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*Feb. 27.
*Mar. 15.

MIKE PROSKO.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Charge of murder—Warrant against accused in United States as undesirable—Admissions before emigration officers—Admissibility of evidence—Voluntary statement.

A warrant of arrest having been issued against the appellant on a charge of murder committed in a lumber camp near Quebec, his presence in the City of Detroit was discovered a year later by a Canadian detective. Instead of instituting extradition proceedings, the detective obtained the arrest of the appellant under a warrant of deportation, as an undesirable, issued by the U. S. Imigration authorities. On being brought before two emigration officers and informed that he would be deported, the appellant declared that he was "as good as dead". The officers asked: "Why?"; and the appellant then answered by making certain admissions as to his presence at the lumber camp at the time of the murder. At the trial, the two officers gave evidence as to these statements by the accused.

Held that the evidence was admissible, as the statements made by the accused were "voluntary" within the rule laid down in the case of *Ibrahim* v *The King* ([1914] A.C. 599), Mignault J *dubitante*.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, upholding the conviction of the appellant and dismissing the application made by him for a new trial on a stated case.

*PRESENT.—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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

Alleyn Taschereau K.C. for the appellant.

Lucien Cannon K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the Court of King's Bench of the Province of Quebec, which by a majority upheld the conviction of the appellant Prosko, or "Big Mike" as he was generally called, on the charge of the murder of a man in one of the lumber camps of Quebec. Prosko had been tried jointly with another man named Janousky before Chief Justice Sir François Lemieux and a jury. Both were found guilty by the jury; but on appeal to the Court of King's Bench, the conviction against Janousky was unanimously quashed and a new trial granted to him, while the conviction against the appellant Prosko was by a majority of that court upheld, the Chief Justice Lamothe and Greenshields J. dissenting.

The reasons of the court for quashing the conviction against Janousky substantially were that certain statements, admissions or confessions made to the police officers of the city of Detroit by Prosko when he was in custody there, as to his own and Janousky's connection with the murder for which they were being jointly tried were inadmissible as against Janousky, and calculated to prejudice his receiving a fair and impartial trial, and this notwithstanding that the trial judge in charging the jury had fully and explicitly

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told them they were not to consider or give any weight to these alleged admissions or statements or confessions, as they were called, of Prosko as against his co-prisoner Janousky.

The court was unanimous on this point of granting a new trial to Janousky but a majority, as I have stated, held, and in my opinion, properly that these statements, admissions or confessions of Prosko were admissible against himself in the circumstances and under the conditions in which they were made, and that they would not interfere, in Prosko's case, with the judicial discretion exercised by the trial judge in refusing to grant the application of counsel for a separate trial of each of the prisoners.

The questions reserved for the consideration of the Court of King's Bench were as follows:—

(1) Was there error in refusing a separate trial to the accused?

(2) Was there error in admitting the testimony of the two witnesses Heig and Mitte, as to certain statements or so-called admissions made by one of the accused, Prosko?

(*a*) as to the accused Prosko?

(*b*) as to the other accused Janousky?

(*c*) seeing the admissions made by Prosko were so made in the absence of Janousky, were the instructions of the trial judge to the jury that statements made by one of the prisoners did not make evidence against the other, sufficient?

(3) Was there error in admitting the testimony of the witness Roussin with respect to certain statements made by Prosko either before or after his arrest?

(4) Was there error in permitting the Crown to produce before and exhibit to the jury as exhibits certain objects which were found in the possession of one or other of the accused on or in the premises occupied by one or other of them?

So far as Janousky is concerned, the questions are finally disposed of and we need not concern ourselves with them. As to the other accused, Prosko, question (3) was abandoned at the hearing before us, leaving the three questions to be considered by us on this appeal:—

(1) the refusal of a separate trial to him;

(2) the admission in evidence of the statements or confessions sworn to by Heig and Mitte as having been made to them by Prosko; and

(3) the production as exhibits of clothing and other articles such as a mask, a false moustache and an electric torch, said to have been found in a valise or parcel in Prosko's room in his boarding house in Montreal.

