NICHOLAS MARKADONIS .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1935

* Feb. 18, 19.
* Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA *in banco.*

Criminal law—Murder—Evidence by accused—Whether voluntary—Evidence by police officers in rebuttal—Lack of warning—Whether evidence admissible—Prejudicial to accused—Substantial wrong—Miscarriage of justice—New trial—Charge to jury—Misdirection—Section 1014 Cr. C.

The appellant was convicted of murder. Evidence was given at the trial that in the middle of the night, one day after the murder, the accused was removed from his cell and, escorted by three police officers, was taken out a road in search of the revolver that shot the victim. The accused was cross-examined on the incidents of that trip and one police officer testified in rebuttal as to the course of conduct and the conversation of the accused on that occasion.

Held that there should be a new trial. Under the circumstances of the case, such evidence was inadmissible in the absence of proof that the statements made by the accused were voluntary and upon proper warning; and the curative effect of section 1014 (2) of the Criminal

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

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Code cannot be applied, as it cannot properly be said that there has been "no substantial wrong or miscarriage of justice."

Judgment of the Supreme Court *in banco* (8 M.P.R. 407) rev.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco* (1), affirming the conviction of the appellant upon trial for murder.

The appellant was convicted at Sydney of the murder of one Cleo Markadonis, his brother's wife. She was killed by a 32-calibre revolver bullet. The murder was committed about 4 o'clock p.m. on July 20, 1934.

D. A. Cameron K.C. for the appellant.

J. H. MacQuarrie K.C. and *M. A. Patterson* for the respondent

The judgment of Duff C.J. and Lamont J. and Dysart J. *ad hoc* was delivered by

DUFF C.J.—In his dissenting judgment Mr. Justice Mellish says:

Dealing with ground no. 7 the objection is taken to the part of the charge dealing with the evidence of Hickey in the language set out in said notice when the learned judge comments on the alleged failure of Hickey to see the prisoner come from the back of the house to the garage.

I think the language used suggests that Hickey who was a Crown witness is keeping back further evidence damaging to the accused. I do not think the suggestion is justified. In the interest of the accused it is a dangerous suggestion because at best it has no probative value and it is doubly dangerous because it may not be justified by the facts.

The eighth grounds of complaint is I think justified, and there is considerable evidence I think corroborating the prisoner's evidence that he did walk down Marconi street.

The ninth ground of complaint is to the effect that the learned trial judge expressed his own views as to the prisoner's credibility unfairly in using the words therein set out.

In dealing with the probable effect of these words we should I think look at the precise circumstances under which they were used. The prisoner gave evidence on his own behalf and on his cross-examination he was repeatedly asked in effect what his opinion was as to the veracity of several Crown witnesses. The questions were I think irrelevant and should not have been asked, and it appears surprising that they were not objected to. The answers to such questions might prejudice the accused before the jury, and I cannot conceive of any legitimate reason for asking them. It is a method of cross examination which I think is unfair and should not be resorted to nor allowed especially in a case like the present: *Regina* v.

(1) (1935) 8 M.P.R. 407; 63 Can. Cr. C. 122; [1935] 2 D.L.R. 105.

Bernard (1); *McMillan* v. *Walker* (2); *North Australian Territory Co.* v. *Goldsborough Mort & Co.* (3). Subsequent events I think leave no doubt as to the purpose for which this method was adopted.

The learned judge in dealing with the evidence of the witness Beard remarks: "The prisoner says he is not telling the truth, and he is asking twelve reasonable and intelligent men to believe that Beard came to this court and committed perjury." The learned judge then almost at once expresses his view as to the credibility of the prisoner in the language complained of. I think in view of what had previously been said the jury might have reasonably inferred that they might come to the same conclusion more especially as the prisoner had accused "a responsible and intelligent looking man" of committing perjury, and that they would have to find this charge proven if they believed the prisoner. The tenth ground of objection is to the admission of evidence. The police, when the prisoner was under arrest obtained damaging statements from him which were not shewn to be voluntary and which nevertheless were put in evidence against him. The only justification suggested for putting in such evidence was that it was given in rebuttal. This is in my opinion no real justification for putting in statements which are *prima facie* not voluntary. I am unable to say that the jury would have reached the same conclusion if this evidence had not been admitted. It was obviously, I think, put in to influence the jury and was calculated to influence them to the prisoner's detriment.

