MICHEL BRUNET.. .. ..APPELLANT; 1928

AND *Mar. 19. *Apr. 24.

HIS MAJESTY THE KING.. .. ..RESPONDENT.

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

Criminal law—Evidence—Accomplice—Corroboration—Warning to jury—Duty of Judge—Dissenting opinion

The appellant was convicted on an indictment for manslaughter by performance of an illegal operation on one Alice Couture, causing a miscarriage that resulted in her death and he was sentenced to imprisonment for life. The appellant's appeal to the Court of King's Bench was dismissed, but one judge dissented on the question of law as to whether or not there was error on the part of the trial judge in not having warned the jury as to the danger of convicting on the uncorroborated evidence of the girl Couture, an accomplice.

Held that the appellant was entitled to have a new trial.

Per Duff, Mignault, Rinfret and Smith JJ.—Although there is no case in which it has been explicitly laid down that the warning must be given where there is some corroborative evidence to go to the jury, it necessarily follows from the principle laid down in the cases referred to in the judgment now reported, where the evidence of the accomplice is necessary to sustain the conviction and the corroborative evidence may or may not be accepted as sufficient by the jury. In this case, there was in fact no admissible corroborative evidence to be submitted to the jury, and it was the duty of the trial judge to have given the warning. It is not, however, to be taken that the warning would have been unnecessary, had there been some corroborative evi-

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

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dence proper to be submitted to the jury. It is for the jury to say whether or not the corroborative evidence is to be believed, and if it is not believed by the jury, and yet they convict, no warning having been given, they are convicting on the uncorroborated evidence of the accomplice without having been warned of the danger of doing so. On that ground and also in view of other improper evidence having been introduced at the trial, it cannot be said that the appellant has suffered no substantial wrong.

Per Newcombe J.—The evidence upon which the Crown relied for corroboration of the woman's testimony did not corroborate in the essential particulars; and there was no warning to the jury, such as required by the Court of Criminal Appeal in the well-known case of *Rex* vs. *Baskerville* ([1916] 2 K.B. 658).

APPEAL from the 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, which had found the appellant guilty of manslaughter upon the verdict of a jury.

The material facts of the case and its questions at issue are sufficiently stated in the above head-note and in the judgments now reported.

Alleyn Taschereau K.C. and *J. M. Guérard* for the appellant.

Valmore Bienvenue for the respondent.

The judgment of the majority of the court (Duff, Mignault, Rinfret and Smith J.J.) was declared by

SMITH J.—The accused was convicted on an indictment for manslaughter by performance of an illegal operation on one Alice Couture, causing a miscarriage that resulted in her death on 29th June, 1927. The trial took place on the 3rd day of November, 1927, and the accused was sentenced on the 8th of that month to imprisonment for life. The fact of an illegal operation having been performed causing the miscarriage that resulted in the young woman's death was clearly established, and the further question remaining for the jury was as to whether or not the evidence established that the accused was the person who performed the illegal operation.

On May 16th, 1927, the accused was arrested on a charge, under section 303 of the Criminal Code, of using means to procure an abortion on Alice Couture. On the same day

the magistrate, Judge Lachance of the Court of Sessions of the Peace, the clerk of the court and the crown solicitor attended at the hospital to proceed with the preliminary enquête by taking the evidence of Alice Couture, then lying there very ill. She testified that the accused had performed the operation in question, giving details of what had happened. The accused, then under arrest, was present at this hearing with his solicitor, who cross-examined the witness on his behalf.

Alice Couture having died in the meantime, these depositions were read at the trial to the jury as evidence against the accused, after objection taken by his counsel to their admissibility had been over-ruled by the trial judge.

The accused appealed from the conviction to the Court of King's Bench (in appeal), and the appeal was dismissed by a majority judgment of that court, Justice Letourneau, with the permission of the court, writing a dissenting judgment on the question of law raised as to whether or not the learned trial judge had erred in not having warned the jury that it was dangerous to convict on the uncorroborated testimony of Alice Couture, an accomplice.

