OLIVE GEORGINA RUSTAD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1965

*Mar. 1, 2
Apr. 6

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

Criminal law—Non-capital murder—Evidence—Weight—Confessions made to friends—Charge to jury—Whether adequate.

Charged with the non-capital murder of her mother-in-law, the appellant was convicted of manslaughter. The medical evidence attributed the death to a blow or blows on the head. The only direct evidence to connect the appellant with the death consisted of an alleged confession made by her to her friend S, and of three statements she is alleged to have made to her friend K. During the three and a half years between the death and the trial, S gave several statements to the police and gave evidence under oath at the inquest, but each of her accounts differed as to her own activities on the night of the murder. It was not until three years after the night in question that she first told the police about the alleged confession. The accused was said to have been intoxicated when she made these statements. The Court of Appeal affirmed the conviction. The accused appealed to this Court.

Held (Abbott J. dissenting): The appeal should be allowed and a new trial directed on the charge of manslaughter.

Per Cartwright, Ritchie, Hall and Spence JJ.: The trial judge said enough to indicate that in weighing the evidence of K and S the jury should give serious consideration to the inconsistencies in the statements made by S and to the failure of both women to come forward with their stories at an earlier date. The theory of the defence that these two witnesses were unworthy of belief was expressed by the trial judge with sufficient clarity to comply with the authorities. *Deacon v. R.* [1947] S.C.R. 531.

There was however a total absence of any direction on the question of whether, if the appellant did make the incriminating statements attributed to her by the two women, those statements were in fact true. The evidence of the appellant's intoxication was such as to make it desirable for the trial judge to tell the jury that it was a factor to be taken into consideration in assessing the value of her confession and statements as evidence against her. Assuming that the inconsistencies between the alleged confession and the autopsy as to how the victim met her death was not raised by way of defence, and notwithstanding the fact that defence counsel did not object to the trial judge's failure to comment on it, the charge to the jury should nevertheless have contained specific direction to the effect that the truth of the appellant's alleged admission was to be considered in light of this discrepancy and in light also of her intoxication at the time when the admission was alleged to have been made.

Per Abbott J., *dissenting:* The objections to the trial judge's charge made by the appellant did not, as found by the Court of Appeal, constitute sufficient grounds to allow the appeal.

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* PRESENT: Cartwright, Abbott, Ritchie, Hall and Spence JJ.

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Droit criminel—Meurtre non qualifié—Preuve—Poids—Aveu fait à des amies—Suffisance de l'adresse du juge au jury.

Accusée du meurtre non qualifié de sa belle-mère, l'appelante fut trouvée coupable d'homicide involontaire coupable. La preuve médicale attribua le décès de la victime à des coups portés sur la tête. La seule preuve directe contre l'appelante comprenait un prétendu aveu qu'elle aurait fait à son amie S, et trois déclarations qu'elle est supposée avoir faites à son amie K. Durant les trois années et demie entre le décès de la victime et le procès, S fit plusieurs déclarations à la police et témoigna sous serment à l'enquête du coroner, mais chacun de ses récits différait quant à ses propres activités la nuit du meurtre. Ce n'est que trois ans après la nuit en question qu'elle fit part à la police pour la première fois du prétendu aveu. L'appelante était supposée avoir été sous l'influence de la boisson lorsqu'elle fit ses déclarations. La Cour d'Appel confirma le verdict de culpabilité. L'accusée en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et un nouveau procès doit être ordonné sur l'accusation d'homicide involontaire coupable, le juge Abbott étant dissident.

Les juges Cartwright, Ritchie, Hall et Spence: Le juge au procès en a dit assez pour indiquer au jury qu'en évaluant la preuve de K et S, il devait prendre en considération les variances dans les déclarations faites par S et et le défaut des deux femmes de se présenter avec leurs récits à une date antérieure. La théorie de la défense que ces deux témoins ne méritaient pas d'être crus a été exprimée par le juge au procès avec assez de clarté pour rencontrer les exigences des autorités. *Deacon v. R.* [1947] R.C.S. 531.

