THOMAS ALLEN .....APPELLANT; 1911

AND *March 28. *March 31.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Trial for murder—Improper admission of evidence—New trial—Substantial wrong or miscarriage—Criminal Code, s. 1019.

By section 1019 of the "Criminal Code" it is provided that "no conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected or that something not according to law was done at the trial, * * * unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

Held, reversing the judgment appealed from (16 B.C. Rep. 9), Davies and Idington JJ. dissenting, that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the court of appeal may order a new trial.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the conviction of the appellant, at the trial, on an indictment for murder, upon a reserved case stated by the judge who presided at the trial.

The case reserved is stated in the judgments now reported.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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J. A. Ritchie for the appellant.

McKay K.C. for the respondent.

THE CHIEF JUSTICE.—I did not intend to add anything to what I said when judgment was rendered on this appeal; but in deference to the learned opinions of my dissenting brothers I will endeavour to state the reasons for the conclusions I reached.

The appellant, a soldier in garrison at Victoria, B.C., was tried, at the last Autumn assizes, on the charge of murdering his captain, one Peter Elliston; and, having been found guilty, was sentenced to be hanged. Subsequently, on the application of counsel, the learned Chief Justice, who presided at the trial, reserved a case for the opinion of the provincial Court of Appeal. The point reserved is stated in these words:

> At the said trial the accused gave evidence on his own behalf, and during his cross-examination by Mr. Aikman, the counsel for the Crown, the following occurred as appears by the transcript of the evidence hereto made by the official stenographer present at the said trial, at page 100 thereof:—
>
> Mr. Aikman: Q. You remember Corrigan giving his evidence in the Police Court, don't you?
>
> A. Yes, sir. Well I remember some of it, sir. Most of it was given in a very low tone of voice, sir.
>
> Q. Do you remember him saying this, in answer to a question of, what did Allen say, the answer was, "He threatened Captain Elliston, he said old Peter should be in charge of a ranch instead of a body of men."
>
> A. Well, now, sir, that is an expression that I would not be guilty of using.
>
> Q. That is not the question; I ask you if you remember him saying that?
>
> A. No, sir.
>
> Q. You don't remember him saying that?
>
> A. Oh, I remember him saying that, sir, in his evidence that morning.
>
> Q. Then he was asked this question: "Did he say he was done

an injustice; give his words? (A.) He said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark." Do you remember him saying that?

A. No, sir, I don't remember him saying that; but I can say from that, that is all nonsensical. No man of common sense * * *

Q. We will see that later.

Mr. Davie: I object to that evidence being introduced here. The evidence of that man was taken at the preliminary inquiry, and it has not been shewn that he is absent from the country. It is only an indirect way of getting that evidence in.

The Court: Unless you can produce Corrigan to be cross-examined himself, why should you use this evidence here?

Mr. Aikman: I am just testing this witness's veracity and trying to test his memory.

Mr. Davie: I submit he has no right to mention those statements.

The Court: No, I do not see what the point is. You must test him by standard methods.

No further allusion was made to this matter by either the counsel or myself.

The Court of Appeal decided, Mr. Justice Irving dissenting, that the evidence objected to, although improperly admitted, in the opinion of the Chief Justice and Mr. Justice Galliher, did the accused no substantial wrong, there being abundant legal evidence of guilt. From that decision this appeal is taken.

All the judges below find that there was ample evidence that the prisoner killed Captain Elliston and in that opinion we concur. The question to be determined, however, is with respect to the admissibility of the testimony quoted in the reserved case and its effect upon the verdict.

It cannot be doubted that depositions taken at the preliminary inquiry before a magistrate are not admissible in evidence at the subsequent trial of the accused on the same charge, except in certain events; and when, on the happening of those events, such depositions are admitted they must be produced in their entirety to the court so that the accused and

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the Crown may have the benefit of all they contain. It is also, I submit, undoubted law that, while, in the circumstances of this case, a prisoner might be asked on cross-examination if he had made previous threats against the life of his victim, the jury cannot, under pretence of cross-examination for any purpose, be informed either directly or indirectly by the Crown prosecutor that a witness examined at the preliminary inquiry into the charge upon which the prisoner is tried swore at that investigation that the prisoner had made such threats, unless that witness is produced or his deposition given at the preliminary investigation is properly admissible as evidence. The learned Chief Justice of the provincial Court of Appeal, with whom Galliher J. concurred, describes what happened at the trial on the cross-examination of the prisoner, in these words:

> It appears that one Corrigan was a witness and gave evidence at the preliminary investigation before the police magistrate. Corrigan was not called at the trial, nor did the Crown comply with the conditions precedent to its right to use Corrigan's evidence. Nevertheless, counsel for the Crown asked the accused man, who went into the witness box on his own behalf, whether Corrigan had not, in his evidence in the Police Court, made a statement that he (Allen) had made threats against Captain Elliston of a very serious nature. *It was sought in this way to get before the jury damaging statements made by Corrigan in the Police Court.* This evidence ought not to have been permitted to reach the jury. The course pursued is not in accord with the best practice of officers of the Crown charged with the administration of justice. The argument advanced before us that counsel was entitled in this way to test the credibility of Allen, cannot, in my opinion, be accepted.

