BEATRICE BERNARD CHAPDELAINE..APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1934

*Oct. 29
*Nov. 26

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

Criminal law—Murder—Poisoning—Jury trial—Misdirections by trial judge—Evidence—Admissibility—Declarations by deceased—Res gestae—Ante mortem—Testimony by brother of accused, an accomplice—Warning given to jury—Illegal comments by trial judge in his charge—Whether "substantial wrong or miscarriage of justice"—New trial—Section 1014 (2) Cr. C.

The appellant was tried for the murder of her husband, convicted and sentenced to death, the indictment charging her with the administering of poison (arsenic). The conviction was affirmed by the appellate court, two judges dissenting. The grounds of dissent were based on misdirections by the trial judge in his charge to the jury on the

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and St.-Germain J. *ad hoc.*

1934

CHAPDELAINE v. THE KING.

two following matters. First: the Crown brought witnesses who testified to declarations made by the deceased, in the presence of the accused, four or five days before his death and nearly two weeks after the date of the alleged offence, such declarations being to the effect that he was dying from poison given to him by the accused. Counsel for the accused having objected to the admissibility of such evidence, the trial judge held that it could not be admitted "as being a deposition *ante mortem*," but he allowed it "as being a declaration made by the victim in presence of the accused." But, in his charge to the jury, the trial judge did not restrict himself to instruct the jury accordingly, and, treating these declarations by the deceased as being an important part of the evidence, he proceeded to make an analysis of same and emphasized the statement made by the deceased that he was going to die, and so to give more weight to the truthfulness of the latter's declarations that he had been poisoned by his wife. Secondly: the principal witness for the Crown was one Gédéon Bernard, brother of the accused. At the time of the trial he was serving a sentence of five years' imprisonment following a verdict of manslaughter on an indictment for the murder. He testified that the appellant came to his house and asked him if he had any poison, as she wanted to get rid of her husband, that she agreed to pay him $200; that he gave her some poison; that the appellant, seeing her husband ill but not yet dead, asked him for more poison and he gave it. At the request of counsel for the accused, the trial judge warned the jury of the danger of convicting on the uncorroborated evidence of an accomplice, although it was within their legal province so to do; but he added (translation): "* * * to tell you to take the evidence of Gédéon Bernard as that of an accomplice, I am bound, at the request of the defence, to tell you that he was the aider and not the principal. To be an accomplice, it is necessary that there should be a principal, that another should have committed the crime. If it is absolutely desired that I say to the jurors to regard Gédéon Bernard as an accomplice in the present case, it would be necessary that the principal should be the accused. It is not possible to be the accomplice of one who does not exist. * * * He is not an ordinary accomplice. If he be the accomplice, he is the brother of the accused."

Held that the trial judge misdirected the jury upon each of the two grounds of appeal above mentioned and that those material misdirections were so grave as to necessitate a new trial, the Crown having failed to shew that no substantial wrong or miscarriage of justice did not occur owing to such misdirections. Section 1014 (2) Cr. C.

Held, also, that the declarations made by the deceased that he had been poisoned by his wife were not admissible as forming part of the *res gestae*. These declarations were made at the hospital nearly two weeks after the date of the alleged offence and four or five days before his death: therefore they were too much separated by time and circumstance from the actual commission of the alleged criminal act. These declarations should have been alluded to only in connection with the attitude of the accused.

Held, further (St. Germain J. *ad hoc* expressing no opinion), that the trial judge misdirected the jury in his remarks concerning the evidence of the brother of the accused, if considered as an accomplice. The trial judge after having set out to warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice,

destroyed in effect by his subsequent remarks the warning given; some jurors may have in view of those remarks considered that the request of the defence was tantamount to an admission of guilt.

Per Duff C.J. and Crocket J.—The observations of the trial judge fall within the description "matters which ought not to have been submitted" to the jury for consideration by them "in aiming at their verdict." *Makin* v. *A. G. for N.S.W.* ([1894] A.C. 70).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, sustaining the conviction of the appellant, on her trial before Louis Cousineau J. and a jury, on a charge of murder. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the above head-note and in the judgments now reported. The appeal was allowed; the conviction was quashed, and a new trial ordered.

Antoine Rivard K.C. and *Césaire Gervais K.C.* for the appellant.

Wilfrid Lazure K.C. for the respondent.

The judgment of Duff C.J. and Crockett J. was delivered by

DUFF C.J.—I concur with the conclusion of my brother Hughes and of Mr. Justice St. Germain. I agree with my brother Hughes that the learned trial judge misdirected the jury in the matter of the evidence of Gédéon Bernard, and that this misdirection in itself was so grave as to necessitate a new trial. I agree, moreover, with Mr. Justice St. Germain in what he says as to the statements alleged to have been made by the unfortunate deceased, Ludger Chapdelaine, in the presence of the accused.