With regard to the first of these questions, I have no difficulty in declining to interfere with the judicial discretion exercised by the trial judge in refusing to grant the application for such separate trial for Prosko. It is true the application was made twice; once, when the trial began and, afterwards, when it was proposed to put in Heig and Mitte's evidence respecting Prosko's statements or confessions (so-called) to them. But I am quite unable to find any possible prejudice which could arise to Prosko from this refusal. There might be and in fact the Court of King's Bench held it to be quite possible that a joint trial coupled with the admission of such evidence, notwithstanding the judge's charge to the jury that they were not to consider or give any weight to these alleged admissions or statements of Prosko as against his co-prisoner, might prejudice Janousky, and that it was impossible to say what effect they might have had on the minds of the jurymen. But as regards Prosko, admitting for the moment the admissibility of such evidence, I cannot find any possible prejudice which its admission would cause to him.

Then as to the admissibility of this evidence as against Prosko, I think the statement of Lord Sumner, when delivering the reasons for the conclusions of the Judicial Committee of the Privy Council, in the case of *Ibrahim* v. *The King* (1) correctly states the rule in that regard:

(1) [1914] A.C. 599 at p. 609.

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It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

See also *The King* v *Colpus* (1); *The King* v. *Voisin* (2); *Rex* v. *Cook* (3).

I have read the evidence of each of these witnesses Heig and Mitte most carefully. I concede that they were persons in authority having at the time Prosko in their custody with the intention of bringing him before the United States Immigration Board to be examined whether or not he was an undesirable immigrant to the United States, and with a view to his deportation being ordered if he was found undesirable.

I fail to find the slightest evidence that Prosko's statements or confessions were induced or obtained from him either

by fear of prejudice or hope of advantage exercized or held out

by either Mitte or Heig to him. On the contrary I conclude that Prosko's statements were absolutely voluntary ones. After having been told by these witnesses in Detroit that they were going to take up his case with the United States Immigration officials and have him deported to Canada, Prosko replied:— "I am as good as dead if you send me over there." The officers in reply to this naturally asked "Why"? Whereupon Prosko proceeded to give his statement as given in evidence by these two witnesses. (It must be remembered that the time when he made these statements or confessions was before he was brought before the Immigration Board, and that later, when he

(1) [1917] 1 K.B. 574; (2) [1918] 1 K.B. 531:
(3) [1918] 34 Times L. R. 515.

was brought before that Board he repeated under oath, as Heig and Mitte say in evidence, the statement he had already made to them. The Immigration Board on hearing his statement or confession made the necessary order for his deportation). Under these circumstances I feel bound to answer the second question in the negative.

As regards the third question to be considered by us on this appeal, I feel bound to say that I cannot see any reason why the crown, having by its officer, Roussin, visited the boarding house in Montreal of Prosko, and having there been shown the rooms said to have been occupied by Prosko and one Yvasko, should not have produced the articles found there and put them in as exhibits. If the crown produced any of these articles found in this room of Prosko's it was bound, in my opinion, to produce all articles found there.

I do not attach any great importance to the production of these articles. They consisted in part of an electric flashlight, a false moustache, several photos of Prosko, a cap and other articles.

The question of their being improperly admitted as exhibits was not strongly pressed at bar, and even if they were improperly given in evidence as exhibits, which I do not at all concede, I cannot think it possible that "any substantial wrong or miscarriage" was thereby occasioned on the trial as regards Prosko.

Unless there was in our opinion such substantial wrong or miscarriage occasioned, we are forbidden by sec. 1019 of the Criminal Code to set aside the conviction or direct a new trial.

Under all these circumstances and on my findings with respect to the questions submitted to us, I am of the opinion that the appeal must be dismissed.

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IDINGTON J.—Four men entered, during the night of the 27th July, 1918, a lumber camp in the Province of Quebec, for the purpose of robbing the men therein, and, in the course of such pursuit, shot and killed one of the men there.

Two of the said four were convicted of the murder and were executed in July, 1920.

Thereafter the appellant and another named Janousky were placed on trial in Quebec. In their defence they were represented by the same counsel who asked the court to direct that they be tried separately, but this privilege was denied them.

The trial resulted in the conviction of both. Thereupon a stated case was directed by the Court of King's Bench and, upon the hearing thereof, a new trial was granted Janousky but, by a majority of the court, denied the appellant.

The learned Chief Justice and Mr. Justice Greenshields dissented from the said denial of a new trial to the appellant. Hence this appeal here based on some of the grounds taken in such dissent.

The first question so raised is as follows:

(1) Was there error in refusing a separate trial to the accused.?

The Court of King's Bench having unanimoulsy arrived at the conclusion that as to Janousky there was error, we have nothing to say as to that aspect of the case except to make clear the reason for so distinguishing.