Il y a eu cependant une absence totale de directive sur la question de savoir si, admettant que l'appelante ait fait les déclarations qui lui étaient imputées par les deux femmes, ces déclarations étaient en fait vraies. La preuve se rapportant à l'intoxication de l'appelante était telle qu'il était désirable que le juge au procès avertisse le jury que c'était un facteur qui devait être pris en considération dans l'évaluation de la valeur comme preuve contre elle de sa confession et de ses déclarations. En prenant pour acquis que les variances entre le prétendu aveu et le résultat de l'autopsie démontrant comment la victime avait succombé n'avaient pas été soulevées comme moyen de défense, et malgré le fait que l'avocat de la défense ne s'était pas objecté au défaut du juge de commenter ce point, l'adresse du juge au jury aurait dû quand même contenir une déclaration spécifique à l'effet que la véracité de la prétendue admission faite par l'appelante devait être considérée en regard de cette variance et aussi en regard de son intoxication au temps où cet aveu était supposé avoir été fait.

Le juge Abbott, *dissident:* Les griefs contre l'adresse du juge au procès soulevés par l'appelante ne constituaient pas, tel que la Cour d'Appel l'a déclaré, des motifs suffisants pour maintenir l'appel.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique[1], confirmant un verdict de culpabilité pour homicide involontaire coupable. Appel maintenu et nouveau procès ordonné, le juge Abbott étant dissident.

[1] [1965] 1 C.C.C. 323.

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APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming the conviction of the appellant for manslaughter. Appeal allowed and new trial directed, Abbott J. dissenting.

H. A. D. Oliver, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of Cartwright, Ritchie, Hall and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for British Columbia[1] by which that Court dismissed the appellant's appeal from her conviction for manslaughter on an indictment charging her with the non-capital murder of her mother-in-law, Mrs. Thrine Rustad on June 10, 1960.

It is apparent that the appellant was on very bad terms with her 80-year old mother-in-law who was her next door neighbour and who was found lying dead on the floor of her own house on June 10, 1960, and it is also clear that the old lady had come to a violent end which the medical evidence attributed to a blow or blows on the head, but the only direct evidence to connect the appellant with the death consisted of a confession which she is alleged to have made to her one-time friend, Mrs. Shannon. The prosecution contends that this confession finds some support in the story told by a young girl named Koronko of three statements made to her by the appellant and it is contended also that the evidence of fingerprints found on the back door by police sergeant Davies is consistent with the appellant having broken into her mother-in-law's house on the night of 9th-10th of June.

At the trial the appellant's counsel based the defence in large measure on the contention that the evidence of Mrs. Shannon and Miss Koronko was not worthy of belief and that without that evidence there was no case for the Crown.

Mrs. Shannon had spent the evening of the 9th of June at the appellant's house where she had dinner and where she and the appellant had a number of drinks together. She did not leave the house until the early hours of the morning of the 10th of June and on the following day made

[1] [1965] 1 C.C.C. 323.

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a statement to the police which reads, in part, as follows:

> Shortly after at about 9:30 p.m. Mr. Rustad packed some of his things and left the house. I didn't see him going in his car as I wasn't paying attention. During this time a policeman came and spoke to Mrs. Rustad. At this time I was feeling quite sleepy as a result of my drink and lied on the couch in the living room and fell asleep. When I woke up it was about 3:00 a.m., and I saw Mrs. Rustad walking around . . . She was ranting and raving about something but I don't know what. At this time Mrs. Rustad was drinking rye and was very excited and drunk. I then got up and made her a cup of tea. While she was drinking her tea I washed the dishes. Shortly thereafter Mrs. Rustad went to bed and she fell asleep right away.

In the course of the more than three and a half years which elapsed between the death and the trial, Mrs. Shannon made three additional statements to the police and gave evidence under oath at the inquest, but each of the accounts which she gave differed as to her own activities on the night in question and it was not until August 24, 1963, that she first told the police about a confession saying:

> When I awoke on the couch Olive Rustad was standing in the middle of the living room and she came over to me and it was then she said: 'I killed the old lady'.