With all this I agree. The only question as to which a doubt existed in my mind at the argument, was whether the improper admission of this evidence was an irregularity so trivial that no substantial wrong or miscarriage was thereby occasioned, there

being other sufficient evidence of guilt. The majority in the court below thought that the irregularity was trivial, that no harm was done the prisoner and that by reason of the provisions of section 1019 of the Canada Criminal Code the appeal should be dismissed. That section is in these words:

1019. No conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

My difficulty is to say to what extent the jury, or any one of them, may have been influenced by the questions put to the prisoner on cross-examination by the Crown prosecutor. There are many reported cases in which convictions have been quashed on the ground that illegal evidence was admitted — often reluctantly, in view of the clear guilt of the accused. The law on this express point was laid down quite recently in England by the Court of Criminal Appeal in *Rex* v. *Fisher*(1). Speaking for the court, Channel J. said:

In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this court, the conviction cannot stand.

This case was subsequently formally approved in *Rex* v. *Ellis*(2), at page 760.

The English Act(3) is in these words:

The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury

(1) [1910] 1 K.B. 149. (2) [1910] 2 K.B. 746.
(3) 7 Edw. VII. (Imp.), ch. 23, sec. 4.

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should be set aside on the ground that it is unreasonable *or cannot be supported having regard to the evidence*, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

There are, obviously, verbal distinctions which can be made between the English Act and the section of our code. The English statute enacts that the appeal shall be allowed in a certain number of enumerated cases — including that of a verdict *which cannot be supported having regard to the evidence* — and that in any others the appeal shall be dismissed. As appears by the citation from *Rex* v. *Fisher*(1), that statute has been construed by the Court of Criminal Appeals to mean that the conviction must be set aside where improper evidence has been admitted — even if having regard to the whole evidence there is sufficient to support the verdict. This is now the settled rule notwithstanding the proviso to the English Act that the appeal may be dismissed even if the point raised might be decided in favour of the appellant if the court considers that no substantial miscarriage of justice has occurred. Our section 1019 is practically to the same effect. It provides that no conviction shall be set aside if it appears that some evidence was improperly admitted unless some substantial wrong or miscarriage of justice was thereby occasioned. The underlying principle of both is that, while the court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no sub-

(1) [1910] 1 K.B. 149.

stantial wrong or to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here — the existence of previous threats — and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiassed verdict of the jury that the accused was entitled to have.

Despite all the changes made in recent years in the procedure in criminal and quasi-criminal cases, the classic saying of Lord Hardwicke still holds that

> it is the greatest consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct, that the judge determines the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England.

In this case the Crown prosecutor first asked the prisoner if he remembered that Corrigan gave his evidence in the Police Court; and, when this was admitted, then he proceeded to ask him if he remembered that he (Corrigan) then swore that the prisoner had threatened Captain Elliston, saying:

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This question being also answered in the affirmative, the prisoner was asked if he remembered that at the preliminary investigation Corrigan swore that he (the prisoner), speaking of the murdered man had used these words:

> He (the prisoner) said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark.

This question was not answered, counsel for the prisoner having intervened to object. In putting this question, the Crown prosecutor appears to have read from the deposition given by Corrigan before the police magistrate.

What must have been the impression necessarily conveyed to the jury by those proceedings? The prisoner was pressed to admit: First, that Corrigan was examined as a witness at the preliminary investigation before the police magistrate; secondly. The Crown prosecutor stated that being so examined he, Corrigan, testified that the prisoner had made against the life of the deceased the threat quoted above. The result was that a material portion of a deposition taken before the police magistrate was given to the jury without the conditions of the Act being complied with; and that the jurors were told by the Crown prosecutor in effect that a witness not produced and whose absence was not accounted for had at the preliminary inquiry sworn to threats made by the accused against the life of his victim. In my judgment, the proceeding, objectionable as it is in this regard, is made more objectionable by the fact that only extracts from the evidence was produced and that it does not appear whether or not Corrigan was cross-examined as to the alleged threats, so that it is impossible for us to say

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whether all that occurred between the prisoner and Corrigan, on the occasion when the threats are said to have been made, was before the jury. On the plea of not guilty the defence was that the murder was committed under an insane impulse which was irresistible. Whether it is an inference from the McNaghten rules that irresistible impulse is a sufficient defence, I am not called upon to say, but certainly evidence of previous threats made by the prisoner against the deceased would be a most effective answer to a plea of not guilty to a charge of murder; and I say, with all deference for the opinion expressed by my colleagues for whose long experience and wide knowledge I have the greatest respect, that to permit such threats to be proved in the way attempted here would be to adopt "a new and arbitrary method of trial," and to dismiss the appeal we must ignore the well-settled rule that in a criminal case the verdict is to be founded exclusively upon such evidence as the law allows.