The rule as to the admissibility of statements made in the presence of the accused is stated by Lord Atkinson in *Rex* v. *Christie* (1) in these words:

> As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, actions, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. * * *

(1) [1914] A.C. 545 at 554.

1934

CHAPDELAINE v. THE KING.

Duff C.J.

Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, the judge can instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, could not, or would not, rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it in whole or in part his own, or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above mentioned should be ultimately produced, to tell the jury to disregard the statement altogether?

In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice.

The practice indicated in the judgment of Pickford J. in *Rex* v. *Norton* (1) which Lord Atkinson says

* * * where workable, would be quite unobjectionable in itself as a rule of practice, and equally effective for the protection of the accused,

is explained by Mr. Justice Pickford in these words:

The fact of a statement having been made in the prisoner's presence may be given in evidence, but not the contents, and the question asked, what the prisoner said or did on such a statement being made. If his answer, given either by words or conduct, be such as to be evidence from which an acknowledgment may be inferred, then the contents of the statement may be given and the question of admission or not in fact left to the jury; if it be not evidence from which such an acknowledgment may be inferred, then the contents of the statement should be excluded. To allow the contents of such statements to be given before it is ascertained that there is evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as, whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds. It is perhaps too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner, as it is possible that a denial may be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment may be inferred, but, as above stated, we think they should be rejected unless there is some evidence of an acknowledgment of the truth. Where they are admitted we think the following is the proper direction to be given to the jury:—That if they come to the conclusion that the prisoner had acknowledged the truth of the whole or any part of the facts stated they might take the statement, or so much of it as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement standing alone afforded any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of its truth; but unless they found as a fact that there was such an acknowledgment they ought to disregard the statement altogether.

(1) [1910] 2 K.B. 496, at 500.

It is desirable to emphasize what Lord Atkinson says. These observations cannot, except in so far as they relate to the direction to the jury, now be regarded as laying down the law, but they may properly be regarded as outlining a practice which "where workable" is "unobjectionable" and may prove "effective for the protection of the accused."

To these observations it may be useful to add the following extract from the judgment of Lord Moulton at p. 559 of the same case (1):

> There remains the second ground, namely, that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. Now, in a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable * * *
> * * * The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him.

It is not seriously open to dispute that the learned trial judge's charge was calculated to convey to the jury the belief that they were entitled to weigh the evidential value of the statement as if the statement were evidence of the facts stated, apart from the behaviour of the prisoner. This was done, moreover, in a manner calculated to influence weightily the judgment of the jury in arriving at a verdict.

I find myself quite unable to accept the contention made on behalf of the Crown that the appeal ought to be dismissed on the ground that there has been no substantial wrong or miscarriage of justice. To quote the language of the Lord Chancellor in delivering the judgment of the Judicial Committee in *Makin* v. *A.G. for N.S.W.* (2).

> 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

(1) [1910] 2 K.B. 496. (2) [1894] A.C. 57 at 70.

1934

CHAPDELAINE v. THE KING.

Duff C.J.

material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

The matters discussed by the learned trial judge, already referred to, in dealing with the statements of the accused, plainly fall within the description "matters which ought not to have been submitted" to the jury for consideration by them "in arriving at their verdict." This applies also to the observations of the learned trial judge upon the evidence of Gédéon Bernard.

It is not within the province of this court to substitute itself for the jury in such cases.

It is, I think, desirable, since there is to be a new trial, that something should be said as to the principle governing the admissibility of dying declarations. Whether the conditions of admissibility are fulfilled is a question for the judge, and it is his duty to pass upon that question before admitting evidence of the statement alleged to have been made.

First of all, he must determine the question whether or not the declarant at the time of the declaration entertained a settled, hopeless expectation that he was about to die almost immediately. Then, he must consider whether or not the statement would be evidence if the person making it were a witness. If it would not be so, it cannot properly be admitted as a dying declaration. Therefore, a declaration which is a mere accusation against the accused, or a mere expression of opinion, not founded on personal knowledge, as distinguished from a statement of fact, cannot be received.

In *Rex* v. *Sellers,* a decision pronounced in 1796, reported in 1828 in the third edition of Carrington's Supplement to the Criminal Law, it was laid down that,

> Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn. Therefore, anything the murdered person, *in articulo mortis,* says as to facts, is receivable, but not what he says as matter of opinion.

That this statement of the law governs the practice to-day is evidenced by the fact that it is found in the leading current textbooks on criminal law, Russell on Crimes, 8th ed., p. 1930; Archbold, Criminal Evidence, 28th ed., 392; Roscoe, Criminal Evidence, 15th ed., 31; Wills, Evidence, 2nd ed., 197.

