289.
(2) [1930] S.C.R. 194.
(3) [1945] S.C.R. 438.

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If we did come to one conclusion or another, after weighing the evidence that remains, we would substitute ourselves to the trial court, and deprive the accused of his indisputable right to be tried by a jury or a trial judge who have the advantage of seeing and hearing the witnesses.

I agree that the appeal should be allowed, the conviction quashed, and a new trial directed. The cross-appeal should be dismissed.

RAND J.:—The accused, father and two sons, were charged with conspiracy to defraud the Dominion Government in relation to income tax. They were interested in the furniture and housing industries. A company wholly controlled by the father had obtained a contract which ultimately involved the supply of furnishings to fifty-five 10,000-ton ships constructed in British Columbia. To carry out this work the three organized a company named "Millwork Industries Limited" to which for a commission the contract was assigned. At this time two other companies, controlled one by each of the two sons, were being pressed by their creditors.

It was established by a mass of evidence that in the course of the operations of the Millwork Company and in several hundred items, the moneys of that company paid out by cheque were applied to debts of these outside companies as well as to private debts of the three shareholders; and, in certain cases, they were alleged to have been used to pay accounts owing by a third brother who was not interested in the Millwork Company.

As it was a family company, this use of the company's funds, as such, certainly so far as the Crown was concerned, would be unobjectionable. But it did not end there. These disbursements were represented in the company's records either by altered invoices originally directed to the other companies or to the individuals or by fictitious invoices and the whole charged against one or more of the expense accounts of the Millwork Company. It is, therefore, in a conspiratorial connection in one form or another between the accused and these manipulations that guilt lies.

Prior to the prosecution, an inquiry had been held under *section 22* of *The Department of Munitions and Supply Act* as enacted in 1943 which gives the Minister the power to cause such an inquiry to be made "into and concerning any matter relating to or incidental to a contract for the manufacture or production of munitions of war or supplies or for the construction or carrying out of a defence project, and may appoint a person or persons by whom the inquiry shall be conducted." Under *section 19 (1)* passed in 1940 "No information with respect to an individual business which has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business." Certain exceptions to that prohibition are not material here. Before the commissioner, all three of the accused made statements self-incriminatory which, over objection, were admitted in evidence by the trial judge.

On an appeal from conviction, the Court of Appeal (1) during the argument unanimously decided that the admission of this evidence had been improper. They then proceeded to deal with the appeal under *ss. (2)* of *section 1014* of the *Criminal Code* and a majority, O'Halloran, Smith and Bird, JJ. A. with Sloan, C.J. and Robertson, J.A. dissenting, came to the conclusion that "no substantial wrong or miscarriage of justice" had actually occurred; and the case comes here on the point of that dissent.

The finding of guilt was preceded by a short statement of the trial judge in the course of which he made these remarks:

> It is true that the law of conspiracy is somewhat difficult to prove, and it is also true that in the proof of conspiracy, one act or two acts taken out of the general practice would not, of course, prove or allow the court to infer conspiracy on those isolated acts. But this is also true, that the general practice shown by those individual examples might, with the congregation of those items, be sufficient and properly sufficient in law, and in every other way, to come to the conclusion that the conspiracy is proved. * * * I find that I cannot come to any other conclusion on the evidence before me but that the charge is proved.

The "evidence before me" included the admissions that had been improperly accepted, and the question is whether in that situation it can be said that no substantial wrong or miscarriage of justice can have taken place.

(1) [1947] 2 W.W.R. 289.

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The Crown relies on the interpretation laid down in *Stirland* v. *Director of Public Prosecutions* (1), that the proviso "assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict", language that was quoted with approval in *Schmidt* v. *The King* (2). It was pointed out by Lord Simon that the trial judge, in his summing up, advised the jury to disregard entirely the impeached questions, but the words "after being properly directed" seem rather to refer to a direction than to advice.

Assuming that view has been accepted by this Court and applying it to the facts here, I think it impossible to say that on the evidence bearing upon the connection of the father and the son Paul with the tainted invoices and book entries, together with any inferences that could possibly be drawn from the payment transactions themselves, the trial judge, rejecting the objectionable evidence, must have come to the same decision of guilt, or that, conversely, a verdict of acquittal would have been perverse.

I would, therefore, allow the appeal and direct a new trial.