I entirely agree in this.

Mr. Justice Carroll in his dissenting judgment says:

There is one ground raised, however, which merits very grave consideration. This concerns the rebuttal evidence given by officer Churchill. I do not think any of the evidence given by Churchill as rebuttal was in fact rebuttal, but the right of the Crown to give evidence other than rebuttal with the permission of the trial judge, after the defence has closed its case, cannot be challenged.

The objection to this evidence is as to its admissibility; that certain statements made by the accused to the officers, while out on the Morien road the night after the tragedy, were in their nature incriminating and therefore could not be admitted as evidence, because the trial judge was not invited to and did not rule that the statements were made voluntarily.

It was argued by counsel for the Crown that these statements were admissions not in the nature of confessions, and not in their nature incriminating and therefore not subject to the rule that decision must be made on their voluntary character before they became admissible. It is rather surprising that if that was the opinion of the learned counsel that he did not tender the evidence as part of the Crown's main case when officer Churchill was first called.

The accused under cross-examination was asked, in reference to his midnight trip over the Morien road with the police officers, "Did you tell the officers that you threw the revolver away on the Morien road?" He did not answer that question directly, but went on to narrate certain circumstances under which he was required to go out on this midnight expedition and of the existence of conditions going over and while there. If those conditions existed and the circumstances narrated are true (and I think officer Churchill practically admits their truth) then no judge

(1) (1858) 1 F. x F. 240, at 249; 40 Cyc. 2509.
(2) (1881) 21 N.B. Rep. 31.
(3) [1893] 2 Ch. D. 381, at 385.

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would admit as voluntary any statement made under those circumstances. Churchill testified: "We asked him why he did not go and find the gun, and he said, *we did not let him go far enough, and he said let us go back a little farther* and when he came back he said we *would have better luck in the day time.*" The learned trial judge told the jury that accused must have known that they were over there looking for the gun that shot Cleo Markadonis.

Now this statement of accused does not amount to what is known as a "plenary" confession but is a statement which gives rise to an inference that he hid the revolver which shot Cleo Markadonis for whose murder he was being tried and a further inference is that he shot her with that revolver. It is a self-harming statement which thrown into the mass of circumstantial evidence would lend much weight and strength to the chain.

I think under the circumstances that the evidence was not admissible. If however by any chance it was rightly admitted, in such case I think there should have been an instruction to the jury as to the weight of that evidence and what his state of mind would be under the circumstances, and whether he made the statement in order to escape a situation which to say the least could not be pleasant to him. If admissible for the reason that an acknowledgment of guilt cannot reasonably be inferred from the language attributed to the accused, then I think the trial judge should caution the jury as to its true effect. *Rex* v. *Christie* (1).

However, I do not think that my brother judges with whom I differ seriously suggest that the evidence of the statement is under the circumstances admissible. Their judgment is based I think on the curative effect of the Criminal Code, section 1014 (2), that notwithstanding the reception of the inadmissible evidence "no substantial wrong or miscarriage of justice has actually occurred" and therefore there should not be a new trial.

This section or its equivalent has been the subject of inquiry and controversy in our own and in English courts. I shall refer to three precedents: *Allen* v. *The King* (2); *Makin* v. *The Attorney-General of New South Wales* (3); and *Maxwell* v. *The Director of Public Prosecutions* (4). In the *Makin* case (3) the Lords of the Privy Council decided that a section of the *Criminal Law Amendment Act* of New South Wales ("Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice") does not on its true construction empower the court to affirm a conviction where the evidence submitted to the jury was inadmissible and *may have* influenced the verdict. In that case the Lord Chancellor said (pp. 69, 70): "Reliance was of course placed upon the language of the proviso. It was said that if without the inadmissible evidence there was evidence sufficient to sustain the verdict and to show the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence—that is to say what the law regards as evidence—established the guilt of the accused. In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence

(1) [1914] A.C. 545.
(2) (1911) 44 Can. S.C.R. 331.
(3) ([1894] A.C. 57.
(4) (1934) 50 T.L.R. 499.