In the section of Lord Hailsham's edition of Lord Halsbury's Laws of England devoted to the criminal law (9 Hals. 452) it is reproduced almost *ipsissimis verbis*. The authors of that section are Mr. Justice Avory, Sir Archibald Bodkin and Mr. R. E. Ross.

If alleged *ante mortem* declarations of Ludger Chapdelaine are tendered as such during the course of the new trial, it will be the duty of the judge to consider and decide, before permetting evidence of them to go before the jury, whether or not these conditions have been satisfied.

The appeal should be allowed and a new trial should be ordered.

CANNON J.—I agree with my Lord the Chief Justice that the learned trial judge erred in matters of substance with respect to the declarations of the deceased in the hospital, in the presence of the accused, and also in his presentation to the jury of the appellant's position if Gédéon Bouchard's evidence was to be considered as that of an accomplice. But I have pondered with grave anxiety over paragraph 2 of article 1014 of the Criminal Code which would allow this court to dismiss the appeal and avoid a third trial if, notwithstanding our opinion on the above grounds, we were also of opinion that no substantial wrong or miscarriage of justice has actually occurred. I cannot, however, reach the conviction, to use the language of Lord Hewart, C.J. *re Jones alias Wright* (1), that, *without* these irregularities in the trial, the jury *must inevitably* have reached the same verdict of guilty against the accused.

> It is impossible for us to enter into a speculation about what the jury might, could, would or should have done, and as we do not feel able to say that they must "inevitably" have come to the conclusion to which they did come, in the absence of the material improperly admitted,

the conviction must be quashed and a new trial ordered.

HUGHES J.—The appellant was tried before Mr. Justice Louis Cousineau and a jury at Sherbrooke, Quebec, January, 1934, on the following indictment:—

> A East Angus, dans le district de St. François, dame Béatrice Bernard a assassiné son mari, Ludger Chapdelaine, dans les circonstances suivantes, savoir: en faisant prendre, le ou vers le 15ème jour de février 1932, au dit Ludger Chapdelaine, malicieusement et dans le but de l'empoisonner, un poison violent, savoir de l'arsenic, qu'elle mêla à son breuvage, lors de son repas, le tout à l'insu du dit Ludger Chapdelaine, et

(1) (1922) 16 Cr. App. Rep. 124, at 128.

1934

CHAPDELAINE v. THE KING.

Hughes J.

ce dernier mourut le 6 mars 1932, à Sherbrooke, dit district, des suites du dit empoisonnement, la dite dame Béatrice Bernard commettant par là un meurtre.

The accused was convicted and sentenced to death.

The accused appealed to the Court of King's Bench, appeal side. The appeal was dismissed by a majority judgment, Chief Justice Sir Mathias Tellier and Mr. Justice St. Jacques dissenting.

From the judgment of the Court of King's Bench, appeal side, the accused now appeals to this Court.

The grounds of dissent as set out in the formal judgment of the Court of King's Bench, appeal side, are as follows:

Sir Mathias Tellier et M. le Juge St-Jacques sont dissidents, parce que, suivant eux, le verdict est vicié par suite de la preuve illégale admise au dossier, comme celle des déclarations du défunt Ludger Chapdelaine et par suite de la direction illégale et injuste donnée au jury, et que, dans ces conditions, il est impossible de dire que, sans ces illégalités, le verdict du jury aurait été le même.

The notes of the Chief Justice and those of Mr. Justice St. Jacques both shewed that the misdirection above referred to concerned the declarations of the deceased and also concerned the evidence, as an accomplice, of Gédéon Bernard, a brother of the appellant.

The declarations of the deceased, both as to admissibility and direction, may first be taken up. It is not in dispute that the deceased, on or about February 17, 1932, felt ill about two hours after he had eaten some tomato soup prepared by the appellant, the remains of a can opened by the deceased the day before. At first he thought it was indigestion and had the doctor treat him. On February 23, the patient was removed by the doctor to St. Vincent de Paul Hospital at Sherbrooke. He died there on Sunday, March 6, 1932.

When, at the trial, Josephine Chapdelaine Brault, sister of the deceased, was testifying to a statement made by the deceased in the presence of the appellant the Tuesday or Wednesday before his death, the Crown counsel endeavoured to lay a foundation for the admission of the evidence as an *ante mortem* statement. The defence counsel objected, and the learned trial judge said:—

Je ne l'accepterai pas comme une déposition *ante mortem,* mais comme une déclaration ordinaire formant partie du *res gestae* en présence de l'accusée.