It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, 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 as to this the prisoner must get the benefit of that doubt *propter favorem vitæ*. To say that we are in this case charged with the duty of deciding the extent to which

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the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury. The law on this express point was laid down by the Judicial Committee of the Privy Council in 1893 in *Makin* v. *Attorney-General for New South Wales*(1), when Lord Chancellor Herschell said:

> It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction 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. The result is that, in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. *The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.*
>
> It is impossible to deny that such a change of the law would be a very serious one, and the construction which their Lordships are invited to put upon the enactment *would gravely affect* the much-cherished right of trial by jury in criminal cases. The evidence improperly admitted *might have chiefly affected the jury to return a verdict of guilty*, and the rest of the evidence which might appear to the court sufficient to support the conviction *might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses.* Yet the court might, under such circumstances, be justified, or even consider themselves bound to *let the judgment and sentence stand.* These are startling consequences.
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> * * * * * *
>
> Their Lordships do not think it can 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. In their Lordship's opinion, *substantial wrong would*

(11) (1894) A.C. 57, at pp. 69, 70.

be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence.

In that case the enactment in question was the statute of New South Wales, 46 Vict., No. 17:

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.

On the whole I am of opinion that the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong, and that is the opinion of the majority.

DAVIES J. (dissenting).—I am not able to agree with the conclusion reached by a majority of the court to grant a new trial in this case.

The ground as I understand upon which the new trial has been granted is the wrongful admission of evidence at the trial which may have occasioned substantial wrong to the prisoner, Allen.

He was indicted on a charge of having murdered Captain Peter Elliston, and pleaded not guilty. The fact of the killing by the prisoner was proved by the Crown, and the defence, the only one in fact which could under the evidence have been set up, was, as stated by his counsel to the jury, that at the time the prisoner

committed the offence he was void of sane consciousness and was temporarily insane.

Counsel for the prisoner frankly admitted at the argument before us that no other defence than that

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of temporary insanity was or could have been under the evidence advanced or sustained.

The jury found the prisoner guilty thus negativing his only defence and after a careful perusal of the evidence given at the trial, I am unable to see how reasonable men could have reached any other conclusion. The question comes before us whether any evidence was improperly admitted or "something not according to law done at the trial," which in our opinion occasioned some substantial wrong or miscarriage to the prisoner on the trial.

The jurisdiction of the court acting as a court of criminal appeal is defined and limited by the Criminal Code. The 1019th section reads as follows:

> 1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

The prisoner tendered himself as a witness and gave evidence on his own behalf. In the course of his evidence replying to the question of his own counsel: "Tell the jury what you know of this affair," said:

> Well, I am afraid I shall be able to tell them very little, because I am of opinion that the man who left here, that is Corrigan — Corrigan came here the same as Trimby, with a manufactured statement, he was not prepared at the time, apparently, and he came along here with a rambling statement at the preliminary investigation; and I am of opinion that Corrigan deserted as a consequence of being afraid to stand the cross-examination that he might have been subjected to.

Later on in his evidence he said that he had

> a very strong suspicion that the man Corrigan knows more about this, sir, than anybody else, and that is the reason he deserted;

something tells me, sir, that that man Corrigan acted crooked on that morning.

Having made these broad insinuations against Corrigan, who was a deserter and supposed to be away out of the province, he was naturally cross-examined with reference to his statements, and the following appears in the case reserved by the Chief Justice who tried the case, as having occurred during the cross-examination:

Mr. Aikman: Q. You remember Corrigan giving his evidence in the Police Court, don't you?

A. Yes, sir. Well I remember some of it, sir. Most of it was given in a very low tone of voice, sir.

Q. Do you remember him saying this, in answer to a question of, what did Allen say, the answer was, "He threatened Captain Elliston, he said old Peter should be in charge of a ranch instead of a body of men."

A. Well, now, sir, that is an expression that I would not be guilty of using.

Q. That is not the question; I ask you if you remember him saying that?

A. No, sir.

Q. You don't remember him saying that?

A. Oh, I remember him saying that, sir, in his evidence that morning.

Q. Then he was asked this question: "Did he say he was done an injustice; give his words? (A.) He said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark." Do you remember him saying that?

A. No, sir, I don't remember him saying that; but I can say from that, that is all nonsensical. No man of common sense * * *

At this stage objection was taken by the prisoner's counsel to the cross-examination as being an indirect way of getting in the evidence of Corrigan given at the preliminary inquiry and the objection being sustained by the Chief Justice, the cross-examination on the point was dropped.

I think myself the manner in which the Crown prosecutor framed his questions objectionable and that

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the Chief Justice was right in sustaining the objection. It is obvious, however, that the statements made by the prisoner in his examination-in-chief quoted above fully justified cross-examination, and that if there had been none legitimate comment might have been made at its absence. The substance, however, of what took place is that the prisoner admitted having heard Corrigan state that he, the prisoner, "had threatened Captain Elliston," but denied that he heard him state that prisoner had made the specific threat counsel mentioned in his second question. The nature of the general threat which he admitted having heard Corrigan state he, prisoner, had made is not stated, and as to the specific threats he denied having heard Corrigan's assumed statement respecting them.

It cannot be successfully argued in these circumstances that any material evidence was admitted improperly or in fact that any evidence at all was admitted. The Chief Justice at once ruled against admitting the evidence.

