LAWRENCE WILLARD BROSSEAU .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

*1968

Nov. 15
Nov. 28

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Plea of guilty—Charge of non capital murder—Accused represented by counsel—Whether Court should have questioned the accused before accepting plea.

The appellant, who was a 22 year old Cree Indian with a Grade II education, was charged with capital murder to which he pleaded not guilty. The charge was subsequently reduced to non capital murder, and in the presence of his counsel, the appellant pleaded guilty thereto and was sentenced to life imprisonment. The Court of Appeal dismissed his application for leave to withdraw that plea and affirmed the conviction on the charge of non capital murder. The appellant was granted leave to appeal to this Court on the question as to whether the trial judge erred in law in accepting the plea of guilty without making inquiry as to whether the appellant understood the nature of the charge and the effect of such plea.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Martland, Judson and Ritchie JJ.: When a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, there is no doubt that the judge will make inquiry to ascertain whether he does so; and the extent of the inquiry will vary with the seriousness of the charge to which the accused is pleading. Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt. However, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non capital murder, the trial judge is bound as a matter of law to interrogate the accused before accepting the plea.

Per Spence J., *dissenting*: It is the duty in law of the trial tribunal to satisfy itself that the accused understands the nature of the charge and the effect of the plea before it is entitled to accept a plea of guilty. The trial judge could not, in the circumstances of this case, in exercising his discretion to accept the plea of guilty, rely only on the fact that the accused was represented by counsel. In so doing, he could not satisfy himself that the accused knew either the nature of the plea or the consequences thereof.

Droit criminel—Plaidoyer de culpabilité—Accusation de meurtre non qualifié—Accusé représenté par un avocat—Est-ce que la Cour aurait dû questionner l'accusé avant d'accepter le plaidoyer.

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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L'appelant, un Indien Cri âgé de 22 ans et ayant une éducation allant jusqu'au grade II, a été accusé d'un meurtre qualifié auquel il a plaidé non coupable. L'accusation a été subséquemment réduite à celle de meurtre non qualifié, et en présence de son avocat, l'appelant a plaidé coupable à cette accusation et a été condamné à l'emprisonnement à vie. La Cour d'appel a rejeté sa demande pour obtenir la permission de retirer ce plaidoyer et a confirmé la déclaration de culpabilité sur l'accusation de meurtre non qualifié. L'appelant a obtenu la permission d'appeler à cette Cour sur la question de savoir si le juge au procès a erré en droit en acceptant le plaidoyer de culpabilité sans faire une enquête pour déterminer si l'appelant comprenait la nature de l'accusation et l'effet d'un tel plaidoyer.

Arrêt: L'appel doit être rejeté, le Juge Spence étant dissident.

Le Juge en Chef Cartwright et les Juges Martland, Judson et Ritchie: Lorsqu'un plaidoyer de culpabilité est offert et qu'il y a raison de douter que l'accusé comprend ce qu'il fait, il n'y a aucun doute que le juge fera une enquête pour s'assurer qu'il comprend; et l'étendue de cette enquête variera selon la gravité de l'accusation à laquelle l'accusé plaide. Le défaut de faire l'enquête requise peut être un motif sur lequel la Cour d'appel s'appuiera pour exercer la juridiction qu'elle possède de permettre que le plaidoyer de culpabilité soit retiré s'il appert que l'accusé n'a pas complètement apprécié la nature de l'accusation ou l'effet de son plaidoyer ou si la chose est laissée dans le doute. Cependant, on ne peut pas dire que lorsqu'un accusé est, comme dans le cas présent, représenté par un avocat et offre un plaidoyer de culpabilité à une accusation de meurtre non qualifié, le juge au procès est tenu en droit d'interroger l'accusé avant d'accepter le plaidoyer.

