
MICHEL BRUNET APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1928

*Feb. 17.
*Feb. 20.

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

*Leave to appeal—Criminal law—Conflict with “any court of appeal”—
English decisions—Similar law—Applicability—Cr. C. ss. 995, 996,
998, 1025 (R.S.C. [1927], c. 36).*

Upon a motion for leave to appeal under section 1025 of the Criminal Code and in order to decide whether the “judgment appealed from conflicts with the judgment of *any other court of appeal* in a like case,” the judge may look at decisions not only of Canadian courts of appeal but also of English courts of criminal appeal, provided the statute governing the matter be to the same effect.

Sections 995, 996 and 998 of the Criminal Code respecting the “evidence under commission of a person dangerously ill” are taken from the Imperial statute 30-31 Vict., c. 35, ss. 6, 7. The judgment appealed from which held that the evidence of a dying witness was regularly taken and could be considered by the jury is, if these sections apply (a point on which no opinion was expressed), in conflict with the decision of the English Court of Crown Cases Reserved in *Reg. v. Shurmer* (16 Cox C.C. 94). This decision strictly applied the Imperial statute above mentioned requiring a notice in writing to the accused. Under the circumstances of this case and inasmuch as there is already

*PRESENT:—Mr. Justice Mignault in chambers.

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an appeal by the appellant before this court, leave to appeal is granted as to the question of the admissibility at the trial of the *ante mortem* deposition.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1024*a* (now 1025) of the Criminal Code, from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant for manslaughter.

The material facts of the case are stated in the judgment now reported.

Alleyne Taschereau K.C. for the motion.

Valmore Bienvenue K.C. contra.

MIGNAULT J.—This is an application made before me, on the 4th of February, for leave to appeal from a judgment of the Court of King's Bench, Quebec, of the 14th of January, 1928, dismissing an appeal by Brunet from his conviction for manslaughter following an abortion practised by him on one Alice Couture who died as a result of the operation. Brunet's appeal to the Court of King's Bench was on four questions of law, as to one of which—misdirection or non-direction of the trial judge to the jury as to the danger of convicting an accused on the evidence of an accomplice—there was a dissent (that of Mr. Justice Letourneau) in the appellate court, and on this point the petition alleges that an appeal has already been taken to this court under section 1023 of the Criminal Code (according to the numbering of the sections in R.S.C., 1927, c. 36). The object of this application is to seek leave to appeal on the following points with respect to which the learned judges were unanimous:

(1) The evidence of Alice Couture taken at the hospital by a magistrate should not be accepted without following the rules of art. 955 of the Criminal Code of Canada, concerning "evidence, under commission, of person dangerously ill."

(2) Sufficient instructions were not given to the jurors regarding the crime of manslaughter and abortion.

(3) The defence was not sufficiently put before the jury.

I will consider point 1 only, for with respect to points 2 and 3, the petitioner has not established a case for granting leave to appeal.

Point 1 is as to the admission of the evidence of Alice Couture at the trial. The petition refers to art. 955 of the Criminal Code, but this is a clerical error. It should be section 995 and the following sections, the effect of which the parties discussed, and I will consider the petition as amended accordingly.

Under section 1025 of the Criminal Code, leave to appeal from a unanimous judgment of a court of appeal may be granted.

if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case.

In *The King v. Boak* (1), it was held that decisions prior to the enactment of s. 1013 in 1923 might properly be considered as coming within the intendment of section 1025, if they were rendered in a like case. In another case, *De Bortoli v. The King* (2), my brother Newcombe appears to have been of the opinion that a decision of the Supreme Court of Canada might, if in conflict and in a like case, be brought within the meaning of s. 1025.

In view of the generality of the words "any other court of appeal," I think I am at liberty to look at decisions not only of the Canadian courts of appeal, but also of English courts of criminal appeal, provided of course the statute governing the matter be to the same effect.

Coming now to the evidence of Alice Couture, there are two depositions of this witness in the record:—

The first is intituled:

Déposition *ante mortem* de Alice Couture, âgée de 23 ans, de la cité de Québec, 482, rue St. Vallier, prise sous serment à l'Hôtel-Dieu du Précieux Sang, à Québec, devant l'Honorable Arthur Lachance, Juge des Sessions de la Paix pour la province de Québec, ce quatorzième de mai, 1927.

As stated, this deposition was taken on the 14th of May, 1927. It does not appear that the accused, or any counsel appearing for him, was present. The deposition is certified at the foot by the stenographer.

The second deposition was taken at the "Hôpital Hôtel-Dieu du Précieux Sang de Québec" on the 16th of May,

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(1) [1926] S.C.R. 481.

(2) [1926] S.C.R. 492.

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1927. The heading is "Bureau de la Paix (Instruction préliminaire)," and the deposition is stated to have been taken before the judge of the Sessions of the Peace in presence of the accused. The witness was cross-examined by Mr. Léo Pelland, a barrister, on behalf of Brunet. The deposition is followed by a certificate signed by Arthur Lachance, Esq., Judge of Sessions of the Peace.

I am informed that an information was on the later date, 16th May, 1927, pending against Brunet for having illegally used instruments to bring about an abortion.

It appears by the evidence, as well as by statements of counsel, that the first deposition was taken at the hospital before any complaint had been laid against Brunet. Counsel for the Crown informs me that this deposition remained among the papers of the preliminary inquiry, but was not used at the trial nor read to the jury.

The second deposition was read to the jury, the objection of the accused's counsel to its admission as evidence having been overruled. The petitioner now contends that it should have been rejected. He relies on sections 995 and following of the Criminal Code.

Counsel for the Crown argues that section 995 has no application here, that the deposition of Alice Couture (the reference is to the second one) was taken as a part of the preliminary inquiry on the information then pending against the accused, and that it could be read at the trial under section 1000 of the Criminal Code.

The sections of the Criminal Code in question (and more particularly sections 995, 996 and 998) are taken from the Imperial statute 30-31 Vict., c. 35, ss. 6 and 7. If they govern this case, I must find that the decision of the appellate court that the evidence of Alice Couture was regularly taken and could be considered by the jury, is in conflict with the decision of the English Court of Crown Cases Reserved in *Reg. v. Shurmer* (1), which strictly applied the Imperial statute above mentioned requiring a notice in writing to the accused. *Reg. v. Shurmer* (1) has been since followed in England. See *Rex v. Harris* (2).

I do not think I should take upon myself on this application to decide whether sections 995 and following do or

(1) 16 Cox C.C. 94.

(2) 26 Cox C.C. 143.

do not govern this case. The question is a very important one and there is conflict if the sections apply. Under these circumstances, and inasmuch as there is already an appeal by the accused before the court, I have decided to grant the petitioner leave to appeal on point 1 above mentioned.

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This application was made to me within the twenty-one days mentioned by section 1025, but if an extension of time be necessary, I hereby extend it to the date of this judgment.

Leave to appeal granted.