The learned judge added:—

Je ne permets pas la preuve comme étant une déposition *ante mortem,* mais je la permets comme étant une déclaration faite par la victime en présence de l'accusée.

The witness had, before the objection, testified that the deceased had said, in his wife's presence: "C'est toi qui m'as empoisonné; tu le sais." After the learned judge's ruling, the witness added that the deceased had also said that the appellant would appear in court and would be hanged for it. The witness further testified that the appellant appeared indifferent and did not reply at all. In cross-examination the witness said the deceased had not spoken that way previously. The witness said to the deceased that she should not say such things, but the deceased replied: "Oui, ma tante, c'est elle qui m'a empoisonné." He further said:

Je pense que je vais mourir parce que je suis empoisonné; c'est de la soupe que j'ai mangée * * * Oui, ma tante, c'est elle qui m'a empoisonné avec la soupe qu'elle m'a donnée.

Napoléon Brault, a cousin of the deceased, testified that he had been at the hospital to see the deceased the Sunday before he died and also on the Wednesday or Thursday before his death. He was asked by the Crown counsel if the deceased had spoken in the presence of the appellant of what had happened to him. The defence counsel objected to the admission of the statement of the deceased as a dying declaration. The learned trial judge then ruled::—

Je suis de votre opinion. Mais je ne la prends pas comme ça. Je la prends comme une déclaration faite en présence de l'accusée et comme faisant partie du *res gestae,* et je la permets.

The witness then testified that on the Wednesday or Thursday the accused had said in the appellant's presence: "C'est elle qui m'a empoisonné". The appellant did not say anything in reply.

Elie Chapdelaine, a brother of the deceased, testified that he had gone to the hospital five or six times to see the deceased and that he had met the appellant there on almost every occasion. The Crown counsel asked the witness whether the deceased, during the last days, had spoken of his dying condition, and what he had said. The defence counsel objected to the admissibility of the evidence as a dying declaration. The learned trial judge then ruled as follows:

Je suis de cette opinion là. Mais je ne la prends pas comme telle. C'est la déclaration de la victime qu'il faut interpréter et non pas l'opinion du témoin; ce n'est pas une déclaration *ante mortem,* mais ça fait partie du *res gestae.* Ensuite ça ne regarde pas l'opinion du témoin, ça regarde la déclaration de la victime elle même et elle fait partie du *res gestae.* Je permets la preuve.

1934

CHAPDELAINE v. THE KING.

Hughes J.

The defence counsel then objected to the admission of the evidence as part of the *res gestae*. On this objection the learned trial judge ruled as follows:

Je rends toujours le même décision et pour les mêmes raisons.

The witness then testified that the deceased had, on the Wednesday or Thursday before his death, said, in his wife's presence: "Je suis empoisonné, je vais mourrir; c'est elle Béatrice qui m'a empoisonné." The witness was asked what attitude the appellant had taken to this statement and replied that the appellant had smiled and, to change the subject, had said to the witness: "Ta femme est bien?" Previously the deceased had always told the witness that he was ill of indigestion from eating soup which the appellant had prepared from the balance of a can opened by the deceased the day before his first illness.

Raoul Gosselin, also a Crown witness, testified that he was a hospital attendant. He was asked by the Crown counsel if he had heard what the deceased had said to the appellant about his illness and about poison. He replied that he had heard it on two occasions. The defence counsel objected to the admission of the evidence as a dying declaration or as part of the *res gestae*. The learned trial judge ruled:

L'objection est renvoyée parce que toute déclaration ainsi faite ne serait pas prise comme déclaration *ante mortem* faite par la victime, mais comme déclaration de la victime en présence de l'accusée faisant partie du *res gestae*.

The witness then testified that the deceased had said in the presence of the appellant:

Tu peux sortir ma maudite hypocrite, c'est toi qui m'a empoisonné, et tu viens ici m'en faire acroire.

The witness did not remember any reply by the appellant. The witness added that the deceased had been delirious almost continually for three or four days before he died. From the arrival of the deceased at the hospital he had been delirious at times.

Dealing with the declarations of the deceased the learned trial judge charged the jury as follows:

Maintenant, il y a pour moi la partie la plus importante, quoiqu'on en dise. Ce sont les déclarations de la victime à l'hôpital. Voici un homme qui dit à tout le monde qu'il va mourir, qu'il est empoisonné, en présence de l'accusée; elle est là, elle est là tout le temps. Il ne dit rien les premiers jours.

* * *

Dans les premiers jours il ne dit rien; il ne sait pas encore; mais c'est quand il est rendu à hôpital et puis que sa maladie augmente tout

1934

CHAPDELAINE v. THE KING.

