1930 EUGENE VIGEANT..... APPELLANT;

*Mar. 14.
*Apr. 10.

AND

HIS MAJESTY THE KING..... RESPONDENT

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

Criminal law—Conspiracy—Witness—Accomplice—Charge—Misdirection—New trial—Police spy or informer—Need of corroboration—Practice when dissenting opinion in appellate court—Cr. C., s. 573, s. 1013, ss. 5.

The appellant, with two other men, was convicted of conspiring to commit an indictable offence. On appeal to the appellate court and to this court, the appellant's main ground was that one Boulanger, the chief witness for the crown, was in fact an accomplice; that the direction given by the trial judge was bad in law, as he had omitted to instruct the jury on what is an accomplice in law, and to warn them of the danger of convicting on the uncorroborated testimony of an accomplice.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1888) 13 App. Cas. 418, at p. 424.

Held that, after consideration of the charge as a whole and reading it in the light of the evidence, there had been misdirection by the trial judge and that the appellant was entitled to a new trial. There was in the record of the trial some evidence upon which the jury might have found that Boulanger had been, at some stage of the affair, an accomplice in the conspiracy charged against the three accused; and it appears by his charge that the trial judge thought this was a question of fact that should be submitted for the determination of the jury. Therefore it was the first duty of the trial judge to have instructed the jury as to what in law would constitute a man an accomplice; he should then have proceeded to direct their attention particularly to any facts in evidence which would serve to indicate Boulanger's complicity in the conspiracy at any stage thereof, and to submit to them the issue as to whether what he was proved to have done made him, having regard to the direction in law already given, an accomplice; he should then have instructed the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the accused, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated, although the law did not preclude their doing so.

The formal judgment of the appellate court directed that "separate judgments should be pronounced" by the two dissenting judges of the court; and there was no direction that any other judgment be pronounced except that to be delivered by Cannon J., who was said to have been "designated by the Chief Justice to pronounce judgment." But opinions, practically the same as that of Cannon J., were also delivered by the two remaining judges.

Held that such a practice is contrary to the imperative prohibition of ss. 5 of s. 1013 Cr. C., its impropriety having already been asserted by this court in *Davis* v. *The King,* [1924] Can. S.C.R. 522. *Gouin* v. *The King,* [1926] Can. S.C.R. 539; *De Bortoli* v. *The King,* [1927] Can. S.C.R. 455, also ref.

Observations, in view of its regrettable results, as to misdirection by a trial judge which necessitates a new trial, especially where the misdirection is due to inattention to matters of substance.

Comments made upon a passage of Phipson on Evidence, 3rd Ed., at page 456, corrected in the 6th Ed., at page 486. The statement that "the rule requiring the corroboration of accomplice does not apply to * * * police spy" means that the informer must have been connected with the matter from the first only as a police spy and not merely have "continued" as such.

APPEAL from a decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Court of King's Bench, criminal side, and sustaining the conviction of the appellant upon an indictment of having conspired to commit an indictable offence.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

1930

VIGEANT v. THE KING.

Francois Lajoie K.C. and *Leopold Pinsonnault* for the appellant.

Valmore Bienvenue K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant (Vigeant), with two other men, Edgar Gariépy and Armand Tremblay, was convicted at the assizes at Three Rivers, Que., before the Honourable Mr. Justice Marchand, of conspiring to commit an indictable offence (Cr. C., s. 573). On appeal to the Court of King's Bench (Appeal Side) by all three from this conviction, several grounds were taken; but only the two following, as given in the judgment of Cannon J., were thought to require consideration by the court:

(*f*) Le témoignage de Boulanger est dans l'espèce un témoignage de complice avant le fait, son témoignage doit être considéré comme tel, et Boulanger seul incrimine Vigeant dans l'offense reprochée, soit de la conspiration.

(*g*) La direction donnée par le président du tribunal aux jurés est fausse en droit, alors que le juge n'a pas mentionné ce fait, le juge a omis de renseigner les jurés sur ce qui peut être un complice en droit et que c'est une question de fait que les jurés ont à décider.

In the appellant's factum in this court these two grounds are treated as one and stated as follows:

The witness Boulanger was in fact an accomplice and the direction given by the president of the assizes was bad in law, and the learned judge having omitted to instruct the jury on what is an accomplice in law, and to warn them of the danger to convict on the uncorroborated testimony of an accomplice.

This was the ground of dissent by Lafontaine C.J.Q. and Létourneau, J. in the Court of King's Bench.

The formal judgment of that court

directs that it is convenient that separate judgments should be pronounced by Chief Justice Lafontaine and Mr. Justice Létourneau, two of the members of the court who dissent from the judgment of the majority for the reasons stated in their respective judgments.

There is no direction that any other judgment be pronounced except that to be delivered by Mr. Justice Cannon, who is said to have been

designated by the Chief Justice to pronounce judgment.

Yet, notwithstanding the imperative prohibition of s.s. 5 of s. 1013 of the Criminal Code that

no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court,

save that which has been so directed to be pronounced, the record now before us contains opinions by two of the learned

judges of the Court of King's Bench, whose views, speaking generally, coincide with those of Mr. Justice Cannon. We had occasion to remark on the impropriety of a similar practice in *Davis* v. *The King* (1). See also *Gouin* v. *The King* (2); *De Bortoli* v. *The King* (3).