The utmost that can be argued is that the incident amounted to something which was "done at the trial not according to law," and which might have substantially prejudiced the prisoner.

I have already stated that in my opinion the form of the questions was objectionable, and my concurrence in the Chief Justice's ruling with regard to them at the trial.

The question remains: Did the putting of such questions, in the circumstances and in view of the character of the defence raised, occasion substantial wrong or miscarriage to the prisoner?

The duty of determining whether the facts which happened did or did not occasion such substantial

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wrong rests under the statute upon the court. In my judgment unless we are able to find that some substantial wrong or miscarriage was so occasioned we are without any jurisdiction to interfere with the verdict of the jury.

The statute was passed for the purpose of putting an end to the judicial scandals occasioned by courts feeling themselves obliged by authorities and precedents to give effect to trivial errors or mistakes at criminal trials either with respect to the reception or rejection of evidence, the conduct of the trial or the charge or rulings of the trial judge, quite irrespective of the fact whether these errors or mistakes occasioned substantial wrong or injustice to the prisoner or not.

Under the code as it now stands, all this is changed, and the court is forbidden to set aside any conviction or to grant a new trial unless in its opinion some substantial wrong or miscarriage was occasioned by the alleged errors or mistakes in respect to the evidence, or the conduct of the case or the ruling or direction of the trial judge as prescribed in the section.

In order to discharge my duty in that regard I have, as I have stated, read most carefully the entire evidence with the result that I am unable to reach the conclusion that the occurrence or incident objected to or the manner of putting the questions objected to could have occasioned the prisoner any substantial injustice.

I had written my reasons out more fully on this branch of the case, but in view of the fact that a majority of the court have reached the conclusion that a new trial should be had, I thought it better to state my conclusion generally, without going into the evidence in detail.

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We were pressed with the opinion expressed by the Judicial Committee of the Privy Council in the case of *Makin* v. *The Attorney-General for New South Wales*(1), at pages 69 and 70, as to the proper construction of a section of the "Criminal Law Amendment Act" of that colony, conferring power upon the Supreme Court on a stated case to deal with convictions of prisoners, etc., and containing a proviso

> that no conviction should be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

Although in view of the decision reached by them that the evidence objected to in that case was admissible, it became unnecessary for the determination of the appeal to decide upon the true construction of this proviso, their Lordships thought it right, in the special circumstances, to state their opinion that

> the language used in the proviso was not intended to apply to circumstances such as those now (then) under consideration; that is cases of the wrongful reception of evidence. Their Lordships after giving reasons for their opinion added: "That there is ample scope for the operation of the proviso without applying it in the manner contended for," (and that) "they desired to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury.

I have already given my reasons for thinking why it is impossible to suppose that the improper manner in which the questions objected to in this case were framed and put or the answers the prisoner made to them could under the defence raised have had any influence on the verdict of the jury.

But what I desire to point out is the radical difference between the language of the New South Wales

(1) [1894] A.C. 57.

statute and ours. Ours expressly and explicitly refers to cases where some evidence was improperly admitted or rejected, or *something not according to law done* at the trial, and declares that in such cases unless the court is of the opinion that some substantial wrong or miscarriage was thereby occasioned on the trial no new trial should be directed or conviction set aside. There is no such language or anything analogous to it in the New South Wales statute upon the construction of which the Judicial Committee gave their opinion, and no room in my humble judgment for applying that opinion to our statute. Its language is so explicit, so definite, so clear, as to leave no possible doubt in my mind of its meaning.

The Supreme Court of British Columbia in 1897, in the case of *Reg.* v. *Woods*(1), construed this section of the code now under review in accordance with the views I have expressed. So also did the Appeal Court of Ontario in the case of *Rex* v. *Sunfield*(2), where it was held that although evidence of threats made by the prisoner in respect of another person was improperly admitted, yet in the opinion of the court no substantial wrong or miscarriage of justice having been occasioned thereby, the conviction should not be set aside or a new trial directed.

For these reasons I am of the opinion that the appeal should be dismissed.

IDINGTON J. (dissenting).—The appellant was indicted for and convicted of murder on a trial wherein the prosecution presented against him such a mass of evidence, that the learned trial judge was constrained

(1) 5 B.C. Rep. 585. (2) 15 Ont. L.R. 252.

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to describe it in his charge to the jury as overwhelming, on the first issue raised by the plea of not guilty.

At the close of the case for the prosecution, the counsel for the accused opened his client's case thus:

> The evidence I will deduce will be to shew that this man at the time he committed the offence was void of sane consciousness and was temporarily insane. In order that all the evidence may be before you enabling you to come to a proper conclusion, it is my intention to submit the prisoner to you, in order that he may be examined. That is his wish, and he will now take the box.

The accused was accordingly sworn on his own behalf.