There were many statements made by appellant which the trial court admitted in evidence against him, and in some of these he had referred to Janousky, under his nickname of "little George," in such a way as to implicate him.

There was a possibility of the jury having been impressed thereby to the detriment of Janousky and, in that result, to have confused that and somewhat similar incidents in other features of the case as presented by the entire evidence, nothwithstanding the clear and express direction of the learned trial judge to the jury to apply the evidence in such a way as to avoid such possible error.

There was no such counterpart in the evidence against Janousky alone as would tend to the confusion thereof with the case made against the appellant alone.

In the broad salient features of the case demonstrating the actual perpetration of the crime there was nothing to confuse. It is merely when the evidence of the identification of the accused, or either of them, came to be considered by the jury that there was a possibility of undesirable confusion of thought.

Whatever may have been possible in that regard relevant to Janousky, and to his detriment, I cannot see how appellant was likely to have suffered the like from anything in the evidence directed to Janousky's part, if any, in the matter in question.

Counsel for appellant, indeed did not point to anything specific in that regard but seemed to rest upon and press the possibility of appellant having been able to call Janousky as a witness on his behalf if a separate trial had been granted.

There is nothing specific in way of fact presented to support this contention.

Nor, so far as I can see, was such a pretension presented to the learned trial judge.

I cannot see any good ground for the allowance of this appeal by way of answering this question in the affirmative.

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The next question raised herein is as to the admissibility of the evidence of Heig and Mitte who swear that appellant, after having been presented with the decision of the authorities in Detroit that he was to be deported back to Canada as an undesirable citizen, said "I am as good as dead" which naturally evoked the question "how is that"? and he proceeded to to tell a story which, as I read its introduction, was not improperly induced within the meaning of the rule in that regard as set forth by Lord Sumner in the case cited to us, as follows:—

> It has long been established as a positive rule of English Criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

I refer to the case of *Ibrahim* v. *The King*, (1) at foot of page 609 and top of 610. The *dictum* from which I quote was approved in the later case of *The King* v. *Voisin* (2).

As pointed out in argument the said case was decided on other grounds and the ruling only an incident, but nevertheless, this is a fair presentation of the rule invoked by the dissenting judges in the Court of King's Bench.

It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against.

And the evidence of each of these witnesses is introduced by a distant categorical denial of having exercised any of these practices which would bring the evidence given within the rule against its admission.

(1) [1914] A.C. 599. (2) [1918] 1 K.B. 531.

I think, therefore, the learned trial judge's ruling was right and that the question raised anent same must be answered in the negative.

Then as to Roussin's evidence the appellant was distinctly warned by him upon his arrest that anything he said would be used against him and hence no ground for the contention set up.

In truth it seems to have been assumed in argument here as hopeless to argue, if held that the evidence of the American detectives of statements made by accused, without express warning, was admissible, then Roussin's story in what he tells, so far as it was substantially the same as had been told by the said detectives, could not be rejected.

I am decidedly of the opinion that both were admissible.

The only other question upon which counsel for appellant rested his appeal was the fourth question of the stated case, which reads as follows:

> Was there error in permitting the Crown to produce before and exhibit to the jury as exhibirs certain objects which were found in the possession of one or other of the accused on or in the premises occupied by one or other of them?

I, with great respect, find it difficult to treat such a question seriously. Some of the articles found were not worthy of serious consideration by the jury, but the false moustache and flashlight, for example, were important items well worthy of consideration in a case such as this dependent to so great an extent as it was upon circumstantial evidence.

That which was incapable of being fitted into the chain of circumstances to be relied upon, of course, would be discarded by the jury to whom we must attribute common sense.

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It became the duty of the crown officer to present the suit-case contents as found and let the jury determine what was relevant and what was not. And then not leave the impression that accused was so intent in pursuit of easy money that he could think of nothing else, and hence carried only false moustaches, flashlights or glass cutters.

The question should be answered, as it was by the majority of the court below, in the negative.

The appeal herein should be dismissed.

ANGLIN J.—The material facts are sufficiently stated in the judgments delivered in the Court of King's Bench. Of the three questions argued before us only one in my opinion called for consideration, viz., whether certain statements alleged to have been made by the appellant to two American detectives (Heig and Mitte) were admissible in evidence against him. To both the other grounds of appeal s. 1019 Cr. C. appeared to me to afford a sufficient answer. But, having regard to the importance attached to the statements made to Heig and Mitte by the learned Chief Justice in charging the jury, the question of their admissibility cannot be thus disposed of.