By special leave (1) the accused was allowed to also appeal on the question of whether the depositions of Alice Couture, mentioned above, should have been admitted as evidence against the accused on his trial for manslaughter.

Dealing first with the latter ground, it was argued that, it having been shewn that Alice Couture was at the time dangerously ill and, in the opinion of Dr. Marois, not likely to recover, the method of taking her evidence under these circumstances is by commission, as expressly laid down by sections 995 and 996 of the Criminal Code, and that it could not be taken otherwise. If this argument were sound, the strong ground of objection would seem to me to be that there was no commission, but what was specially urged was that accused was not served with a written notice of the intended taking of evidence as had been held by English courts to be necessary under the corresponding sections of the English Act, citing *Reg.* v. *Shurmer* (2); *Rex* v. *Harris* (3); *Rex* v. *Quigley* (4). As there was no written notice in this case, it is urged that there is conflict on a

(1) [1928] S.C.R. 161.
(2) 17 Q.B.D. 323.
(3) 26 Cox, C.L.C. 143.
(4) 18 L.T.R., N.S. 211.

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question of law between the judgment of the court below and the judgments in the English cases cited.

The Criminal Code, by section 999, expressly provides for reading the depositions of a witness taken at a preliminary investigation against the accused at his trial for the same cause where the witness has died in the meantime, and section 1000 provides that these depositions may also be read under the same circumstances on his trial on any other charge. The depositions in question were read as evidence under these sections and not as having been taken under sections 995 and 996, which have clearly no application. The appeal, therefore, on this ground must be dismissed. We are not, however, passing on the question of whether or not this is an appealable matter, even with leave.

Proceeding, then, to the other ground of appeal, involving the question of law as to whether or not there was error on the part of the learned trial judge in not having warned the jury as to the danger of convicting on the uncorroborated evidence of Alice Couture, an accomplice, it is urged on behalf of the Crown that there was in fact corroborative evidence, and that therefore such warning was not necessary.

The practice to be followed by a trial judge in reference to the uncorroborated evidence of an accomplice was carefully considered and authoritatively laid down in the case of *Rex* v. *Baskerville* (1).

In the subsequent case of *Rex* v. *Beebe* (2), Lord Hewart, C.J., gives in a few words the rule as laid down in the Baskerville case. He says the jury should be told

> that it is within their legal province to convict; they are to be warned in all such cases that it is dangerous to convict; and they may be advised not to convict.

He points out that there is no reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict, and further on states that such a direction would not be according to the law laid down in the *Baskerville Case* (1).

Following what Lord Hewart had thus laid down, this court, in *Rex* v. *Gouin* (3), set aside a conviction, although there was corroborative evidence where the learned trial

(1) [1916] 2 K.B. 658. (2) 19 Cr. App. 22.
(3) [1926] S.C.R. 539.

judge had told the jury that if they were quite certain that the girl (an accomplice) was telling the truth, though uncorroborated, they ought to act on it.

These cases, however, do not expressly lay down what is necessary where there is some corroborative evidence. It is urged on behalf of the accused that in this case there was in fact no corroborative evidence proper to be submitted to the jury. Alice Couture had stated, in her depositions read to the jury, that the accused had performed on her in the previous year (1926) an illegal operation to procure a miscarriage, which resulted at her sister's house, and that she took the foetus to the accused. The fact of the miscarriage, and of the placing of the foetus in a box furnished by her "cavalier," Adrien Letourneau, was testified to by the sister Madame Turgeon. Blanche Pouliot testified to having been shewn the foetus in this box at the house of Madame Turgeon, to having gone for a walk with Alice Couture and to having seen the latter, after they had separated on the street, go into the office of the accused, having with her this box. The question is: Was this evidence of a previous crime committed by accused admissible

The leading case on this subject is *Makin* v. *The King.* L.R. 1894 A. C., 57. The headnote gives the effect of the decision in the following words:

> Evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.