Hughes J.

le temps qu'il parle. C'est à vous autres à vous demander:—Est-ce que c'est en pleine santé, se voyant disparaître tout à coup, sachant qu'il est empoisonné, et qu'il est empoisonné, d'après sa conviction, par sa femme, croyez-vous qu'il est bien naturel qu'il ne se soit pas tu alors? Tous les médecins de l'hôpital disent qu'il délirait par moment; tous ceux qui l'ont vu disent qu'en les voyant entrer il les reconnaissait. Même ceux qui disent, du côté de la défense, qu'ils y sont allés et qu'il a jamais parlé de rien, qu'ils ont jamais crû qu'il était empoisonné, ne disent pas qu'il délirait dans ce temps là. Il avait toute sa connaissance et souffrait. Maintenant quel intérêt avait-il d'affirmer, de venir dire ça? Quel intérêt aurait cette dame Brault, sa tante. Elle a rendu un témoignage, si je pouvais me servir d'une expression connue, de sainte femme, sans aucune malice, au contraire. Et quand le savant procureur de la défense lui demande si l'accusée a protesté contre les accusations du mari, elle dit:—Non, elle n'a pas protesté; c'est moi qui ai dit:—Ne parle donc pas comme ça.—Et elle dit sa réponse à lui:—C'est vrai ma tante, c'est vrai ma tante.—Il déclare qu'elle l'a empoisonné; et puis même il demande à son ami de la sortir et il la traite d'hypocrite. Tous ces témoignages ont été entendus. C'était le mercredi ou le jeudi; c'était quatre ou cinq jours avant sa mort, il n'était pas encore entré dans le coma. Alors voici des déclarations excessivement sérieuses d'un homme, quand même ça ne serait pas une déposition *ante mortem,* mais qui déclare qu'il sait qu'il va mourir. Vous aurez à vous demander: quel intérêt Ludger Chapdelaine avait-il d'accuser sa femme, puisque la défense reconnaît qu'ils vivaient bien et étaient heureux tous les deux. Si encore on avait prouvé une animosité; s'ils étaient déjà séparés, détestés. S'il y a eu une preuve de faite c'a été contre l'accusée, qu'elle n'aimait pas son mari. Toute la défense a démontré que c'était un ménage modèle, c'est son expression, elle a démontré qu'il n'y avait aucun conflit entre les deux.

Vous devez vous demander si un homme qui a son bon sens,—d'après tous les témoins,—l'infirmier a dit:—Pour moi il était absolument normal,—et les réponses qu'il a données à sa tante au moment où elle a dit:—Ne parle pas comme ça.—C'est vrai ma tante, ce n'est pas une réponse d'un homme qui délire. Vous êtes obligés de vous demander, dans vos délibérations, quel intérêt avait-il d'accuser sa femme plutôt qu'un autre? pourquoi? Enfin il disait qu'il croyait qu'il était empoisonné, qu'il était pour mourir.—Je vais mourir, je meurs empoisonné; sortez moi cette hypocrite; je ne veux pas la voir; elle essaie de m'en faire accroire.—Il disait qu'il allait mourrir et de fait il est mort.

It is clear that the declarations of the deceased above referred to were not admissible as forming part of the *res gestae.* They were made at the hospital within a week or thereabouts of the death of the deceased and consequently long after the commencement of the illness of the deceased. They were, as Lord Atkinson said, in *Rex* v. *Christie* (1), so separated by time and circumstance from the actual commission of the alleged criminal act that they were not admissible as part of the *res gestae.* The Crown contended, however, that, if not admissible as part of the *res gestae,* the declarations were admissible statements made in the

(1) [1914] A.C. 545.

1934

CHAPDELAINE v. THE KING.

Hughes J.

presence and hearing of the accused under such circumstances that she might reasonably have been expected to have made some answer or done something in repudiation thereof. *Gilbert* v. *The King* (1). *Hubin* v. *The King* (2). The appellant, on the other hand, contended that the statements were mere opinions and therefore inadmissible, but, assuming that the declarations were admissible as the Crown contended, the learned trial judge did not explain to the jury that the statements made in the presence of the appellant, even upon an occasion which should be expected reasonably to call for some explanation or denial from her, were not evidence against her of the facts, if any, stated save so far as she accepted the statements or part thereof, so as to make them or part thereof, in effect, her own, and that the evidential value of the statements depended on her behaviour in response thereto. *The King* v. *Christie* (3).

The Crown further contended that the declarations were admissible as dying declarations in any event and that the learned trial judge sufficiently charged the jury. But the learned trial judge refused to admit them as dying declarations and, in view of the disposition that I think must be made of this appeal on the next ground, it is not necessary to discuss them here in that light.