Le Juge Spence, *dissident:* En droit, le juge au procès doit s'assurer que l'accusé comprend la nature de l'accusation et l'effet du plaidoyer avant qu'il lui soit permis d'accepter un plaidoyer de culpabilité. Dans les circonstances de cette cause, le juge au procès ne pouvait pas, dans l'exercise de sa discrétion d'accepter le plaidoyer de culpabilité, s'appuyer uniquement sur le fait que l'accusé était représenté par un avocat. En ce faisant, il ne pouvait pas s'assurer que l'accusé connaissait la nature du plaidoyer ou ses conséquences.

APPEL d'un jugement de la Cour d'appel de l'Alberta confirmant une déclaration de culpabilité pour meurtre non qualifié. Appel rejeté, le Juge Spence étant dissident.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming a conviction for non-capital murder. Appeal dismissed, Spence J. dissenting.

Ian H. Baker, for the appellant.

Brian A. Crane, for the respondent.

The judgment of Cartwright C.J and of Martland, Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court on October 17, 1968, from a judgment of the Appellate Division of the Supreme Court of Alberta pronounced on September 10, 1968, dismissing, without recorded reasons, the application of the appellant for leave to withdraw his plea of guilty, granting leave to appeal and dismissing the appellant's appeal from his conviction on a charge of non-capital murder.

Leave was granted to appeal on the following question:

> Did the learned trial judge err in law in accepting the Appellant's plea of guilty to non-capital murder without making inquiry to satisfy himself that the Appellant understood the nature of the charge and the effect of such a plea?

It appears that the appellant was indicted on the charge that on or about March 11, 1967, he unlawfully killed Robert George Sidener, thereby committing capital murder. The indictment is dated September 5, 1967. The appellant appeared before Primrose J. on September 5, 1967, was arraigned and pleaded not guilty and the case was remanded to October 30, 1967, for the purpose of fixing a date for trial. The appellant appeared on October 30 before Greschuk J.; he appeared on January 2, 1968, before Primrose J.; he appeared on January 15, 1968, before Manning J.; on each of these occasions the case was further remanded for the purpose of fixing a date for trial. The appellant appeared on February 26, 1968, before Greschuk J. and was remanded to March 11, 1968, for trial. On March 11, 1968, he appeared before O'Byrne J. and the notation on the back of the indictment as to what occurred on that day is as follows:

> Monday March 11th, 1968
> Mr. Justice M. B. O'Byrne
> Mr. W. J. Stainton—Crown
> Mr. P. Mousseau for the Accused
> Indictment amended to read
> "NON-CAPITAL MURDER"
> Accused arraigned.
> Pleads "NOT GUILTY"
> Mr. L. Pearce—reporter
> Case adjourned to 2:00 p.m. for election & continuation

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Monday, March 11th, 1968
2:00 p.m. Mr. Justice M. B. O'Byrne
Mr. W. J. Stainton—Crown
Mr. P. Mousseau for the Accused
Mr. G. F. Remedios—reporter
Mr. Patrick Callihoo—interpreter sworn
Accused re-arraigned on the amended indictment—
Pleads "GUILTY"
Sentence LIFE IMPRISONMENT

The transcript of the proceedings on March 11, 1968, opens as follows:

MR. STAINTON: In this case, my Lord, might the amendment which has been proposed and which has been written into the indictment be granted so that the charge will read non-capital murder instead of capital murder?

THE COURT: Yes, the amendment is granted.

MR. STAINTON: Might the accused be rearraigned, my Lord?

THE COURT: Yes. Mr. Clerk:

THE CLERK OF THE COURT: Lawrence Willard Brosseau, you stand charged that you on or about the 11th day of March, A.D. 1967, at or near Tulliby Lake in the Judicial District of Edmonton, did unlawfully kill and slay Robert George Sidener, thereby committing non-capital murder contrary to the provisions of the Criminal Code. How say you to this charge, do you plead guilty or not guilty?

THE ACCUSED: Not guilty.

THE CLERK OF THE COURT: Harken to your plea as the Court doth record it, Lawrence Willard Brosseau, not guilty.

MR. MOUSSEAU: My Lord, if we may, would the Court grant a five-minute adjournment?