My only reason for withholding concurrence in the judgment dismissing the appeal was that, owing to pressure of other work of the court, I had not had an opportunity of satisfying myself by a study of the record that the Crown had discharged the burden, which undoubtedly rested upon it, of establishing that the statements made by the appellant to Heig and Mitte were voluntary statements, in the sense that they had not been obtained from him by fear of prejudice or

hope of advantage exercised or held out by a person in authority. *Ibrahim* v. *The King* (1); *The Queen* v. *Thompson* (2); *The King* v. *Colpus* (3); *The King* v. *Voisin* (4).

The two detectives were persons in authority; the accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him. While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *The King* v. *Kay* (5), they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinized. *Rex* v. *Rodney* (6).

If I should have reached the conclusion that the burden on the prosection of establishing the voluntary character of the alleged admissions had not been discharged, the proper result would have been to order not the discharge of the appellant (s. 1018 (d) Cr. C.), but his remand for a new trial (s. 1018 (b) Cr. C.) Since the majority of the court was clearly of the opinion that the impugned evidence was properly received and the appeal therefore failed, I did not feel justified in delaying the judgment and shortening the time available for consideration of the case by the Executive, merely to complete my own study of the evidence, especially in view of the fact that the case must in any event go before the Minister of Justice, who may, if he should entertain any doubt of the propriety of the conviction, grant the appellant the only relief to which he would in my opinion in any event have been entitled. (S. 1022 Cr. C.)

(1) [1914] A.C. 599 at p. 609.
(2) [1893] 2 Q.B. 12, at p. 17.
(3) [1917] 1 K.B. 574.
(4) [1918] 1 K.B. 531, at p. 537.
(5) [1904] 9 Can. Cr. C. 403.
(6) [1918] 42 Ont. L.R. 645, at p. 653.

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For these reasons, while not dissenting, I refrained from concurring in the judgment affirming the conviction.

Since the delivery of judgment, however, I have had an opportunity of considering the material evidence and I think I should state that I now see no reason to differ from the conclusion reached by the majority of the Court that the evidence in question was admissible. At all events the discretion exercised by the learned trial judge in receiving it could not properly have been interfered with. *The King* v. *Voisin* (1).

BRODEUR J.—Trois questions nous sont soumises.

La première est de savoir si l'accusé Prosko avait eu raison de demander un procès séparé de son co-accusé Janousky.

Le président du tribunal a refusé cette demande et les deux accusés ont subi leur procès en même temps et ont été trouvés coupables de meurtre.

La Cour du Banc du Roi a décidé que Janousky avait eu raison de demander un procès séparé parce que des aveux faits par son complice Prosko ont pu lui causer un tort réel et ont pu amener sa condamnation. La Cour du Banc du Roi a été d'opinion que Prosko n'avait souffert aucun préjudice d'avoir subi son procès en même temps que son complice. Un nouveau procès séparé a donc été accordé à Janousky, mais a été refusé à Prosko.

Ce dernier appelle de cette décision.

La preuve au procès a été en général commune aux deux accusés. Ils ont été vus tous les deux près de la scène du meurtre, avant et après. On a trouvé à leurs résidences respectives des effets dont se ser-

(1) [1918] 1 K.B. 531, at pp. 538, 539.

vent d'ordinaire ceux qui font du vol leur principale occupation. Dans le cas de Prosko, cette preuve de circonstances a été fortifiée par des aveux qu'il a faits avant et après son arrestation pour meurtre.

Il est bien évident que ces admissions de Prosko pouvaient lui nuire considérablement; mais ces aveux pouvaient être prouvés, que Prosko eût été mis seul en accusation ou qu'il l'eût été avec son complice. Alors un procès séparé ne lui aurait pas été plus favorable sur ce point. Il y a bien les effets trouvés chez Janousky dont la mention au procès de Prosko aurait pu lui porter préjudice. Mais on en a trouvé des semblables chez lui. Alors il me semble que cette preuve quant aux effets trouvés chez Janousky ne peut pas être considérée comme ayant causé un tort réel à Prosko. L'article 1019 du code criminel couvre le cas. Je dirais donc que le président du tribunal n'a pas fait d'erreur en refusant d'accorder à Prosko un procès séparé.

