1953

*Sept. 21
*Dec. 18

CLERMONT BINET .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal Law—Evidence—Failure to charge jury of danger of accepting evidence of perjured accomplice on a vital issue.

Where a judge fails to properly instruct a jury on the great danger of accepting the evidence of an admittedly perjured accomplice on a vital issue, a conviction cannot stand. The rule in *Moreau* v. *the King* [1944] 1 D.L.R. 462; 80 Can. C.C. 290 cited in *Rex* v. *Stack and Pytell* [1947] 3 D.L.R. 747 at 762; 88 Can. C.C. 320 at 327, approved.

Per: Rinfret C.J. and Taschereau and Fauteux JJ. It appears from the evidence in the record that a verdict of guilty by a jury properly instructed and acting judicially would not be open to review as unreasonable and unsupported by the evidence. Therefore a new trial should be ordered.

Per: Rand and Cartwright JJ., (dissenting in part). On the evidence a properly instructed jury should have acquitted the accused and therefore this court should direct that a judgment of acquittal be entered.

Judgment of the Court of Queen's Bench, Appeal Side, Q.R. [1953] Q.B. 234, reversed. Rand and Cartwright JJ. dissenting in part.

*PRESENT: Rinfret C.J., and Taschereau, Rand, Cartwright and Fauteux JJ.

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BINET v. THE QUEEN

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1) affirming (Barclay and Hyde JJ. dissenting) the conviction of the appellant before Girouard J. and a jury on a charge of assault with intent to do bodily harm.

Remi Taschereau for the appellant.

Antoine Lacourcière, Q.C. for the respondent.

The judgment of Rinfret C.J. and Taschereau and Fauteux JJ. was delivered by:—

TASCHEREAU J.:—I agree with my brother Cartwright that the learned trial Judge failed to properly instruct the jury on the great danger of accepting the evidence of an admittedly perjured accomplice on a vital issue, and that as a result of that omission, the conviction cannot stand.

However, I would not direct a judgment of acquittal. I am not satisfied that a verdict of guilty rendered on the evidence in the record, by a jury properly instructed and acting judicially, would be open to review as unreasonable and unsupported by the evidence. There is I think some evidence that must be left for the sole consideration of the jury, and I would therefore order a new trial.

The judgment of Rand and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) pronounced on the 13th of February, 1953, affirming by a majority the conviction of the appellant, before Girouard J. and a jury, on a charge that he, on the night of the 21st to the 22nd of July, 1951, with intent to maim or disable Raoul Fortin or to do some other grievous bodily harm to him, did unlawfully wound and cause grievous bodily harm to the said Raoul Fortin by striking him on the head with a blunt instrument and causing a fracture of his skull.

Barclay and Hyde, JJ. dissenting, would have quashed the conviction and directed a new trial. The appeal is based, pursuant to section 1023(1) of the *Criminal Code*, on their dissent on the point of law stated in the following words in the formal judgment:—

> the trial judge failed to instruct the jury on the great danger of accepting the evidence of an admittedly perjured accomplice on a vital issue . . .

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Cartwright J.

Two questions arise for our consideration, first whether the verdict can stand, and secondly, if it must be set aside, whether we should order a new trial or direct that a judgment of acquittal be entered.

The learned trial judge warned the jury in terms to which no exception is taken of the danger of convicting on the uncorroborated evidence of an accomplice but he failed to give them any direction in regard to the fact that Giroux had on two previous occasions made statements on oath which were in direct conflict with the evidence which he had given at the trial on a vital point.

I respectfully agree with Barclay and Hyde JJ. that, in the circumstances of this case, the omission to direct the jury in this regard was an error in law so serious as to require that the conviction be quashed. I do not find it necessary to refer to all the authorities which were discussed by counsel. I am in respectful agreement with Hyde J. that the applicable rule is correctly stated by Errol McDougall J. who gave the judgment of the majority in *Rex* v. *Stack and Pytell* (1) in the following words:—

> Where the testimony of a principal Crown witness is in direct conflict with a prior sworn statement made by him the trial Judge must caution the jury in the strongest terms with respect to the danger of accepting his evidence, and the failure to do so will necessitate a new trial, notwithstanding that the trial Judge properly instructed the jury with respect to the evidence of such witness in the event that they concluded that he was an accomplice.

With the greatest respect for the contrary view entertained by the majority in the Court of Queen's Bench I do not think that the circumstance that counsel for the defence stressed the fact of the conflicting statements having been made in any way absolved the learned trial judge from the duty of dealing with them.

It remains to consider whether or not a new trial should be directed. After an anxious perusal of the whole record I had prepared somewhat lengthy reasons dealing with this question, referring to the evidence in considerable detail and reaching the conclusion that we ought to direct an acquittal. However, as the majority of the Court are of opinion that a new trial should be ordered and it is not usual to discuss the details of the evidence when that course is to be followed, I propose simply to state the result at

(1) [1947] 3 D.L.R. 747 at 762; 88 Can. C.C. 310 at 327.

which I arrived. I am of opinion that on the evidence in this record a properly instructed jury should have acquitted the appellant and that therefore we should not direct a new trial.

I would allow the appeal, quash the conviction and direct a judgment and verdict of acquittal to be entered.

Appeal allowed; new trial ordered.

Solicitors for the appellant: *Taschereau & Cliche.*

Solicitor for the respondent: *Antoine Lacourcière.*