At the trial Mrs. Shannon described the conversation which she had with the appellant after she woke up in the following terms:

> Well, she came in and then she told me that she had been over to Mrs. Rustad . . . And she had words with her and then she said that she had killed her, and I said, 'Oh' or something like that. And then I said, 'Oh, no. You didn't'. And then she said that she had killed her with her own panties.
>
> Q. With what?
>
> A. Her own underwear.
>
> Q. Her own panties; that is, underwear. Yes?
>
> A. Oh, she said, 'You wouldn't like to have a murderess for a friend,' She said that to me. So I got sick and I left—and I went out, right out the back door. It was a warm night and the doors were open so I went right out to the fence and I got sick over the fence.

Miss Koronko, who was 20 years old at the date of the trial, recounted three isolated conversations which she had had with the appellant. The first was in July 1960 when they were alone together and Mrs. Rustad brought up the subject of her mother-in-law's death saying "that she hated the old lady but she could never kill her." Although Miss Koronko went to live with the appellant in the same house in May 1961, she does not appear to recall any other references to the matter until one night in December 1961, at

about midnight when she says that the appellant had been drinking and was "tight" and while "tight", was discussing her mother-in-law and then she began to cry very badly and she had her head down on her arms, on the table, and she said, "I'm sorry. I didn't mean to do it. I didn't mean to go that far."

The only other statement having any bearing on the matter to which Miss Koronko testified was allegedly made in February 1962 on an occasion when her boy friend, Len Soloway, was in the house and was talking about the trouble that his sister had with her mother-in-law. Miss Koronko says that the appellant at that time said "that she knew that mothers-in-law caused a lot of trouble and that Bernice, Len's sister, should do something about it before it was too late because Mrs. Rustad knew what it was like and she had to do something about hers". It is noteworthy that Soloway, who gave evidence, stated of this conversation, "I never thought it meant anything at that time".

Miss Koronko went on living with the appellant until November 1962 but does not appear to have made any mention of these conversations to anyone in authority until May 1963.

The first ground upon which leave to appeal to this Court was granted complained of the failure of the trial judge "to instruct the jury that it was dangerous and unsafe to put much reliance upon the evidence of Mrs. Shannon because of her numerous prior inconsistent statements both verbal and in writing and one prior statement that she testified to under oath".

I do not think that the differences in detail between the various accounts given by Mrs. Shannon of her own activities on June 9 justify the accusation of perjury which was so strongly urged against her by appellant's counsel, but if she was telling the truth at the trial about the appellant having confessed to the killing on the morning of the death, it is singular to say the least of it that when giving evidence at the inquiry into the same death only fifteen days after the alleged confession was made, she did not mention it at all and could only explain her failure to do so by saying, "I always felt that you could not tell about a murder or a killing unless you were an eye witness". This was undoubtedly a

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circumstance bearing directly upon the weight to be attached to Mrs. Shannon's evidence and constituting a weakness in the Crown's case which the learned trial judge was bound to draw to the attention of the jury, and the same considerations apply, although in a lesser degree, to Miss Koronko whose evidence must be viewed in light of the fact that the statements which she alleged to have been made by the appellant were withheld by her from the authorities for nearly three years.

Mr. Justice McInnes, who presided at the trial, pointed out to the jury that there were inconsistencies in the various statements made by Mrs. Shannon and stressed particularly the fact that in making three of these statements and in giving evidence at the inquest she had said nothing about the appellant's confession. In dealing with the evidence of both these witnesses, the learned trial judge said:

> You saw these two women, Mrs. Shannon and Miss Koronko, under lengthy cross-examination by defence counsel. You have the fact that neither of them revealed what the accused told them for a long period afterwards. You will have to decide how they impressed you as witnesses and whether they are worthy of belief or not. It would be well for you in considering what degree of credibility you attach to their evidence to recall the evidence of Sergeant Davies as to the fingerprints and the manner in which they were put on the door according to Davies' evidence. Of course if you do not believe the women, then there is no necessity to consider Davies' evidence.

Although it is true that Mr. Justice McInnes would have been justified in using stronger language to describe the weaknesses inherent in the evidence of both these witnesses, I am none the less of opinion that he said enough to indicate that in weighing their evidence the jury should give serious consideration to the inconsistencies in Mrs. Shannon's statements and to the failure of both women to come forward with their stories at an earlier date. I think that the theory of the defence that these two witnesses were unworthy of belief was expressed in the judge's charge with sufficient clarity to comply with the requirements indicated by this Court in *Deacon v. The King*[1], and in the other cases referred to in the reasons for judgment delivered by Sheppard J.A. on behalf of the majority of the Court of Appeal. I would not quash the conviction on this ground,

[1] [1947] S.C.R. 531, 3 C.R. 265, 89 C.C.C. 1, 3 D.L.R. 772.

but there are more serious omissions which require consideration.