This case and many others are reviewed in *The King* v. *Bond,* (1), where the charge was using instruments on Ethel Anne Jones on October 25th, 1905. It was not disputed that accused had used instruments, the defence being that they were used for a lawful purpose. Evidence was given by one Gertrude Taylor that the accused had in January, 1905, used similar instruments on her to procure a miscarriage. It was held by five of the judges that the evidence was admissible as proof of intent, Alberstone, C.J., and Ridley, J., dissenting.

The subject is again discussed in the House of Lords in *Thompson* v. *The King* (2), which deals mainly with the

(1) [1906] 2 K.B. 389. (2) [1918] A.C. 221.

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application of the rule laid down in the previous cases to the circumstances of the particular case under consideration. In the present case there was no question of proving the intent of the accused in performing an operation, the sole question being as to whether he was the party who did perform it. All the evidence, therefore, offered to shew that accused had performed an illegal operation on Alice Couture in 1926 was inadmissible, and it need hardly be said that the evidence of J. Juneau, a discharged servant who had been fined for an assault on the accused, of having found the body of an infant behind a door on the accused's premises about 1918, was also inadmissible.

There remains the evidence of Adrien Letourneau, described by Madame Turgeon as the "cavalier" of the deceased Alice Couture. He says he regarded her as a girl of light morals, and that he was in the habit of seeing her two or three times a week. He is the party who went with her to Madame Turgeon's when she had the miscarriage there in 1926, and he supplied the box spoken of. His evidence, relied on as corroborative, is that in the month of April, some short time before Alice Couture had the miscarriage in question, in 1927, he went with her on two occasions, and parted with her not far from the office of the accused, and saw her, on each occasion after parting from him, enter the accused's office. The accused testified that he had no recollection of ever having seen Alice Couture, and that if he had seen her, she was one of many who called in the course of a day, and had not impressed herself on his memory. He, of course, denied all her statements about having operated on her. He also testified about having been out of the city during part of the month of April.

In the first place, the jury might on the evidence before them have found that Letourneau was an accomplice, and if the evidence was admissible, it should have been left to the jury to determine if he was an accomplice, with a warning as to the danger of convicting on the uncorroborated evidence of two accomplices. *Rex* v. *Malouf* (1). Letourneau's evidence was offered in chief as proof of the crime, and was not corroborative because it did not tend to implicate the accused in the commission of the crime. If it

(1) [1918] N.S. Wales St. B. 143, at p. 148.

were true that the girl entered the office of the accused as he stated, the evidence did not establish that she saw him or implicate him in the commission of the crime.

A Morris chair, such as Alice Couture in her depositions said had been used for the operation, and three instruments such as doctors usually have in their office, with which an abortion might be brought about, but with which, apparently, it would not be possible to cut up the foetus as was done in this case, were found in the office of the accused. This again would not be evidence tending to implicate the accused. It seems clear, therefore, that there was in fact no admissible corroborative evidence to be submitted to the jury, and that it was the undoubted duty of the learned judge to have given the warning. It is not, however, to be taken that the warning would have been unnecessary had there been some corroborative evidence proper to be submitted to the jury. It is for the jury to say whether or not the corroborative evidence is to be believed, and if it is not believed by the jury, and yet they convict, no warning having been given, they are convicting on the uncorroborated evidence of the accomplice without having been warned of the danger of doing so. As stated, there seems to be no case in which it is explicitly laid down that the warning must be given where there is some corroborative evidence to go to the jury, but I think it necessarily follows from the principle laid down in the cases referred to, where the evidence of the accomplice is necessary to sustain the conviction and the corroborative evidence may or may not be accepted as sufficient by the jury. This seems to be assumed by the Court of Criminal Appeal in *The King* v. *Feighenbaum* (1). The appellant was convicted of inciting boys to steal, the boys, accomplices, having given evidence against him. The corroborative evidence was that of a police officer as to the conduct of the accused when he interviewed him before proceedings and stated to him the names of the boys and what they had related. Darling J. delivering the judgment of the court, says:

> In this case the deputy chairman rightly directed the jury as to the danger of believing the uncorroborated evidence of the accomplices, and as to what was, or might be, corroboration; and in our opinion, it would

(1) [1919] 1 K.B. 431.