We now come to the evidence of Gédéon Bernard. This witness, at the trial, testified that he was then serving a sentence of five years' imprisonment at St. Vincent de Paul Penitentiary following a verdict of manslaughter on an indictment for the murder of the same deceased, Ludger Chapdelaine. He testified that during the winter of 1932, he lived at Bishop Crossing, seven or seven and one-half miles from East Angus where the deceased and the appellant lived. On "Samedi gras" the latter came to his house and asked him if he had any poison for the purpose of poisoning her husband, as she wanted to be rid of him. She told him that she would pay him $100. He asked $300 and she said that she would give $200. He set out for East Angus on the evening train. On Sunday morning he returned home. On Monday he went back to East Angus. That evening he gave her some poison which he had brought in an envelope and which he had taken from a

(1) (1907) 38 S.C.R. 284, at 300. (2) [1927] S.C.R. 442.
(3) [1914] A.C. 545, at 554, 560.

little bottle in his own barn. He had purchased it for his horses. Before that the appellant had written him a letter asking for poison but the witness had thrown it in the stove. On February 21, he received another letter, containing one dollar, which he took home and which his wife read. The letter was as follows: "Tu viendras à East Angus. Tu sais pourquoi." That evening he went to East Angus. Ludger Chapdelaine was ill. The appellant said to the witness:

Je lui en ai donné, je pensais qu'il était pour mourir et il n'est pas mort. Tu vas m'en donner encore.

The deceased was complaining of sickness at the stomach and said he was going to die. The following morning, the appellant said to the witness: "Tu vas m'en envoyer, tu m'en enverras, j'en ai plus." That evening she put in his pocket an envelope addressed to her at East Angus. In the morning when he arrived home, he put the balance of the poison from the bottle into the letter and sent it to her. After the death he asked her twice for the hundred dollars she had promised him. The Crown counsel then asked the witness:

Monsieur Bernard, le vingt-deux, lorsque vous avez répondu à sa lettre et que vous êtes allé à East Angus, qu'est-ce qui s'est passé entre vous et elle?

To the question the defence counsel objected. The learned trial judge ruled, "Je permets la question." The Crown counsel then asked the witness if he had talked with the appellant and the witness answered,

Oui, j'ai causé avec elle quand je suis allé chez elle; j'ai causé avec elle et j'ai eu des relations avec elle une fois. C'est ça que vous voulez savoir, je vais vous le dire.

The Crown counsel then asked if that occurred on the trip of the 6th or on the trip of the 21st, and the witness answered that it was on February 8. In cross-examination the witness was asked about a statement in writing previously made by him in which he had said that his wife had heard the appellant say that she wanted poison to get rid of her husband, and that his wife had said to make her pay dearly, to ask two hundred dollars. To this question, he answered: "Je peux assermenter que non." The witness also in cross-examination was asked the following questions and made the following answers:

Et puis, qu'un nommé Gagné le savait lui aussi; votre homme engagé, Oliva Gagné? Je vous demandais, Monsieur Bernard, à la prison, avant votre procès, si ce que vous aviez dit aux détectives, les déclarations aux

1934

CHAPDELAINE v. THE KING.

Hughes J.

détectives si c'était vrai, et vous avez dit que c'était tout de travers, que l'arsenic, vous n'en aviez pas donné à votre sœur, que vous aviez tout donné à vos chevaux, et que Oliva Gagné savait ça?—R. Monsieur Gagné a travaillé pour moi dans l'été.

Q. Je vous demande si vous m'avez dit ça déjà?—R. Oui, je vous l'ai déjà dit.

Introducing and speaking of the evidence of this witness, the learned trial judge charged the jury as follows:

Maintenant, venons en aux faits. C'est là dessus que je dois traiter de la question du complice.

S'il n'y avait que les symptômes trouvés par les médecins tant durant la maladie de Chapdelaine que les symptômes trouvés après sa mort, je dirais que la Couronne n'a pas tenté de faire la preuve complète de l'accusation portée contre l'accusée. Mais il y a d'autres preuves et la Couronne a essayé de démontrer, a lié, par des faits antérieurs, la maladie soufferte par Chapdelaine qui a amené sa mort.