The whole tenor of the charge of the learned trial judge is to the effect that if the jury believed the evidence of Mrs. Shannon and Miss Koronko they would be justified in convicting, but there is a total absence of any direction on the question of whether, if the appellant did make the incriminating statements attributed to her by these women, those statements were in fact true.

At the trial Mrs. Shannon gave it as her opinion that the accused was intoxicated at the time of the alleged confession and in one of her previous statements she had said that she knew the appellant to be drunk and thought that she had lost her senses. Although the learned trial judge referred to these comments in instructing the jury as to the defence of drunkenness, he at no time gave them any instructions as to the effect of her having been intoxicated on the truth or falsity of what the appellant was alleged to have said. It is significant also that the nearest thing to an incriminating statement alleged to have been made to Miss Koronko was that made in December, 1961, when she says that the appellant was "tight". In my opinion in the present case the evidence of the appellant's intoxication was such as to make it desirable for the trial judge to tell the jury that it was a factor to be taken into consideration in assessing the value of her confession and her December 1961 statement to Miss Koronko as evidence against her.

Counsel for the appellant also complained that the learned trial judge had omitted to tell the jury that they should consider the question of the truth or falsity of the appellant's alleged admission to the killing of her mother-in-law in light of the fact that Mrs. Shannon represented her as saying that she had "killed her with her own panties" whereas in fact according to the medical evidence the old lady met her death as a result of a blow or blows on the head and there was no suggestion that she could have been killed "with her own panties". In this regard it appears to me that the case of *Kelsey v. The Queen*[1] is particularly pertinent. That was a case of murder in which the accused was alleged to have confessed nearly two years after the event to killing the murdered man by striking him with a

[1] [1953] 1 S.C.R. 220, 16 C.R. 119, 105 C.C.C. 97.

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hammer and using an icepick "to finish him". The medical evidence was that the death had been caused by blows inflicted on the head by a blunt instrument and that there was also evidence of blows by a rigid, round and pointed instrument. Fauteux, J. in discussing non-direction by a trial judge as a ground of appeal had this to say:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance. *Had the autopsy, for instance, revealed poisoning instead of fracture of the skull as the cause of death, this undoubtedly would have, in this case, been a point of substance relevant to the theory of the defence. Far from conflicting with the appellant's admissions, independent proof of certain facts in the case tends to support his material admission, i.e. his participation in the commission of the murder.*

The italics are my own.

In the present case the autopsy revealed that death was caused by blows on the head instead of the method to which the appellant allegedly confessed. In my view this was undoubtedly a point of substance relevant to the theory of the defence upon which the appellant was entitled to have the jury directed.

I am in agreement with the views expressed in the reasons for judgment of Mr. Justice Davey in the Court of Appeal in so far as he says that:

> If the statement that appellant killed the victim with her own panties clearly implied that appellant strangled her with them, the inconsistency of that statement with the absence of any evidence of strangulation or that the panties played any part in the cause of death, would cogently suggest that either Shannon's evidence or appellant's admission was untrue. *In that case I would have had difficulty in supporting the verdict in the absence of a specific direction to the jury to consider the truth of the appellant's admission in the light of that discrepancy and the appellant's intoxication.*

The italics are my own.

Mr. Justice Davey, however, took the view that defence counsel had not raised the defence that the statements made by Mrs. Shannon were untrue and he accordingly went on to say:

> My difficulty is that the significance of the words 'with her own panties' in this context did not occur to either counsel at the trial and was not canvassed in the evidence. They might have meant something quite different from strangulation, and in my opinion it would be quite wrong to attach that meaning to the words when it was not suggested below or explored on the evidence.