THE COURT: Yes, we will adjourn for five minutes.

The Court adjourned at 10.05 a.m. and reconvened at 10.20 a.m., at which time Mr. Mousseau asked the Court to stand the matter over to two o'clock in the afternoon, Mr. Stainton stated that he had no objection, and the trial Judge adjourned the matter accordingly. The transcript as to what occurred at 2 p.m. is as follows:

MR. MOUSSEAU: I might at this time, my Lord, before Mr. Brosseau arrives, explain that whilst Mr. Brosseau appears to have a sufficient command of the English language, I have on prior occasions interviewed him with an interpreter, and when I spoke with Mr. Brosseau earlier this morning he did indicate to me that he preferred that the present proceedings be interpreted to him. Mr. Callihoo, who is an ex-agent of the then Department of Indian Affairs, has agreed to do so, and I would request of Your Lordship that he be sworn in order to perform his function.

THE COURT: Very well.

PATRICK CALLIHOO, sworn in as English/Cree interpreter.

THE COURT: It's just a matter of reading the charge again to the accused, Mr. Mousseau?

MR. MOUSSEAU: It is, yes, my Lord.

THE CLERK: Lawrence Willard Brosseau, you stand charged that you on or about the 11th day of March, A.D. 1967, at or near Tulliby Lake, in the Judicial District of Edmonton, did unlawfully kill and slay Robert George Sidener, thereby committing non-capital murder, contrary to the provisions of the Criminal Code. How say you to this charge, do you plead guilty or not guilty?

THE ACCUSED: Guilty.

THE CLERK: Harken to your plea as the Court doth record it, Lawrence Willard Brosseau, guilty.

Mr. Stainton then outlined the circumstances of the killing to the trial Judge at some length. The trial Judge then asked Mr. Mousseau if he wished to say anything and Mr. Mousseau addressed the Court as follows:

MR. MOUSSEAU: Only to indicate to the Court that the accused is describable only in terms of an absolute primitive. I don't pretend to have any particular understanding of his mind or of his intent. I can point out to evidence given in the preliminary both by the wife of the deceased as well as by Mr. Wendt, that there was absolutely no antagonism or ill feeling between the accused and Mr. Sidener. I can point out also the accused's evidence to the effect that he drank what for him was a substantial amount of beer. I can point out also the fact that whilst he did give one profession or did make certain admissions to Mr. Nolin, as my friend has pointed out, he gave a totally different reason for the commission of the act when speaking to the police.

These factors, of course, in view of the statutory penalty, do not involve this Court presently. However, this Court, to the extent that it is a Court of law, is involved with the matter of justice generally, and whilst I am not absolutely certain as to the Court's powers with respect to cases of like nature, I would ask of the Court that it recommend that this matter be gone into by the Parole Board and that it may, upon examination, prove to be one of the special cases that the enactment setting out the Parole Board envisages. That is my submission, my Lord.

The transcript continues as follows:

THE COURT: Thank you, Mr. Mousseau.

Stand up, Mr. Brosseau. Section 206(2) of the Criminal Code provides that a person guilty of non-capital murder shall be sentenced to imprisonment for life. I have no discretion in the matter. I sentence you to imprisonment for life. At the request of Mr. Mousseau a report will be made to the Parole Board along the line suggested by him.

MR. MOUSSEAU: Thank you, my Lord.

THE COURT: That's all, Mr. Stainton?

MR. STAINTON: Yes, my Lord.

THE COURT: Thank you.

(Court adjourned at 3:01 p.m.)

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It will be observed that no inquiry was made by the learned trial Judge either of the appellant or of his counsel as to whether the appellant understood the charge and the consequences of his plea of guilty.

On March 18, 1968, the appellant gave a written notice of appeal to the Appellate Division of the Supreme Court of Alberta stating that he wished to apply "for leave as required" and to appeal his conviction and sentence on the following grounds:

> (*a*) I wish to appeal my conviction and sentence on the grounds that I only have a grade 2 education and my lawyer told me that if I didn't plead guilty to the charge that they would sentence me to hang. When he told me this I was scared and pleaded guilty.