In the course of giving his evidence he spoke of one Corrigan, a fellow soldier, in a way to cast suspicion upon him. Amongst other things he referred to this man as follows:

> Q. You might tell the jury what you know of this affair?
>
> A. Well, I am afraid I shall be able to tell them very little because I am of opinion that the man who left here, that is Corrigan — Corrigan came here the same as Trimby, with a manufactured statement, he was not prepared at the time apparently, and he came along here with a rambling statement at the preliminary investigation; and I am of the opinion that Corrigan deserted as a consequence of being afraid to stand the cross-examination that he might have been subjected to. * * *
>
> That is all, sir, because I had strong suspicion of Corrigan. * * that that man Corrigan acted crooked on that morning. Because you see, sir, Corrigan was in hospital with me a few weeks previous to this in the month of July, and nobody else was in then but Corrigan and me.

In the cross-examination there arose an occurrence, no doubt due to these references, which appears in the reserve case submitted to the Court of Appeal in British Columbia, and by way of appeal is now before us.

In the reserve case the learned Chief Justice who presided at the trial, introduces his statement of the conviction by these words:

2. The fact of the killing by the prisoner was proved by the Crown, and the defence set up by the prisoner (namely, temporary insanity caused by over-indulgence in alcohol) not having been established to the satisfaction of the jury," etc., etc.

In presenting the point desired to be raised the learned Chief Justice gives the following part of the cross-examination, to which I have already alluded:

Mr. Aikman: Q. You remember Corrigan giving his evidence in the Police Court, don't you?

A. Yes, sir. Well I remember some of it, sir. Most of it was given in a very low tone of voice, sir.

Q. Do you remember him saying this, in answer to a question of, what did Allen say, the answer was, "He threatened Captain Elliston, he said old Peter should be in charge of a ranch instead of a body of men."

A. Well, now, sir, that is an expression that I would not be guilty of using.

Q. That is not the question; I ask if you remember him saying that?

A. No, sir.

Q. You don't remember him saying that?

A. Oh, I remember him saying that, sir, in his evidence that morning.

Q. Then he was asked this question: "Did he say he was done an injustice; give his words? (A.) He said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark." Do you remember him saying that?

A. No, sir, I don't remember him saying that; but I can say from that, that is all nonsensical. No man of common sense * * *

Q. We will see that later.

Mr. Davie: I object to that evidence being introduced here. The evidence of that man was taken at the preliminary inquiry, and it has not been shewn that he is absent from the country. It is only an indirect way of getting that evidence in.

The Court: Unless you can produce Corrigan to be cross-examined himself, why should you use this evidence here?

Mr. Aikman: I am just testing this witness's veracity and trying to test his memory.

Mr. Davie: I submit he has no right to mention those statements.

The Court: No, I do not see what the point is. You must test him by standard methods.

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Then the learned Chief Justice submits that with the following remark:

> No further allusion was made to this matter by either the counsel or myself. Mr. Davie urges that this occurrence entitles the prisoner to a new trial, notwithstanding all the evidence adduced, and the question for the court is whether or not this contention is right.

It is somewhat difficult to understand how this can be held of any consequence in this case.

Counsel for the appellant frankly puts it that it is not the reception of evidence he complains of, but merely the form of the questions put by the Crown officer, containing something impliedly, it is said, sworn to elsewhere.

The relative importance or insignificance of anything of that kind must be measured by the attendant circumstances of each case and the possible bearing it may have upon the issues that have been raised.

It certainly does not seem to me to be law that one accused and giving evidence on his own behalf can be permitted to use the occasion in order to traduce others and mislead a jury by such insinuations as this witness chose to introduce in his evidence, and the Crown officer be forbidden to elicit from him the motive for his conduct in making such allegations as I have quoted.

For that purpose the Crown officer would have been perfectly justified in order to shew the animus of the accused in making such insinuations; to have adverted to the circumstances of Corrigan appearing as against the accused in the preliminary investigation and the tenor of his evidence there, and that accused learned or knew thereof, and that this, no doubt, gave rise to such counter charge as made by the accused. He was entitled to have elicited from the witness, and

did thus elicit from him, ample motive for his making the insinuations he did. The accused in cases where he creates thus the occasion for a Crown officer resorting to what might otherwise have been dangerous ground to enter upon, has no right to complain of the necessary consequences of his own acts as a witness. He has no greater right than another witness except so far as given by statute.

The accused did not hear, though present, the later statement, and his denial being the only evidence before the court and jury, as to whether or not such a statement ever had been made, must have been taken, and no doubt was taken, as conclusive.

Again, as to the first statement as to threat or fact, it was simply a repetition of what others had already sworn to on the trial herein.

Neither statement in the case can be said to have had any effect relative to the main issue of fact as to which the defence had then practically been abandoned by this appellant's counsel.

For that reason it might have been as well that the matter had been avoided entirely by the Crown officer. And, unfortunately, when he was asked by the court why he pursued this line of cross-examination, he gave a reason that does not seem to me as tenable as that I have suggested as clearly available. But this reason he assigned can have no bearing upon the substantial right to shew the animus of the accused.

Is it because a wrong reason is given or weaker ground than he might have insisted upon is taken by a Crown officer, that the accused should have his discharge, or be granted a new trial ?

There was no objection taken to these questions

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as should have been by counsel for the accused if he intended to object, or ever supposed his client likely to suffer from these questions or answers thereto.