With the greatest respect, I do not share the difficulty expressed by Davey J.A. because I think that the contention that the appellant's confession was false was implicit in the denial of guilt and I am also satisfied that the significance of the words "with her own panties" did occur to both counsel. While it is true that the references made to these words by defence counsel were primarily directed towards showing that Mrs. Shannon was not telling the truth, they none the less illustrate in the clearest terms the inconsistency between the method of killing described in the alleged confession and the cause of death as revealed by the medical evidence. On the other hand, it appears to me that Crown counsel invited the jury to consider that the evidence was consistent with the use of "panties" having produced strangulation or some other neck injury and having been a factor in the killing. I refer to the passage in which Crown counsel, after quoting the words ". . . and she said that she had killed her with her own panties" went on to say:

> Now may I just stop there for a moment while the thought crosses my mind. You might remember that bit of evidence in connection with the evidence of Dr. Harmon in which he testified as to the injuries to the neck of the deceased and the fingernail marks or scratches that appeared on the neck of the deceased woman.

As I have indicated, Dr. Harmon's evidence contained no suggestion that any neck injury caused or contributed to the death and he was not asked whether such injury as there was to the neck could have been caused by "panties", nor was such a thing suggested anywhere in his evidence.

I am of opinion that even assuming that the inconsistency between the alleged confession and the autopsy was not raised by way of defence and notwithstanding the fact that defence counsel did not object to the learned trial judge's failure to comment on it, the charge to the jury should nevertheless have contained specific direction to the effect that the truth of the appellant's alleged admission was to be considered in light of this discrepancy and in light also of the appellant's intoxication at the time when the admission was alleged to have been made.

The case of *McAskill v. The King*[1] was one of murder in which the question of whether the appellant was so affected by drink as to be incapable of having the intent to kill was

[1] [1931] S.C.R. 330, 55 C.C.C. 81, 3 D.L.R. 166.

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not directly raised by defence counsel and was not made the subject of direction by the learned trial judge. In considering the effect of the failure to put this issue before the jury, Duff J. said at page 335:

> The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and, having done this, he did not ask them to apply their minds to the further issue we have just defined. It was the prisoner's right, however, notwithstanding the course of his counsel at the trial, to have the jury instructed upon this feature of the case. We think, therefore, that there must be a new trial.

I respectfully adopt this language as having direct application to the circumstances disclosed in the present case.

In view of all the above, I would allow this appeal, quash the conviction and direct that there be a new trial on the charge of manslaughter.

ABBOTT J. (*dissenting*):—This is an appeal, brought pursuant to leave, from the unanimous judgment of the Court of Appeal of British Columbia[1] pronounced on August 5, 1964, dismissing the appeal of the appellant from her conviction on December 5, 1963, by the Honourable Mr. Justice McInnis and a jury at the Court of Assize in the City of Vancouver on a charge of manslaughter reduced from non-capital murder, on which charge the appellant was, on December 16, 1963, sentenced to eight years in prison.

The appellant was convicted on the said charge as a result of the death of her mother-in-law. The principal evidence identifying the appellant as the one who caused the death consisted of statements made in conversations which took place on a number of occasions between the appellant and her friend, Helena A. Shannon and between the appellant and her friend, Roberta Dale Koronko. The appellant did not give evidence at the trial.

Since I have the misfortune to differ from the conclusion arrived at by the other members of this Court that a new trial should be ordered, and as it is not usual to discuss the details of the evidence when that course is followed, I shall simply state briefly the reasons for my dissent.

The contentions of the appellant upon which leave to appeal was granted are as follows:

1. That the learned trial judge failed to instruct the Jury that it was dangerous and unsafe to accept or put much reliance upon the evidence

[1] [1965] 1 C.C.C. 323.

of Helena C. Shannon because of her numerous prior inconsistent statements, both verbally and in writing and one prior inconsistent statement that was testified to under oath.