On August 26, 1968, the appellant swore an affidavit stating that he is a Cree Indian, that he reached only grade 2 in school and left school when he was fifteen years old, that he is now twenty-two years old, that he was drunk at the time of the offence and did not know what he did, that he was drunk when he gave a statement to the police, that he understood that for capital murder he would be hanged but that non-capital murder was not so serious, that his lawyer told him in February 1968 that he might get five or seven or eight years but did not say on what charge he could get this sentence, that, in March 1968, his lawyer told him that if he was found guilty they would sentence him to be hanged, that he pleaded not guilty in Court and the case was put over till two o'clock and that his lawyer told him that if he was found guilty he could be sentenced to be hanged but that if he pleaded guilty, he would get life imprisonment; that he pleaded guilty because he was scared of being hanged, that when he pleaded guilty he did not understand that the Judge had no choice but to impose a life sentence. He concluded by saying that he did not believe he had killed Robert George Sidener as he always got along well with him when he worked for him over six years and that he had no grudge against him.

Mr. Mousseau, at the specific request of counsel then acting for the appellant and with the written authorization of the appellant, made an affidavit which appears to have been sworn on September 12, 1968. (This would seem to be

in error as the judgment of the Appellate Division refers to the affidavit of Mr. Mousseau). In this affidavit, Mr. Mousseau states that he arranged the delays in the case being brought to trial in the expectation of a change in the legislation regarding capital crimes, "that the amendments made the Criminal Code, and relevant to the proceedings at bar, were not of a nature as would assist the Appellant", that subsequent to the enacting of the amendment aforesaid a tentative arrangement was entered into between counsel for the Crown and himself, as a result of which it was suggested that the charge should be reduced to non-capital murder.

The amendments referred to were doubtless those contained in *Statutes of Canada 1967-68*, c. 15, and by virtue of s. 3 of that Act, as the date of the killing of Sidener was March 11, 1967, and the indictment was dated September 5, 1967, prior to the date that the amendments were brought into force, December 29, 1967, it is clear that had the appellant been convicted on the indictment for capital murder the imposition of a sentence of death would have been mandatory.

The affidavit continues as follows:

6. THAT subsequent to the above, I met with my client on a number of occasions (the last of those meetings took place on either of the 9th or the 10th days of March, A.D. 1968); we together reviewed the facts of the matter; I discussed with him the nature of the charge with which he was faced, as well as the consequences attendant upon a finding of guilty thereon; I also indicated that, on the evidence, the charge might, at trial, be reduced to one of either 'non-capital murder' or 'manslaughter'—I explained to him the nature of these charges as well as the consequences attendant thereon; I recommended that, in my opinion, his interests would best be served by his pleading guilty to a reduced charge of 'non-capital murder'—I indicated to him that the sentence in a case of this nature was dictated by the Statute; that, notwithstanding, the Parole Regulations permitted review and release upon his having served seven years of his sentence or, in the event that special circumstances be shown to exist, at the Board's discretion—I was able, in this last regard, to assure him of the co-operation and assistance of officials of the Native Friendship Centre as well as to indicate to him that I would move that the Court, in its 'Report', recommend review in the light of the very peculiar nature of his person and circumstances; MR. BROSSEAU indicated that he would be guided by my recommendation.

7. On March 11th, A.D. 1968, MR. BROSSEAU appeared before O'BYRNE, J., and was re-arraigned on a charge of non-capital murder he recorded a plea of "not guilty"; in view of the circumstances surrounding the reduction of the charge as well as of my uncertainty as to whether he was fully cognizant of that which he had done—I requested adjournment of the matter to the afternoon.

