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*Nov. 2, 3, 4, 5
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CLARENCE JOSEPH FORSYTHE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Conspiracy—Charge of offences under The Opium and Narcotic Drug Act, 1929 (Dom. c. 49)—Corroboration—Admission in evidence of certain written statement—Substantial wrong or miscarriage of justice (Cr. Code, s. 1014 (2))—Insufficiency of explanation to jury—Appellant convicted, while another accused, charged with him, found not guilty on subsequent separate trial—Trial Judge expressing his personal opinion to jury as to character of witnesses—Objection to count because of vagueness and generality to be taken before plea (Cr. Code, s. 898).

Appellant and B. and C. were charged on an indictment containing 16 counts: 13 for conspiracy relating to the possession, distribution and sale of drugs; two for conspiracy relating to, respectively, the signing of prescriptions and the signing of orders, in respect of a drug; and one charging them with selling a drug; all within the meaning of and contrary to the provisions of *The Opium and Narcotic Drug Act,*

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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1929 (Dom., c. 49). C. was given a separate trial, which took place subsequent to appellant's trial, and C. was found not guilty. Appellant, on trial before Major J. and a jury, was convicted on all counts. His appeal to the Court of Appeal for Manitoba was dismissed, Robson J.A. dissenting, [1942] 2 W.W.R. 580; [1942] 3 D.L.R. 500; and he appealed to this Court.

Held: A new trial should be directed because (agreeing with certain grounds of dissent in the Court of Appeal): (1) Certain evidence referred to by the trial Judge as corroboration could not be considered by the jury as such; it was merely evidence of opportunity. (2) A certain written statement obtained by the police from one E. P. (a person mentioned in the indictment in connection with certain charges) was improperly admitted in evidence; s. 10 of the *Canada Evidence Act* had no application; the fact that accused's counsel had referred to the statement in cross-examination was not sufficient to permit it to be put in evidence; the statement was made when accused was not present, and, while the majority of the Court of Appeal considered that there was nothing therein that E. P. did not say in the witness box, there were matters referred to in the statement which were clearly hearsay; it could not be confidently stated that no substantial wrong or miscarriage of justice had occurred, within the meaning of s. 1014 (2), *Cr. Code.* (3) While the trial Judge's general statement to the jury of the law of conspiracy might be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to C.'s activities were concerned; the counts charging conspiracy to have C. unlawfully sign prescriptions and orders, required a much fuller explanation than was given.

In disagreeing with certain grounds of dissent in the Court of Appeal, this Court held: (1) The fact that C., on a separate trial as aforesaid, was found not guilty, was no reason in law that appellant should be acquitted. (2) On the new trial, it would be for the jury to say if the conspiracy alleged between C. and accused was proved beyond a reasonable doubt; evidence of C.'s actions on which, together with any other relevant evidence, the jury might so find, was admissible. (3) The trial Judge was within his province in expressing his personal opinion as to the character of the police witnesses, as he made it clear throughout his charge that all questions of fact were for the jury and that the jury was not bound by his opinion. (4) The objection taken to a count of the indictment because of vagueness and generality, should have been taken under s. 898, *Cr. Code,* before the accused pleaded.

APPEAL by Forsythe, one of the accused, from the judgment of the Court of Appeal for Manitoba (1) dismissing (Robson J.A. dissenting) his appeal from his conviction, on a trial before Major J. and a jury, for the offences hereinafter mentioned.

The appellant and two others, Bisson and Carson, were charged on an indictment containing 16 counts—13 for

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conspiracy relating to the possession, distribution and sale of drugs; two for conspiracy relating to, respectively, the signing of prescriptions and the signing of orders, in respect of a drug; and one, the last count, charging them with selling a drug; all within the meaning of and contrary to the provisions of *The Opium and Narcotic Drug Act, 1929* (Statutes of Canada, 1929, c. 49).

On motion on behalf of Carson, a severance of his trial from the trial of the other accused was ordered, and the trial proceeded against the other accused. On the trial of Carson, subsequently, he was found not guilty.

Forsythe was convicted on all counts. He appealed to the Court of Appeal for Manitoba. His appeal was dismissed, Robson J.A. dissenting on a number of grounds (with some of which this Court agreed, in directing a new trial); he would have allowed the appeal and quashed the conviction. Forsythe appealed to this Court.

Wray, Schaf, Lillian Young and Elizabeth Pitt, referred to in the reasons for judgment of this Court now reported, were persons mentioned in the indictment in connection with charges therein.