And when taken a moment or two later, it was clear to the jury and every one else that the learned Chief Justice had stamped this course of inquiry as null.

It seems further (from the request he made at the close of his charge, for any objections thereto, and counsel for accused signifying he had none), to be clear that if he had attached the slightest importance to the circumstances now complained of, he would have asked for a direction to the jury relative thereto.

It may be observed that the only issue before the court and jury at this stage of the inquiry was that of the insanity of the accused.

In relation to that the Crown officer suggested that he had asked these questions as a means of testing the memory of the accused, and seeing that he had sworn to a complete lapse of memory of what occurred at the time of the shooting, what was amiss in this that took place shortly after being applied as a test? Beyond that the jury, if they ever thought of it again, could only reasonably apply the answers as tests of memory. And so far from militating against the accused, the result may have tended the other way.

The appeal in criminal cases like this where no motion was made in arrest of judgment, rests upon section 1014 of the Criminal Code, sub-section 2. And that is confined to questions of law

> arising either on the trial or on any of the proceedings, subsequent, or incidental thereto, or arising out of the direction of the judge.

I doubt much if the mere statement of a question unobjected to, as here, can be said to be a question of law arising at the trial.

I do not overlook the fact that in an English case where a grave miscarriage had taken place without objection, the right to have a case reserved was held not to be taken away by reason of omission to object.

It is one thing in the case of a grave misconception of the conduct of an entire trial, or a great part thereof, to relieve the accused from the ordinary result of a failure to object, and quite another, where the very unimportance of the error caused both court and counsel to overlook it, at the close of a two days' trial.

But where is the practice to end, if such trivial incidents as in question here, happening unnoticed, can warrant a new trial or discharge ?

For example, hearsay evidence as apparent in this case, despite the efforts of the court and counsel, may creep in. Is that to be taken as a matter of law in any case, proper to reserve a case upon, and a new trial or discharge result ?

Let us turn to section 1018 of the Criminal Code, for there, coupled with section 1019, our duties herein are defined. It (section 1018) reads in such a way as to imply there had been a ruling from which an appeal has been taken. How can that be said in regard to every inadvertence that the most competent trial judge may happen to permit, and where no call has been made for a ruling ?

Where the matter is so grave that either he must be taken to have misapprehended the entire nature of the business he was about, and hence to have erred or have permitted others to err, it may well be argued that there has been a ruling which rendered the omission to object of no consequence.

But what is there here ?

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A correct interpretation of section 1019, however, is the most important thing we have to deal with herein. It reads as follows:

> 1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial; provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

To give this section an interpretation such as to allow this appeal, is not only tantamount to an evasion or abandonment of all responsibility such as has been cast by the plain wording of the section, upon the appellate courts of Canada, but also a direction to every trial judge at a criminal trial, then or after the trial, to reserve a case in every instance of the occurrence of something of the like unimportant nature happening on a criminal trial, in order that the accused be acquitted or tried again.

The language of the section is of such a comprehensive and imperative character, that clearly the appellate courts were expected to be strong, and act with that strong hand that would protect the interests of society, and the due administration of justice whilst guarding the rights of the accused.

It is impossible in any single case to draw the exact line of duty that will reach every case, if the appellate court is to assume the responsibility and discharge the duty the section evidently contemplates.

Of course it is not only possible, but easy, to draw the line if we are content to say in this and every other case, that it is impossible to say that any and every thing done, however insignificant, as here, may not have had some effect on a jury.

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The case of *Makin* v. *The Attorney-General*(1), is relied upon and has been referred to in several cases since. I will not dwell upon the curious features of that case, or the language of the judgment, but may be permitted to say that some people seem to have misinterpreted it if my reading of it is correct.

If we examine all the authorities from it down to the latest, neither in it nor in any other case has any court gone to the length, or nearly the length, we are asked to go herein.

But we have it interpreted by later authorities in a way that seems quite consistent with the due working out of this section of the Code.

I do not attach so much importance to the difference of language in the various Acts on which cases have arisen, as some do. But I may say ours is the most restrictive of any, in permitting the setting aside of a conviction. I think we must have regard to the object of the Act, and guard alike the just rights of the accused, and the danger of reducing the administration of justice to a farce.

Experience on this side of the Atlantic has been, from a variety of causes, so different from the experience an English judge has had in his own country, as to render it necessary to take with caution general expressions of such judges in disposing of the cases so far reached under similar legislation. Possibly they have not felt as yet in England the evil this section guards against.

We certainly are not expected, using the language of Lord Alverstone, C.J., in *Rex* v. *Dyson*(2), at page 457, to transfer

(1) [1894] A.C. 57.

(2) [1908] 2 K.B. 454.

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from the jury to the court the determination of the question whether the evidence established the guilt of the accused.

His suggestion in the same case resting upon the construction of the "Criminal Appeal Act, 1907"(1), sec. 4, sub-sec. 1, is that the said

> proviso is intended to apply to a case in which the evidence is such that the jury must have found the prisoner guilty if they had been properly directed. It does not apply when the evidence leaves it in doubt whether they would have so found.