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8. I then called upon P. CALIHOO, an interpreter, and together with MR. CALIHOO, attended upon MR. BROSSEAU at the R.C.M. Police cells; at that time, through the intermediary of MR. CALIHOO I clearly indicated to MR. BROSSEAU that he was wholly at liberty to proceed to trial and that, should he so desire, I would request a further adjournment of the proceedings; I again reviewed the circumstances of the occurrence; explained the consequences attendant upon a finding of "guilty" on each of the three charges aforementioned; I reiterated my advice to the effect that his best interests would be served by his pleading "guilty" to the reduced charge as it presently stood; I requested that he indicate his desire and assured him that I would do as he requested; at 2:00 o'clock that afternoon he again appeared before The Honourable, Mr. Justice M. B. O'BYRNE, the charge was re-read to him and translated into the Cree language by MR. CALIHOO—he recorded a plea of "guilty" thereto.

9. THAT MR. BROSSEAU'S circumstances are such that, in my opinion, notwithstanding the above, it may well be that he was throughout incapable of understanding or appreciating the nature and consequences of the plea instantly recorded; that his background is such that he cannot be regarded other than as a true 'primitive'.

There was also before the Appellate Division an affidavit exhibiting a letter from an M.D., a psychiatric consultant, concluding with the sentence:

> Certainly he (the appellant) would not rate higher than a Borderline I.Q.—that is, just above the Defective level.

and a psychological report of which the last sentence reads:

> It can be concluded that he is functioning within the borderline group.

I have recited the evidence which was before the Appellate Division at perhaps undue length. It was within the powers of that Court, if it saw fit to do so, to make an order permitting the appellant to withdraw his plea of guilty and directing a new trial but their decision not to do so was one involving questions of fact or mixed fact and law, not a question of law in the strict sense, unless it can be said that the question on which leave to appeal to this Court was granted should be answered in the affirmative.

The question before us is whether the learned trial Judge erred in law in accepting the plea of guilty without making inquiry as to whether the appellant understood the nature of the charge and the effect of such plea.

No doubt when a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, the judge or magistrate will make inquiry to ascertain whether he does so and the extent of the inquiry will vary with the seriousness of the charge to which the

accused is pleading. An illustration of the care exercised in a case where the accused pleaded guilty to murder at a time when the imposition of the death sentence was obligatory, is furnished by the case of *Rex v. Bliss*[1].

The extent of the duty of inquiry resting on a judge or magistrate before whom a plea of guilty is offered is discussed in *R. v. Johnson and Creanza*[2] and in *Rex v. Hand (No. 1)*[3], both decisions of the Court of Appeal for British Columbia. In the second of these, Bird J.A., as he then was, speaking for the Court said at page 389:

> This Court in two recent cases has had occasion to express the opinion that a plea of guilty ought not to be accepted unless the Judge or Magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to provide assurance that the accused understands the offence to which his plea relates: *Cf. R. v. Theriault* (unreported) and *R. v. Johnson & Creanza,* (1945) 4 D.L.R. 75, 85 Can. C.C. 56. This course is more particularly essential where the offence, as here, involves a maximum sentence of life imprisonment and whipping.

In *Rex v. Milina*[4], the Court of Appeal for British Columbia consisting of Sloan C.J.B.C. and O'Halloran, Robertson, Sidney Smith and Bird JJ.A. again considered the cases above referred to. Sidney Smith J.A., with whom Sloan C.J.B.C. and Robertson J.A. agreed, said at page 592, after referring to the language used in the *Hand* case:

> But however that may be, it is desirable to state now quite plainly that in my opinion when an accused person pleads guilty it is not the law that the magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty.
>
> What the quoted language does mean is that upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged. And the accused must plead guilty in "plain, unambiguous and unmistakable terms" (*Rex v. Golatham* (1915) 84 L.J.K.B. 758, 112 L.T. 1048, per Lord Reading, C.J.). The cases will be rare indeed in which a magistrate will feel himself obliged to make any special inquiry when the accused, as here, is represented by counsel. The circumstances which are contemplated by the expressions used in the above cases are those in which the accused may be a foreigner, or illiterate, or the charge is one of unusual complexity or of an unusually grave nature. Instances of these are to be

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[1] (1936), 67 C.C.C. 1, [1937] 1 D.L.R. 1.