ESTEY J.:—The three accused, J. L. Northey, father, and his two sons, P. M. Northey and A. J. Northey, were the principal shareholders and officers in Millwork Industries Limited which, during the period in question, manufactured ship furnishings at Vancouver.

The three accused were charged that between January 1, 1942, and December 31, 1944, they conspired to defraud His Majesty The King in the right of the Dominion of Canada, contrary to *section 444* of the *Criminal Code*. The three accused were tried under the speedy trial provisions of the Criminal Code and found guilty.

The evidence divides itself into two parts: (*a*) that given by the three accused as witnesses at an inquiry with respect to the business of Millwork Industries Limited before Jas. C. Wilson under the *Department of Munitions & Supply Act, 1939 (2nd Sess.) S. of C., c. 3,* and *amendments* thereto. This evidence was put in at the trial by calling Mr. Wilson,

(1) [1944] A.C. 315. (2) [1945] S.C.R. 438.

and it is hereafter referred to as the "Wilson evidence". (*b*) That of the bookkeeper of Millwork Industries Limited with respect to the practice in that office, particularly dealing with certain items showing alterations of actual invoices and writing up of fictitious invoices, the proceeds of which benefited one or other of the three, and which were under one heading or another charged up to cost of supplies and expenses, with the result that the net revenue and consequent income taxes were greatly reduced. The balance of the evidence was that of indivduals outside of this company relative to the invoices and credits given for cheques received and drawn upon the accounts of Millwork Industries Limited.

The Court of Appeal (1) unanimously decided that under *section 19* of the *Department of Munitions & Supply Act, 1939,* as *amended* by *section 12, 1940 S. of C., c. 31,* the evidence taken at the inquiry was at the trial improperly received. The majority of the learned Judges were of the opinion that, notwithstanding the improper reception of this evidence no substantial wrong or miscarriage of justice had actually occurred within the meaning of *section 1014 (2)* of the *Criminal Code* and affirmed the conviction. The minority of the learned Judges were of the opinion that there was a substantial wrong or miscarriage of justice and that a new trial should be had.

1014. (2) The Court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

The Wilson evidence was important and material in that it constituted admissions by each of the accused parties of complicity in the offence of conspiracy to defraud His Majesty as charged. The learned trial Judge, in the course of his brief reasons, made no reference to the Wilson evidence and concluded:

I find that I cannot come to any other conclusion on the evidence before me but that the charge is proved.

In *Allen* v. *The King* (2), the accused was charged with murder. Evidence suggesting a motive was improperly introduced during the cross-examination of the accused. The majority of the learned Judges in the Appellate Court

(1) [1947] 2 W.W.R. 289.
(2) (1911) 44 S.C.R. 331.

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held this evidence inadmissible but that it was not more than a trivial irregularity and under *section 1019* (as it then read—now *section 1014 (2)* of the *Criminal Code* affirmed the conviction. In this Court a new trial was directed. Sir Charles Fitzpatrick, C.J., (with whom Duff, J., later Chief Justice, agreed), at p. 335 stated:

> My difficulty is to say to what extent the jury, or any one of them, may have been influenced by the questions put to the prisoner on cross-examination by the Crown prosecutor.

Then at p. 339, referring to section 1019:

> 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 irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae*. To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury.

At p. 363 Anglin, J. (later Chief Justice) stated:

> "A substantial wrong" is "occasioned thereby on the trial" when counsel for the Crown improperly places before the jury, as having been sworn to, statements which may influence them adversely to the accused upon a material issue.

In *Gouin* v. *The King* (1), the learned trial Judge misdirected the jury. In this Court, after commenting upon *Allen* v. *The King* (2), my lord The Chief Justice (then Rinfret, J.) in writing the judgment of the Court stated at p. 544:

> In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the improper direction and therefore the conviction cannot stand.

In *Schmidt* v. *The King* (3), the accused was convicted of murder. Two items of misdirection were considered. With respect to the first the learned trial Judge had failed to comply with "advisable practice" but had not violated any absolute rule. As to the second, while his illustrations "were not apt", it was pointed out "that later in his charge the trial Judge stated the law correctly but he did not apply the law to the evidence as fully as he might have

(1) [1926] S.C.R. 539.
(2) (1911) 44 S.C.R. 331.
(3) [1945] S.C.R. 438.

done." It was under these circumstances held that the conviction should be affirmed. Mr. Justice Kerwin, writing the judgment of the Court (1), stated:

In this case a reasonable jury on a proper direction would have undoubtedly convicted Schmidt and the appeal is therefore dismissed.