Le principal témoin c'est Gédéon Bernard. C'est un complice * * * Vous devez prendre le témoignage d'un complice, pour me servir d'une expression assez connue, avec un grain de sel. Vous devez le prendre avec beaucoup de précaution, malgré que vous ayez le droit de considérer ce témoignage, celui du complice, sans corroboration. Vous avez droit de le croire, mais il doit être supporté, d'après moi, pour que, dans une accusation aussi sérieuse que celle-ci, vous deviez le prendre en considération * * *

Dans les circonstances je ne crois pas que vous ayez de doute que Gédéon Bernard était un complice, parce qu'il a subi son procès sur la même offense et a été condamné à cinq ans de pénitencier, qu'il purge à l'heure actuelle. Mais la question présente un côté assez sérieux au point de vue des précautions que vous devez prendre, avant de prendre son témoignage, surtout dans la présente cause. Il y a un caractère absolument particulier qui se présente dans cette cause spécialement, qui n'est pas dans une autre cause. Pour que Gédéon Bernard soit complice, soit l'aide de quelqu'un qui a commis un meurtre ou un crime, il faut qu'il y ait un crime. La défense me demande de vous dire de prendre le témoignage de Gédéon Bernard avec beaucoup de précaution parce qu'il est complice dans la mort de Ludger Chapdelaine; on me dit de vous demander de prendre son témoignage avec beaucoup de précaution, parce que si on a tué par le poison, l'arsenic, Ludger Chapdelaine, Gédéon Bernard y a participé.

Donc, pour que je vous dise de prendre le témoignage de Gédéon Bernard comme complice, je suis obligé, à la demande de la défense, de vous dire qu'il a été l'aide et n'a pas été le principal auteur. Pour être le complice de quelqu'un il faut un auteur, il faut qu'un autre commette le crime. Si on veut absolument que je dise aux jurés de reconnaître Gédéon Bernard comme complice dans la présente cause, il faudrait que le principal acteur soit l'accusée. Il ne peut pas être le complice de quelqu'un qui n'existe pas. Il faut que le meurtre ait existé pour que je vous demande de le considérer comme complice, et dans ce cas, prenez son témoignage avec beaucoup de précaution. Mais s'il est vrai, d'après les prétentions de la défense, qu'il n'y a pas eu de meurtre, que Ludger Chapdelaine est mort de mort naturelle et non de mort violente par arsénic, il n'est plus le complice; c'est un témoignage indépendant qui n'aurait aucun défaut, et que vous seriez obligés de prendre en entier. L'un ou l'autre, ou il est le complice ou il ne l'est pas. S'il est complice

il est complice de l'accusée et le meurtre a été commis. S'il n'est pas le complice, c'est un témoin absolument impartial et vous devez le prendre en entier. Je ne sais pas si je m'exprime assez clairement pour vous démontrer dans quelle position assez embarrassante au point de vue de l'interprétation du complice vous êtes. Alors, s'il est le complice, prenez le avec précaution. En dehors de ça je suis obligé de vous dire: ce n'est pas un complice ordinaire, s'il est le complice, c'est le frère de l'accusée.

Il est en preuve qu'il n'y a jamais eu aucune animosité entre l'accusée et Gédéon Bernard; il est en preuve qu'ils se visitaient. Ce n'était pas rien qu'un frère, c'était un ami, et un ami très intime. C'est en preuve. On n'a pas amené dans cette cause qu'il y avait une rancune quelconque existant entre les deux. Gédéon Bernard est condamné à cinq ans de pénitencier; il ne peut pas être touché de nouveau sur la même accusation. Il a été trouvé coupable et c'est fini. Quand même on découvrirait aujourd'hui qu'il est l'acteur principal, on ne peut pas le mettre en accusation. Quel intérêt le complice aurait-il à venir rendre témoignage? Quel intérêt avait-il? Vous pouvez vous demander ça. La vengeance? Ca n'a pas été prouvé. Au contraire, c'est de l'amitié qu'on vous a démontrée entre les deux. Ils ont eu un intérêt commun, à un moment donné, au point de vue du meurtre, mais aujourd'hui il n'y en a plus; il n'y a aucun danger pour lui de parler. Quant aux promesses qu'il aurait pu recevoir pour rendre son témoignage, où en est la preuve? Aucune * * * vous devez vous demander toutes ces questions. C'est en analysant toutes les attitudes de Gédéon Bernard depuis le commencement jusqu'à aujourd'hui que vous aurez la véritable interprétation de son témoignage.

In *Vigeant* v. *The King* (1), a new trial was ordered by this Court where the trial judge had omitted to instruct the jury on what was an accomplice in law and to warn them of the danger of convicting on the uncorroborated evidence of an accomplice although it was within their legal province so to do. This rule applies whether there is or is not corroborative evidence of the testimony of the accomplice. *Boulianne* v. *The King* (2). In the case at bar the learned trial judge appeared to have set out to warn the jury of the danger of convicting on the uncorroborated evidence of Gédéon Bernard, but he destroyed, in effect, by the subsequent remarks, particularly those beginning with the words " Mais la question * * * " and ending with the words " * * * de l'accusée," the warning given. Some jurors may have, in view of those remarks, considered that the request of the defence was tantamount to an admission of guilt.