[2] (1945), 85 C.C.C. 56, [1945] 3 W.W.R. 201, 62 B.C.R. 199, [1945] 4 D.L.R. 75.

[3] (1946), 85 C.C.C. 388, [1946] 1 W.W.R. 421, 1 C.R. 181, 62 B.C.R. 359, [1946] 3 D.L.R. 128.

[4] [1946] 2 W.W.R. 584, 2 C.R. 179, 86 C.C.C. 374.

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found in *Crankshaw's Criminal Code*, 6th ed., pp. 1062-3. The practice in England is to the same effect and is thus stated in *Kenny's Outlines of Criminal Law*, 15th ed., at p. 558:

> If he confesses, i.e., 'pleads guilty', he may be at once sentenced. But in certain cases, lest he should be confessing under some misapprehension as to the law or even as to the facts of his case, the Court often advises him to withdraw his plea of guilty, and so let the matter be fully investigated.

This passage, in my view, furnishes a useful guide to the practice which should be followed when a plea of guilty is offered and there is reason to doubt that the accused understands what he is doing. Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused.

I have reached the conclusion that the question on which leave to appeal was granted should be answered in the negative.

I would dismiss the appeal.

SPENCE J. (*dissenting*):—I have read the reasons of the Chief Justice as set out herein. In those reasons, the facts are set out with considerable clarity and detail and there is no need to repeat them in these reasons. With respect, I am of the opinion that it is the duty in law of the trial tribunal, whether it be magistrate or judge, to satisfy himself that the appellant understands the nature of the charge and the effect of the plea before he is entitled to accept a plea of guilty. I am in accord with the analysis made by Sidney Smith J.A. in *Regina v. Milina*[5], when he said, referring to the language used in *Rex v. Hand* (No. 1)[6]:

> What the quoted passage does mean is that upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged.

[5] [1946] 2 W.W.R. 584, 2 C.R. 179, 86 C.C.C. 374.

[6] (1946), 85 C.C.C. 388, [1946] 1 W.W.R. 421, 1 C.R. 181, 62 B.C.R. 359, [1946] 3 D.L.R. 128.

I realize, as Avory J. said, in *Vent v. The Queen*[7]:

> It is only in a case where there is some reason to doubt whether an accused person appreciates the nature of his confession or the consequences resulting from it that a jury is empanelled to try that issue.

I also agree with Smith J.A. when he pointed out in *Rex v. Milina, supra,* that the cases will be rare indeed in which a magistrate will feel himself obliged to make any special inquiry when the accused, as here, is represented by counsel; but Smith J.A. pointed out that one of those cases may well be where "the accused may be a foreigner or illiterate or the charge is of unusual complexity or of an unusually grave nature". Certainly even the reduced charge of non-capital murder was a charge of an unusually grave nature. Moreover, the accused man, a Cree Indian, was certainly an illiterate, an illiterate who was described by counsel to the learned trial judge as a "primitive".

I am of the opinion that the present case is not one in which the learned trial judge exercised his discretion. Perhaps, to put it more accurately, if it is such a case then it is one in which the learned trial judge failed to exercise his discretion in accordance with judicial principles. It would appear that the judge, in exercising the discretion to accept the plea of guilty, relied only on the fact that the accused was represented, and apparently very adequately represented, by counsel. I am of the respectful opinion that he could not, under the circumstances, so rely on counsel for in doing so he could not satisfy *himself* that the accused knew either the nature of the plea or the consequences thereof. Therefore, in failing to so satisfy himself, the learned trial judge was wrong in law.

I would grant the appeal and direct a new trial.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitors for the appellant: McClung & Baker, Edmonton.

Solicitor for the respondent: The Attorney General of Alberta, Edmonton.

[7] (1935), 25 Cr. App. R. 55 at 58.