2. That the learned trial judge misdirected the Jury, or alternatively failed to direct the Jury so as to be a misdirection in law in omitting to leave with them the fact that the admissions were capable of more than one inference, and in coupling the conversation as testified to by Dale Koronko of July 1960, with that of December 1961, so as to give the statement of the December 1961, an inference of guilt that the words standing alone would not naturally and normally bear.
3. That the learned trial judge failed to instruct the Jury that even though they believed the evidence of Helena Shannon, they must still consider whether they would place any reliance on the admissions of the accused having regard to her state of sobriety at the time of making the same.
4. That the learned trial judge failed to instruct the Jury that even though they believed the evidence of Dale Koronko, they must still consider whether they would place any reliance on the admissions of the accused having regard to her state of sobriety and her emotional condition at the time of said statement was made.
5. That the learned trial judge erred in failing to direct the attention of the Jury to the fact that the admission alleged to have been made by the appellant indicated that the victim had been killed in a certain manner and that it was established that the victim had not been killed in that manner.

The principal argument made before us by Counsel for appellant related to the first ground, namely, that the learned trial judge failed to instruct the jury that it was dangerous and unsafe to put much reliance upon the evidence Helena Shannon because of what he contended were numerous prior inconsistent statements made by her, both verbally and in writing, and of one prior inconsistent statement under oath.

Counsel submitted that there is a duty in law resting upon a trial judge to give such a warning concerning incriminating evidence of a person who has previously given contradictory evidence under oath; and that such a warning ought to be given concerning contradictory statements not under oath when the defence sets up the unreliability of the evidence given by that witness at the trial.

This contention was fully dealt with by Davey J.A. in the Court below with whose reasons and conclusions I am in complete agreement. After carefully reviewing the authorities from *Re Harris*[1]—which decision he points out cannot be taken to correctly set forth the law of Canada—

[1] (1927), 20 Cr. App. R. 144.

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up to and including the decisions of this Court in *Deacon* v. *The Queen*[1], *Binet* v. *The Queen*[2] and *Lucas* v. *The Queen*[3], he said:

> From these authorities it seems to me that the obligation to give such a direction arises not from a distinct rule of law or of practice, but from the obligation resting upon the trial Judge under *Azoulay* v. *The Queen* (1952) 2 S.C.R. 495, and *Kelsey* v. *The Queen* (1953) 1 S.C.R. 220, to review the substantial parts of the evidence, and to give the jury the theory of the defence, so that they may appreciate the value and effect of the evidence, and how the law is to be applied to the facts as they find them; and to present clearly to the jury the pivotal questions upon which the defence stands.

After a further discussion of the nature of this obligation and a reference to certain authorities, he continued:

> In the present case the learned trial judge charged most carefully upon the series of conflicting statements given by Shannon and Koronko, and left it to the jury to consider their effect, and the long delay in revealing the facts as they gave them in the box, upon their credibility and the weight of their evidence. In my opinion the defence was in this respect properly put to the jury without giving a warning that it would be dangerous to convict on such evidence considering the explanations and the amount of other confirming evidence.
>
> The serious discrepancies in the earlier statements were the omission of the incriminating statements made by the appellant, and some of the surrounding detail. Shannon said she did not tell the full story in her earlier statements, because she was afraid of the appellant, and because she was not asked the appropriate questions to bring it out. But over and above that, both Shannon and Koronko were friends of the appellant and might well have withheld the incriminating information to help the appellant. So far as Shannon is concerned, there is no submission that she bore any enmity or ill will to the appellant that would lead to Shannon giving false evidence against her. There was no close connection or association between Shannon or Koronko, although they knew each other, that would cause Shannon to give false evidence against the appellant to favour Koronko. In view of the whole of the Crown's case, it would have been wrong for the learned trial judge to tell the jury that it would be dangerous to convict upon the evidence of Shannon and Koronko.

As to the other grounds raised by appellant relating to the truth of the statements made to Shannon and Koronko, drunkenness and the like, these too were fully dealt with in the Court below. I am in general agreement with what was

[1] [1947] S.C.R. 531, 3 C.R. 265, 89 C.C.C. 1, 3 D.L.R. 772.

[2] [1954] S.C.R 52, 17 C.R. 361.

[3] [1963] 1 C.C.C. 1, 39 C.R. 101.

said by Davey and Sheppard JJ.A. as to these grounds and have nothing to add.

I would dismiss the appeal.

Appeal allowed and new trial directed, ABBOTT J. *dissenting.*

Solicitors for the appellant: Oliver, Millar & Co., Vancouver.

Solicitor for the respondent: G. L. Murray, Vancouver.