Stirland v. *Director of Public Prosecutions* (2): In this case certain questions were asked relative to credibility in cross-examination. Counsel for the appellant did not object to the questions and in his summing up the Common Serjeant advised the jury to take the appellant as being of good character. The House of Lords held the evidence inadmissible but that it occasioned no substantial miscarriage of justice. Viscount Simon, with whom the other lords concurred, stated at p. 320:

Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied.

Then in *Kelly* v. *The King* (3), Duff, J. (later Chief Justice) discussed *section 1019* (now as amended *1014 (2)*):

In these circumstances there was obviously no "miscarriage"; and assuming there was some *technical "wrong"* there can be in my judgment no "substantial wrong" from the admission of inadmissible evidence if it must be affirmed that relatively to the whole mass of admissible evidence that which is open to exception is merely negligible and that in the absence of it the verdict could not have been otherwise. This conclusion is in no way inconsistent with the acceptance of the criterion suggested in *Makin's Case,* (4). In such a case the impeached evidence cannot in any practical sense be supposed "to have had any influence upon the verdict."

The Wilson evidence improperly received was neither "trivial" nor "merely negligible" when considered "relatively to the whole mass of admissible evidence". On the contrary it was, relative to the whole, important and implicated each of the accused parties in the offence charged to a degree that it would be impossible to conclude but that it may have influenced the decision. Indeed, having regard to its content, it may well have been a determining factor. It is therefore not a case in which

(1) [1945] S.C.R. 438 at 440.
(2) [1944] A.C. 315.
(3) (1916) 54 S.C.R. 220 at 260.
(4) [1894] A.C. 57 at 70 and 71.

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it can be concluded "that no substantial wrong or miscarriage of justice" has actually occurred as that statement has been construed in the *Allen* (1) and other cases, *supra*.

The reasons of the learned trial Judge in finding the accused guilty indicate that he so concluded upon all the evidence before him. There is no suggestion that any part thereof was disregarded, and in so far as his report under *section 1020,* made some time later and after an illness, suggests otherwise, the former should be accepted.

In any event, under the circumstances of this case it appears to be impossible to conclude that no substantial wrong or miscarriage of justice has actually occurred, and therefore a new trial must be had.

The appeal should be allowed and a new trial directed.

LOCKE J.:—In this matter the dissent of the Chief Justice of British Columbia and of Mr. Justice Robertson is expressed in the formal judgment (2) as being upon the ground that as a matter of law the provisions of *section 1014 (2)* of the *Criminal Code* ought not to be applied in the circumstances of this case. The Court of Appeal (2) had during the hearing unanimously decided that what has been called the Wilson evidence, which had been taken during an enquiry under the provisions of the *Department of Munitions and Supply Act,* had been improperly admitted at the trial, and the reasons for judgment of the learned Chief Justice refer to the fact that part of the other evidence received had been inadmissible as hearsay. In consequence of the admission of this evidence the learned Judges who dissented were of the opinion that the accused had not had a fair trial and that accordingly the powers conferred upon the Court by the *Code, section 1014 (2),* should not be exercised.

I agree with the finding of the Court of Appeal (2) as to the Wilson evidence and I am further of the opinion that a considerable amount of the evidence tendered by the Crown for the purpose of proving that goods paid for by Millwork Industries Limited had in fact been purchased by and delivered to one or other of the accused, or to the companies controlled by one or other of them, was

(1) (1911) 44 S.C.R. 331. (2) [1947] 2 W.W.R. 289.

inadmissible as hearsay. Eliminating the evidence so improperly admitted, the matter to be decided is as to whether upon the remaining evidence the verdict would necessarily have been the same (*Schmidt* v. *The King* (1), Kerwin, J. at 440). Since there is to be a new trial it is undesirable that there should be any extended comment on the evidence. The onus is upon the Crown to satisfy the Court that there would without doubt have been a conviction had this evidence been excluded and, in my opinion, that onus has not been discharged in this case. I have come to this conclusion upon consideration of the evidence alone as I think the report of the learned trial Judge which, owing to his unfortunate illness, was not made until some months had elapsed from the date of the trial and at a time when the appeal had been partly heard cannot be considered.

The conviction should be quashed and there should be a new trial.

Appeal allowed, conviction quashed and new trial directed. Cross-appeal dismissed.

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