and there were substituted for it the verdict of the court founded merely upon the perusal of the evidence." Then his Lordship pointed out that there is ample scope for the operation of the proviso, where the evidence improperly admitted can have no possible influence on the jury "as for example where some merely formal matter not bearing direct on the guilt or innocence of the accused has been proved by other than legal evidence." In the *Allen* case (1) the Supreme Court of Canada followed the *Makin* case (2) and held that the inadmissible evidence *may have* influenced the verdict of the jury. The Chief Justice in that case said (p. 339): "I cannot agree that the effect of the section is to do more than give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities *are so trivial* that it may safely be assumed that the jury was not influenced by it. If there is any doubt about this the prisoner must get the benefit of the doubt *propter favorem vitæ*."

It should be observed that the proviso in the Canadian Criminal Code is not expressed in the same language as the English statute. It is very important to note that in our Code the proviso requires that a conviction or judgment shall not be quashed except for "some substantial wrong" or some miscarriage of justice.

In *Makin's* case (2), it was said by the Judicial Committee of the Privy Council, speaking through Lord Herschell, that it cannot

properly be said that there has been no substantial wrong or miscarriage of justice where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

The learned trial judge did not, before admitting evidence of what occurred between the accused and the police officers, decide, as it was his duty to do, that what the accused said was voluntary.

Now, it is quite true that evidence wrongfully admitted may be of a character so trivial that it could not affect the result. We agree with the dissenting judges in the view that this cannot be affirmed with regard to the evidence adduced in rebuttal which was objected to. The learned trial judge emphasized with a good deal of vigour the evidence adduced concerning that episode.

We do not think, moreover, in considering the probable effect of the evidence, that the accused was imputing perjury to the witnesses against him as suggested by counsel for the Crown in his questions addressed to the accused,

(1) (1911) 44 Can. S.C.R. 331. (2) [1894] A.C. 57.

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which suggestion was impressively commented upon by the learned trial judge in his charge. Nor should we overlook the circumstance that while the case for the Crown was powerfully presented to the jury in the judge's charge, the considerations weighing in favour of the prisoner were by no means brought out with their full effect.

We think, for the reasons given by the dissenting judges, that there was a mistrial and that the case should be brought before another jury.

There will be a new trial.

CANNON J.—The appellant, convicted of murder and sentenced to be hanged for unlawfully killing, on the 20th July, 1934, Cleo Markadonis, his sister-in-law, appeals from the Supreme Court of Nova Scotia *in banco* on questions of law raised by Mellish J., and Carroll J., dissenting.

The majority of the court found that, even if the alleged irregularities in the judge's charge or the illegal admission of evidence in rebuttal existed, "no substantial wrong or miscarriage of justice had actually occurred," and that the appeal should therefore be dismissed. The formal order ignores the amendment brought by 21-22 Geo. V, ch. 28, section 14, to article 1013 of the Criminal Code and does not "specify any ground or grounds in law on which such dissent is based either in whole or in part." We are therefore compelled to abstract from the opinions of the learned judges the questions which fall within our jurisdiction.

The dissenting judgment of Honourable Mr. Justice Mellish apparently deals with the grounds of appeal numbered 7, 7*a*, 8, 9 and 10, which are as follows:

(7) Because the learned judge, in his general summing up of Hickey's evidence, unduly emphasized the time when Hickey first saw the prisoner to the disadvantage of the prisoner, particularly in the following paragraph:

"The important fact to remember in this man's evidence is that however friendly disposed he was towards the prisoner he did not pretend to say that he saw the prisoner in the garage at the time he heard the shot and that the first time he saw him was after he heard Mrs. Markadonis hollering, and stood up. I again state I think that that is rather an extraordinary story for Hickey to tell, that he did not see the prisoner come from the back of the house into the garage."

(7*a*) Because the whole of the learned judge's charge partook unreasonably of the nature of advocacy against the prisoner, rather than that of impartial presentation of the facts, from the viewpoint of the Crown and the prisoner.

(8) Because in making the following comment on the prisoner's evidence:

"Why did not Trysok and Murrant see him on Marconi street at the time? Why did not Mrs. Murrant see him? It is puzzling to me. If this bright young fellow, Peter Trysok, is telling the truth, then the prisoner never walked down Marconi street that day from the Markadonis house."

the learned judge stated as a fact, that the prisoner never walked down Marconi street that day; whereas he might very well have walked down Marconi street, and Peter Trysok be still telling the truth.