After fully considering the record of the trial, which occupied three days, we are of opinion that there was some evidence upon which the jury might (of course we do not at all mean that they should) have found that Boulanger, the chief witness for the Crown, had been, at some stage of the affair, an accomplice in the conspiracy charged against the three defendants. That the trial judge thought this was a question of fact that should be submitted for the determination of the jury is manifest from the following passage in his charge:

> Vous aurez à juger la conduite de Boulanger. Dès le premier ou deux d'août, il a averti le gérant de la banque, que l'on tramait quelque chose contre lui. Dès le quatre août il a rencontré le détective Jargaille, à tous les jours après ça, à chaque fois qu'il voit les accusés, qu'il avait connaissance de ce qu'ils faisaient, il venait le dire au détective Jargaille. Il était en communication constante avec lui. Je ne crois pas que c'est la conduite d'un homme qui est complice dans la préparation d'un crime. Je vous laisse à décider si la conduite de Boulanger, est la conduite de quelqu'un qui avait préparé un complot.

It was suggested in the course of argument by counsel for the Crown that the complicity on the part of Boulanger referred to in the above passage was not complicity in the conspiracy charged against the defendants but in some other crime, which, it was said, the evidence disclosed was in the contemplation of Boulanger and the defendants. After careful consideration of the charge as a whole and reading it in the light of the evidence it seems to us impossible to put that construction upon the language used; on the contrary, it seems clear that what the learned judge intended to leave to the jury by this passage in his charge was the question of Boulanger's complicity in the very conspiracy which was the subject of investigation.

Under such circumstances, the first duty of the trial judge was, in our opinion, to have instructed the jury as to what, in law, would constitute a man an accomplice. He should then have proceeded to direct their attention par-

(1) [1924] Can. S.C.R. 522, at p. 525.
(2) [1926] Can. S.C.R. 539.
(3) [1927] Can. S.C.R. 455.

1930

VIGEANT v. THE KING.

Anglin C.J.C.

ticularly to any facts in evidence which would serve to indicate Boulanger's complicity in the conspiracy at any stage thereof; and to submit to them the issue as to whether what he was proved to have done made him, having regard to the direction in law, already given, an accomplice. Nothing of this kind appears to have been done by the learned trial judge in this instance.

He should then proceed to instruct the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the defendants, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated; that the law does not preclude their doing so—indeed, they are at liberty to do so—but that there is danger in basing a conviction on such uncorroborated evidence. If, after this warning, the jury had faith enough in the evidence given by the accomplice to convict, their verdict will not be set aside. The jury should not be told to acquit the prisoner; but they should be warned of the danger of convicting. *Rex* v. *Royal* (1). Where there has been failure so to charge a jury with regard to the uncorroborated evidence of an accomplice the conviction must be quashed. *Gouin* v. *The King* (2); *Brunet* v. *The King* (3).

A passage from the 3rd edition of Phipson on Evidence (1902), at p. 456, cited by Mr. Justice Cannon, which, at first blush, lends colour to the view taken by that learned judge, that the rule as to corroboration does not apply

> to the case of persons who have * * * continued in a conspiracy as agents of the police,

in our opinion does not correctly state the law. Indeed, this misleading statement will be found to have been corrected in a later edition of Mr. Phipson's work, viz., the 6th edition of 1921, at p. 486, where it is said that

> the rule requiring the corroboration of accomplices does not apply to * * * persons who have joined in or even provoked the crime as police spies.

The latter passage makes it clear that the informer must have been connected with the matter from the first only as a police spy and not merely have "continued" as such. This distinction underlies the observation made in Roscoe's Criminal Evidence (15th Ed.) at p. 156. Here, as already

(1) Q.R. 31 K.B. 391. (2) [1926] Can. S.C.R. 539.
(3) [1928] Can. S.C.R. 375.

stated, there was some evidence on which it was open to the jury to determine, if they were so advised, that, from the 22nd of July and up to the 2nd or 4th of August, the witness Boulanger was connected with the conspiracy charged against the defendants as a principal therein and not merely as *agent provocateur,* police spy or informer.

On the whole case, for the foregoing reasons and for those very clearly and succinctly stated by the learned Chief Justice of Quebec in his dissenting judgment, we are of the opinion that the conviction of the appellant Vigeant must be set aside and a new trial as against him ordered.

This conclusion is the more satisfactory, because, while not open for consideration in this court, owing to its not having been made a ground of dissent in the court below, we are disposed to think that a new trial might well have been ordered as to the present appellant by that court on the ground, there taken at bar, but not given effect to, that the learned trial judge had, contrary to the prohibition of subs. 5 of s. 4 of the *Canada Evidence Act,* R.S.C., c. 59, alluded, in the course of his charge, to the fact that the present appellant had not given evidence in his own behalf, when he said,

> Deux des accusés ont été entendus et *le troisième ne l'a pas été; c'était son droit. Ce sera à vous d'agir en conséquence.. Bigaouette* v. *The King* (1).

It is always very unfortunate that a new trial should become necessary because of some misdirection by a trial judge. It is especially so where such misdirection is due to inattention to matters of substance. It is sometimes not as fully realized as it should be that such errors on the part of those charged with the conduct of criminal trials not only put the country to very considerable expense but also lead to delays and uncertainties in the administration of justice which are deeply regrettable.

Appeal allowed.

---

(1) [1927] Can. S.C.R. 112.