La deuxième question qui nous est soumise porte sur des aveux qui auraient été faits par Prosko aux témoins Heig et Mitte.

Le détective Roussin, qui avait été chargé de retrouver les auteurs du meurtre, avait appris que Prosko pouvait être l'un des meurtriers et, un an environ après que le crime eût été commis, il l'a retracé à Détroit, dans les Etats-Unis. Il s'est alors abouché avec deux détectives de cette dernière ville, Heig et Mitte, et ils ont décidé, pour éviter les frais d'un procès en extradition, que Prosko serait amené devant les autorités de l'immigration, qui, si elles trouvaient que Prosko n'était pas un citoyen désirable, pourraient le déporter des Etats-Unis au Canada.

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On l'arrête pour violation des lois d'immigration. On lui dit qu'il va être déporté au Canada, et alors il déclare en présence de Heigh et Mitte qu'il ne veut pas retourner au Canada; et il ajoute:" I am as good as dead". Les détectives lui demandent pourquoi, et alors il raconte qu'il avait été dans un camp avec certains hommes qui avaient alors commis un meurtre. Ces déclarations ont été faites volontairement, sans aucune menace et sans aucune sollicitation.

Les décisions récentes en Angleterre sont à l'effet que des déclarations faites comme dans le cas actuel doivent être reçues par les tribunaux. *Ibrahim* v. *The King* (1); *The King* v. *Colpus*, (2); *The King* v. *Voisin*, (3). Il est à remarquer que ces déclarations de Prosko ont été faites avant qu'il ne fût arrêtè pour meurtre. Je suis d'opinion que la cour n'a pas fait d'erreur en recevant les témoignages de Heig et Mitte.

La troisième question est de savoir si les effets trouvés dans les chambres des deux accusés pouvaient être produits comme exhibits dans la cause.

Ces effets ont été produits comme éléments d'accusation. Il est de règle, surtout dans le cas de meurtre, de produire devant la cour les effets dont l'accusé aurait pu se servir pour commettre le crime dont il est accusé. On peut aussi produire des articles qui peuvent servir à l'identifier.

Il paraît certain dans cette cause que le vol a été le mobile du crime. Alors je ne vois pas pour ma part d'objection à ce que l'on produise devant la cour des articles qui sont généralement utilisés par les voleurs et que l'on trouve en la possession des accusés. Il est

(1) [1914] A.C. 599. (2) [1917] 1 K.B. 574.
(3) [1918] 1 K.B. 531 at p. 538.

possible que certains de ces articles n'ont pas dû servir à la commission du crime. Mais cette circonstance ne serait pas suffisante pour constituer dans le cas de Prosko un déni de justice ou un tort grave. Je répondrai donc négativement à cette troisième question.

En conséquence l'appel doit être renvoyé.

MIGNAULT J.—The only question raised by this appeal which appeared to me at the hearing to have any substance was whether the evidence of some statements made by Prosko at Detroit to the American detectives Heig and Mitte should have been allowed.

When these statements were made Prosko was under arrest by virtue of a warrant issued by the United States Immigration authorities, as an undesirable, which warrant was served on him by one Roussin, a Canadian detective, who was seeking to bring him to trial in Canada on a murder charge, and instead of instituting extradition proceedings, it was considered better to have Prosko deported as an undersirable when he would of course be arrested on the murder charge. Roussin brought Prosko before the Immigration authorities in Detroit, and when informed by them that he would be deported, Prosko told them that he was as good as dead. Heig and Mitte then questioned him and it was under these circumstances that he made the statements which were given in evidence.

I have serious doubts whether this evidence should have been allowed. The American detectives were persons in authority and Prosko's exclamation when told that he would be deported shows that he under-

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stood that his deportation was sought in order to have him brought to trial in Canada on the charge of murder. He evidently made the statements he did with the hope to escape deportation and his consequent arrest for murder, and the American detectives were persons in authority. It is true that he subsequently made similar admissions in Canada to Roussin, but the learned trial judge insisted in his charge on the evidence of Heig and Mitte as corroborating that of Roussin which otherwise the jury might have hesitated to accept as sufficient, so the introduction of this evidence may have caused a substantial wrong to the appellant.

A majority of the court is, however, of the opinion, that the evidence of Heig and Mitte was admissible, so that Prosko's appeal cannot succeed. Under these circumstances I have not entered a formal dissent, but I cannot do otherwise than express my serious doubts as to the admissibility of this evidence.

Appeal dismissed.