But the Crown alleges that, if there was misdirection, in respect of the declarations of the deceased or in respect of the evidence of Gédéon Bernard or both, no substantial wrong or miscarriage of justice actually occurred and that

(1) [1930] S.C.R. 396. (2) [1931] S.C.R. 621, at 623.

1934

CHAPDELAINE v. THE KING.

Hughes J.

there should not be a new trial, Criminal Code, section 1014 (2), particularly as there was ample other evidence of guilt. *Boulianne* v. *The King* (1). It is not possible in the case at bar to say to what extent the jury or some of the jurors were materially prejudiced against the appellant by the misdirection concerning the evidence of Gédéon Bernard alone, but it is clear that there was material misdirection. *Allen* v. *The King* (2). Where the jury has been misdirected on a material matter, the onus is upon the Crown to shew that the jury, charged as they should have been, could not, as reasonable men, have given on the evidence a verdict other than one of guilt. *Brooks* v. *The King* (3). The Crown has failed to shew this.

The appeal should be allowed and a new trial ordered.

ST-GERMAIN J. *ad hoc*: Regarding the admission of the declarations made by Ludger Chapdelaine, at the hospital, and narrated by some of the Crown witnesses, as evidence in the case, I am of the opinion that these declarations were rightly rejected by the learned trial judge as "dying declarations." In making these declarations, Chapdelaine was merely expressing the opinion that he had been poisoned by his wife and was not asserting a statement of fact. Had Chapdelaine been able to testify himself at the trial, such declarations would not have been allowed. In a case of *Rex* v. *Sellers,* reported in Carrington's Treatises on the Criminal Law, p. 233, it was decided that:

> Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn. Therefore, anything the murdered person, *in articulo mortis,* says as to facts, is receivable, but not what he says as matter of opinion.

These declarations, however, though rejected as "dying declarations," were admitted as *res gestae.* Here again I must come to the conclusion that said declarations should have also, as such, been rejected, first, for the very same reason above mentioned as to "dying declarations," and, secondly, for the further reason that, having been made several days after the date on which the appellant was accused of having given poison to her husband, said declarations did not "*constitute or accompany and explain,* the fact or transaction in issue" and therefore were

(1) [1931] Can. S.C.R. 621, at 629. (2) (1911) 44 Can. S.C.R. 331.
(3) [1927] Can. S.C.R. 633.

not admissible "as forming parts of the *res gesta*"; (Phipson, 7th Ed., p. 54).

These declarations could only have been admitted to prove the accused's attitude or answers and, thereby, allow the jurors to draw their own conclusions as to such attitude and answers of the accused. Unfortunately, the learned trial judge in his charge did not restrict himself to instruct the jury accordingly; on the contrary, treating said declarations as the most important part of the evidence, he proceeded to make an analysis of same and emphasized the statement made by Ludger Chapdelaine that he was going to die, and so to give more weight to the truthfulness of the latter's declarations that he had been poisoned by his wife.

Maintenant, il y a pour moi la partie la plus importante, quoiqu'on en dise. Ce sont les déclarations de la victime à l'hôpital. Voici un homme qui dit à tout le monde qu'il va mourir, qu'il est empoisonné, en présence de l'accusée; * * *

Est-ce que c'est bien naturel pour un homme de trente ans encore en pleine santé, se voyant disparaître tout à coup, sachant qu'il est empoisonné, et qu'il est empoisonné, d'après sa conviction, par sa femme, croyez-vous qu'il est bien naturel qu'il ne se soit pas tu alors? * * *

Maintenant quel intérêt avait-il d'affirmer, de venir dire ça? * * *

Alors voici des déclarations excessivement sérieuses d'un homme, quand même ça ne serait pas une déposition *ante mortem,* mais qui déclare qu'il sait qu'il va mourir. Vous aurez à vous demander: Quel intérêt Ludger Chapdelaine avait-il d'accuser sa femme, puisque la défense reconnaît qu'ils vivaient bien et étaient heureux tous les deux * * *

Thus by his remarks the learned trial judge invites the jurors to consider as the most important part of the evidence the declarations of the deceased, while they should have been alluded to only in connection with the attitude of the accused. These declarations as commented were surely illegal evidence submitted to the jury.

Having reached that conclusion, even after the reading of the whole evidence, in view of the decisions of *Allen* v. *The King* (1), and *Gouin* v. *The King* (2), I cannot but conclude that the appeal must be allowed, the conviction quashed and a new trial directed.

Seeing my conclusion on the first ground raised by the appellant, I need not express any opinion with regard to the second ground as to the comments of the learned trial judge concerning the accomplice.

Appeal allowed, new trial ordered.

(1) (1911) 44 Can. S.C.R. 331. (2) [1926] S.C.R. 529.