In the later case of *Rex* v. *Norton*(2), at page 501, the court uses the expression "would," not "might," instead of "must" relative to the jury and its possible or probable discharge of its duty.

I am unable to say that either word, standing alone, can satisfy my mind. I assume either "must" or "would" implies the assumption that due regard be had to the discharge of their duty by the jury as really what is meant by either expression in each of these judicial opinions. In this case we ought not to have, in light of either expression, the slightest difficulty. The only issue raised is as to an occurrence at the stage of this trial when inquiry was being made relative to the insanity of the accused. It seems absurd on the evidence adduced to suppose that any sane jury could have honestly come to the conclusion that the accused was at the time in question insane. We must bear in mind the legal presumption of sanity, and that the onus of insanity at the time rested upon the accused.

There is not a shred of evidence that goes so far as to bring the accused within the range of any legal definition of insanity, save that the evidence bearing on the long-continued drinking of the accused, might

(1) 7 Edw. VII. ch. 23. (2) [1910] 2 K.B. 496.

render one suspicious of its having brought on delirium tremens or alcoholic dementia. And not only did the accused fail to prove it had, but the only expert who saw him and could speak relative thereto, and had ample opportunity to enable him to speak, is emphatic in saying he had neither.

An acquittal in face of such evidence and none on the other side, able to bear the test of our law relative to insanity and its relation to responsibility in law, would have shocked every sensible man who had heard this evidence.

I have read it all to be quite sure of my ground in this case.

On the whole of it excluding any effect flowing from the Crown officer's statements in question, it was the bounden duty of the jury to convict.

To decide this case in a way to support this appeal means to my mind the imposing as a legal duty on every trial judge in a criminal case to note the most trifling irregular omission or occurrence liable to happen on any trial, and reserve a case on such foundation for an appellate court, and the imposing on such court the duty of discharging the accused or directing a new trial.

It would render the insanity plea very popular. For what bearing in the mind of any man could the above statement of counsel, for it is that which is here complained of, ever have had in determining the question of this man's sanity ?

I think the appeal should be dismissed.

Since writing the foregoing, I am surprised by the judgment of the majority of the court, placing the allowance of the appeal on the ground of the improper admission of evidence.

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My note on the bench was this:

Mr. Ritchie confines whole to the point of the counsel having stated in putting the questions the facts of statement having been sworn to in Police Court.

DUFF J.—I agree with the Chief Justice.

ANGLIN J.—I think it is incontrovertible that the references made by counsel for the Crown, when cross-examining the defendant, to the Police Court depositions of the absent witness Corrigan were improper. *North Australian Territory Co.* v. *Goldsborough, Mort and Co.*(1), at page 385. Without laying a foundation under section 999 of the Criminal Code, which was not done, these depositions were inadmissible in evidence. The effect of the course taken by counsel for the Crown was to place before the jury a part of this inadmissible evidence which bears directly upon a question vital to the defence.

That the deceased had been killed by the defendant was practically not contested, the only serious defence set up being that, at the time the homicide was committed, the prisoner was not legally responsible because his mental condition was such, owing to the effect of intoxicants, that he was then incapable of criminal intent. If upon the evidence legally admissible the proper conclusion was that the effect upon the prisoner of liquor, though taken voluntarily, was such that, when he shot Captain Elliston,

his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury,

(*Rex* v. *Meade*(2), at page 899; *Rex* v. *Blythe*(3), at

(1) [1893] 2 Ch. 381. (2) [1909] 1 K.B. 895.
(3) 19 Ont. L.R. 386.

page 395) — that it produced a condition, mental or physical, inconsistent with the inference that his act was intentional, intent or premeditation being of the essence of the crime (Russell on Crimes (1 Can. ed.), 88) — that temporal mental derangement at the time of the commission of the offence was the result (*Rex* v. *Baines,* noted in Wood-Renton on Lunacy, p. 912) — a verdict of acquittal, or perhaps of manslaughter (*Reg.* v. *Doherty*(1), at page 308), should be the result. But if the defendant had really formed a previous determination to resent a slight affront in a barbarous manner, "his mental state due to intoxicants might furnish no excuse:" *Rex* v. *Thomas*(2), at page 820. Upon this question of premeditation — malice aforethought — which is of the essence of the crime of murder, evidence of previous threats by the accused against the deceased is most material. Proof of such threats would go far to destroy the contention that his act was excusable because the use of liquor had reduced him to such a condition that he was unable to restrain himself from committing the act, or was deprived of the power of forming any specific intention; *Reg.* v. *Monkhouse*(3), at page 56. It is obvious that such threats, if shewn, would not improbably lead a jury to discredit the only defence relied upon in this case.

If Corrigan's deposition had been received in evidence at the trial without compliance with the requirements of section 999 of the Criminal Code, I entertain no doubt that there would have been a mistrial. The reading of such a material extract from it as was put to the prisoner on his cross-examination by counsel

(1) 16 Cox C.C. 306.
(2) 7 C. & P. 817.
(3) 4 Cox C.C. 55.