Counts 6 and 7 of the indictment, referred to in the reasons for judgment of this Court as requiring a much fuller explanation than was given to the jury, were charges of conspiracy to have the said Carson, alleged in the charges to be a veterinary surgeon within the meaning of said Act, unlawfully sign prescriptions and unlawfully sign orders, respectively, for the filling of which diacetylmorphine, a drug within the meaning of said Act, was required, said drug not being required for medicinal purposes in connection with his practice as a veterinary surgeon.

By the judgment of this Court now reported, the appeal was allowed and a new trial directed.

H. P. Blackwood K.C. for the appellant.

A. M. Shinbane K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal from an order of the Court of Appeal for Manitoba dismissing an appeal by the accused Forsythe against his conviction on thirteen counts of conspiracy relating to the possession, distribution and sale of drugs, one charge or count relating to the

signing of prescriptions in respect of a drug, one charge or count relating to the signing of orders respecting a drug and one charge or count relating to the sale of drugs, all within the meaning of and contrary to the provisions of *The Opium and Narcotic Drug Act* of Canada. Mr. Justice Robson dissented on twelve separate grounds set out in the formal order of the Court of Appeal and would not only have ordered a new trial but would have acquitted the accused. We do not agree that Forsythe should be acquitted, but, as a new trial is being directed, as little as possible will be said about the evidence.

The accused was indicted jointly with one Carson; a severance was granted with respect to Carson who, on his trial subsequent to Forsythe's conviction, was found not guilty. This circumstance is no reason in law that the appellant should be acquitted. The trial judge was within his province in expressing his personal opinion as to the character of the police witnesses, as he made it clear throughout his charge that all questions of fact were for the jury and that the latter were not bound by his opinion. On the new trial, it will be for the jury to say if the conspiracy alleged between Carson and the accused is proved beyond a reasonable doubt. Evidence of Carson's actions on which, together with any other relevant evidence, the jury might so find, is admissible. These remarks dispose of grounds of dissent 1 to 4 inclusive.

As to ground 5, we agree with Mr. Justice Robson that what was referred to by the trial Judge as corroboration could not be considered by the jury as such; that is the evidence by the stenographer in Forsythe and Bisson's office that she saw Wray and Schaf, at different times, in the office when apparently they had no business there, and the evidence of a witness who had seen Lillian Young with Bisson in an auction sales room. All this would be merely evidence of opportunity and is not corroboration. *Burbury* v. *Jackson* (1); *The King* v. *Baskerville* (2). On this ground a new trial should be directed.

A new trial should also be directed because the written statement obtained by the police from Elizabeth Pitt was improperly admitted (ground 6 of dissent). Section 10 of the *Canada Evidence Act,* referred to by the trial Judge, has no application, and counsel for the Crown

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before us so admitted. It was suggested that the statement was admissible since counsel for the accused had referred to it in cross-examination. It is true that the latter did ask Mrs. Pitt if she had signed a statement for the police; that she admitted that she had done so but stated there was an error in the statement. This, however, is not sufficient to permit it to be put in evidence. The statement was made when the accused was not present and, while the majority of the Court of Appeal considered there was nothing in the statement that Elizabeth Pitt did not say in the witness box, there are two or three matters referred to in the statement which are clearly hearsay. We are unable to agree that, within the meaning of subsection 2 of section 1014 of the *Criminal Code,* it can be confidently stated that no substantial wrong or miscarriage of justice has occurred.

There is nothing in grounds 7 to 9 inclusive upon which a new trial should be directed because, subject to what is stated presently, the case for the defence was put to the jury, and the trial Judge did not exclude or qualify legitimate cross-examination by counsel for the defence of Crown witnesses. As to grounds 10 to 12, it may be stated that any objection to count 16 of the indictment because of vagueness and generality should have been taken under section 898 of the *Code* before the accused pleaded. However, while the general statement of the law of conspiracy made by the trial Judge may be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to Carson's activities was concerned. Counts 6 and 7 required a much fuller explanation than was given. For this third reason a new trial is directed.

In view of the statement before us of counsel for the respondent, no doubt the Crown authorities will consider whether it is advisable that the accused should be tried on an indictment containing a less number of counts, leaving it to him, if so advised, to demand particulars.

Appeal allowed and new trial directed.

Solicitors for the appellant: *H. P. Blackwood and L. L. Broad.*

Solicitor for the respondent: *A. M. Shinbane.*