(9) Because the learned judge, in making the following comment:

"I personally have no hesitation in stating that, in my opinion at least, his story is a tissue of lies almost from begininng to end, but you will accept that statement subject to the observaion which I have already made that the facts are for you entirely."

unduly and unfairly prejudiced the prisoner's defence, notwithstanding the qualifying words he used.

(10) Because the evidence of N. W. Churchill, corporal, Royal Canadian Mounted Police, was improperly admitted.

His Lordship Mr. Justice Carroll retained only no. 10 and agreed with the other members of the court that the other points were not sufficient to quash the conviction.

On grounds of appeal 7-7*a*-8-9, Mr. Justice Carroll says:

The trial judge expressed strong opinions on certain matters of fact and evidence which opinions were not favourable to the accused. A trial judge in summing up has that right so long as he makes it clear to the jury that they are the judges of the facts and are not bound to accept his views. This the learned trial judge did and I do not think it can he said that, either in fact or in effect, he withdrew from the consideration of the jury anything material.

I agree with Mr. Justice Carroll and the majority of the appellate court in refusing to grant a new trial on account of the judge's charge to the jury. These alleged misdirections on questions of fact, in view of the repeated warning given to the jury that they were the sole judges of the facts and of the credibility of the witnesses, including the prisoner, could not harm the latter, unless they were accompanied by a misdirection, or constituted a misdirection, on a point of law, which I have been unable to find after a careful perusal of the summing up.

The cardinal point to be determined is the one raised by both the dissenting judges below as to the admissibility in rebuttal of the evidence of sergeant Churchill; and on this I agree with my Lord the Chief Justice that the prisoner's declaration on his night trip to Morien road while under arrest should not have been given to the jury under the

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circumstances; and for the reasons recently given by me *re Chapdelaine* v. *The King* (1), I would order a new trial.

DAVIS J.—In considering whether or not the accused had a fair trial on the charge of murder upon which he was convicted and is under sentence of death, we should observe firstly that there was neither in the evidence at the trial nor in the argument before us the slightest suggestion of any motive that might have prompted the accused in killing his sister-in-law if he was the one who in fact committed the crime; secondly, that the revolver used to commit the crime was not produced and apparently was never found; thirdly, that the accused was only eighteen years of age at the time of the murder.

The theory of the Crown is that the accused fired a shot from an old revolver he had secured and then went out on the Marien road and buried the revolver. Evidence was given at the trial that in the middle of the night (a day after the murder) the accused was removed from his cell and, escorted by three police officers, was taken out the Marien road in search of his revolver. The accused was cross-examined at length on the incidents of that trip and his answers were made the basis for rebuttal evidence. The whole course of conduct and conversation of the accused on that trip was clearly inadmissible in the absence of any proof that the statements made were voluntary and upon proper warning. But quite apart from that, it was inadmissible because it was irrelevant. The evidence of the accused himself and of the Crown witness in rebuttal of all that was said and done on that trip proved nothing relevant to the issue, and was inadmissible from its own lack of evidential value. While it was admitted that the accused protested throughout the trip that he did not have a gun the day of the murder and none was found, the story of that midnight trip to the Marien road was pregnant with suspicion that might readily affect the minds of the jury to the prejudice of the accused. The trial of this lad of so heinous an offence should have been devoid of the story of that trip and no matter upon whom the fault

(1) [1935] S.C.R. 53, at 59.

lies for its introduction, the very justice of the case requires that there be a new trial.

Moreover, I cannot escape from the view that the charge of the learned trial judge did not present certain aspects of the case in favour of the accused that should have been dealt with and considered. Firstly, the absence of any proof of motive. While it is not the motive but the intent which is essential, proof of motive becomes of importance where the evidence as here against the accused is entirely circumstantial. Secondly, the possibility if not the probability that fear on the part of the lad may have accounted for his staying away from the house after the murder and for some of his actions subsequently to the murder, might well have been considered by the jury. Nothing whatever was said to the jury that would lead them to face the problem of the possible innocence of the accused.

In every view of the case the trial was unsatisfactory and I would grant a new trial.

Appeal allowed, new trial ordered.