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for the Crown, accompanied as it was by the statement that he was reading from the testimony of Corrigan at the preliminary investigation, was quite as mischievous — quite as prejudicial to the accused — as its formal reception in evidence could have been. "Something not according to law was done at the trial." (Criminal Code, sec. 1019.) The learned trial judge did not, either then, or in subsequently charging the jury, tell them that they must disregard the alleged threats to which Corrigan had deposed — if indeed such a direction from him would have cured the mischief. *Loughead* v. *Collingwood Shipbuilding Co.*(1).

The fact that in his evidence in chief the deceased had spontaneously referred to Corrigan's previous testimony, challenging its accuracy and even hinting that Corrigan himself was not free from suspicion in connection with the murder, in my opinion did not at all justify counsel for the Crown in placing before the jury, under the guise of questions in the cross-examination of the prisoner, material extracts from Corrigan's deposition. An effective cross-examination might easily have been conducted without resort being had to this indefensible practice.

Neither can I agree with the learned Chief Justice of the Court of Appeal of British Columbia that the conduct of the Crown counsel could not have prejudiced the interests of the defendant because there was no evidence proper for submission to the jury on the question of his irresponsibility at the time of the homicide. The evidence in support of this defence may have been slight. Since this case must go before another jury I refrain from discussing the question

(1) 16 Ont. L.R. 64.

further than to say that there was in my opinion enough for submission to the jury — enough to entitle the prisoner to have the jury pass upon the issue raised by him, unaffected by matter not properly admissible in evidence.

But it is said on behalf of the Crown that under section 1019 of the Criminal Code the conviction should not be set aside unless the court is satisfied that the jury *must* have been influenced in reaching their verdict by the matter improperly put before them. There being other evidence sufficient to support the conviction, it is manifestly impossible to say that the jury *must* have acted upon, or were in fact influenced by, the matter which now forms the subject of the appellant's objection. On the other hand, it is equally impossible to say that the minds of the jury *may* not have been, or were not in fact, affected prejudicially to the appellant by matter so pertinent to the main issue before them — impossible indeed to say that it may not have been this matter which with some juryman turned the scale against the defendant.

I cannot accept the construction of section 1019 urged on behalf of the Crown. So construed, as pointed out in *Makin* v. *Attorney-General for New South Wales*(1), it would in effect substitute the court for the jury in

> the determination of the question whether the evidence — that is to say what the law regards as evidence — establishes the guilt of the accused.

If Parliament had meant to effect such a startling change in the law, language much more explicit would certainly have been employed. The Lord Chancellor in the *Makin Case*(1) said:

(1) [1894] A.C. 57.

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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, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

Although the express reference to the improper admission of evidence made in section 1019 of our Code, as one of the grounds upon which a verdict may be impeached, is not found in the New South Wales statute dealt with by the Judicial Committee in the *Makin Case*(1), the direction of both Acts is substantially the same, viz., that the appellate court shall not set aside the verdict unless for some substantial wrong or miscarriage of justice. In our statute the court of appeal is required in certain specified cases not to interfere unless in its opinion some substantial wrong or miscarriage was occasioned by the error complained of; in the "New South Wales Act" interference is prohibited, *whatever the ground of objection to the verdict,* unless for some substantial wrong or other miscarriage of justice. I fail to find any ground of real distinction between these statutory provisions. *Reg.* v. *Woods*(2) was on this point, in my opinion, wrongly decided; and I am, with respect, unable to accept the view stated by Moss C.J.O., in *Rex* v. *Sunfield*(3), at page 258, that under section 1019 of our Code the appellate court

is placed in a position quite different from that occupied by the court in the case before the Judicial Committee.

The correct construction was put upon section 1019 of our Code by Dubuc and Killam JJ., in *Reg.* v. *Hamilton*(4), the head-note to which is misleading, and by

(1) [1894] A.C. 57.
(2) 2 Can. Crim. Cas. 159.
(3) 15 Ont. L.R. 252.
(4) 2 Can. Crim. Cas. 390.

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Osler J.A., in delivering the judgment of the Ontario Court of Appeal, in *Rex* v. *Brooks*(1).

"A substantial wrong" is "occasioned thereby on the trial" when counsel for the Crown improperly places before the jury, as having been sworn to, statements which may influence them adversely to the accused upon a material issue.

Although section 4, sub-section 1, of the English "Criminal Appeal Act of 1897" does not so closely resemble section 1019 of our Criminal Code as does the New South Wales provision dealt with by the Privy Council, it is not dissimilar and English decisions upon it are of value because they shew that the principle of construction acted on in the *Makin Case*(2) should be applied in the interpretation of statutory provisions similar to that there dealt with. *Rex* v. *Dyson*(3); *Rex* v. *Fisher*(4), at page 153; *Rex* v. *Norton*(5), at page 501; *Rex* v. *Ellis*(6), at page 764.

In my opinion there must be a new trial of this case.

Appeal allowed.

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(1) 11 Can. Crim. Cas. 188.
(2) [1894] A.C. 57.
(3) [1908] 2 K.B. 454.
(4) [1910] 1 K.B. 149.
(5) [1910] 2 K.B. 496.
(6) [1910] 2 K.B. 746.