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in the circumstances of this case have been wrong for him to say that in his opinion there was no corroboration of the boys' evidence.

Here there was corroboration, and it is stated that the jury were rightly warned.

In *Baker* v. *The King* (1), it seems also to have been assumed that the warning should have been given, although there was the corroboration of uncontroverted facts;

facts established by the admissions of the appellants or by independent and unchallenged evidence.

The trial judge warned the jury that though they might convict on the evidence of an accomplice, it would be dangerous to do so, and warned them that one of the witnesses, Sowash, must be treated as an accomplice, but failed to give the same warning as to the other witness, Stromkins. One of the grounds of appeal was that the warning was not sufficient, but there was in addition the objection that the learned trial judge did not explain that corroboration means

corroboration not only in respect of some fact tending to shew that the crime was committed, but also in respect of some evidence implicating or tending to implicate the accused.

These objections were disposed of on the ground that the accused suffered no substantial wrong. The failure to warn as to the evidence of the accomplice Stromkins is commented on, but there is no suggestion that the objection on that ground was untenable because there was corroboration, doing away with the necessity of giving the warning.

Here the learned trial judge in substance said to the jury: You have the evidence of Alice Couture, categorically relating that the accused performed the illegal operation; you have confirmative evidence of her story; and, on the other hand, you have the evidence of the accused denying that he performed the operation. He has admitted that he was convicted previously for a similar offence, which is a strong circumstance to be taken into consideration in deciding whether you are to believe him or not. It is a question, then, of which story you believe. If you believe the accused, he is not guilty; if you don't believe him, but believe Alice Couture, he is guilty.

In addition to the defects of the charge, there was the improper admission of evidence to which I have referred, and

(1) [1926] S.C.R. 92.

many other irregularities. The accused was put in the box and testified as to his previous conviction and as to a long list of subscriptions that he had since made for charitable and religious objects. Presumably this was intended as evidence of good character, and was clearly inadmissible as such or otherwise. It was made the basis for a cross-examination of the accused on all the details of the previous offence and on his subsequent conduct. A few sample questions will shew the character of this cross-examination:—

Q. You remember that Miss Vachon said in court in her evidence that you had worked in the same manner as in this case? (Miss Vachon was the girl operated on in the former case.)

Counsel goes on in this way to repeat a great part of the evidence given in the former trial.

The following are further samples:—

Q. Is it not true that at the time of your condemnation in 1917 you were recognized as a public abortioner?

Q. Is it not true that you are recognized as such at present by the public?

If the evidence of accused referred to had been rejected, as it should have been, the cross-examination as to character would have been limited to what was relevant on the question of his credibility. In any case, the questions referred to should not have been allowed. The latter two were, in effect, a declaration of fact by the Crown prosecutor to the jury. The impropriety of introducing the evidence given by a witness on a previous occasion by stating it to the accused and asking him if he remembers hearing it, is pointed out in *Allen* v. *The King* (1).

It cannot be said that the accused suffered no substantial wrong. The appeal is therefore allowed, and a new trial ordered.

NEWCOMBE J.—I agree that there must be a new trial, because, in my view, the evidence upon which the Crown relied for corroboration of the woman's testimony did not corroborate in the essential particulars; and there was no warning to the jury, such as required by the Court of Criminal Appeal in the well-known case of *Rex* v. *Baskerville* (2).

Appeal allowed.

(1) 44 Can. S.C.R. 331.

(2) [1916] 2 K.B. 658.