1954

*Dec. 8, 9, 20
*Dec. 22

GEORGES HEBERT .....APPELLANT

AND

HER MAJESTY THE QUEEN .....RESPONDENT

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

Criminal law—Murder—Charge to jury—Plea of insanity—Possible verdicts—Alleged illegal cross-examination of accused—Whether miscarriage of justice—Criminal Code, ss. 1014(2), 1025.

The appellant was convicted of murder. His appeal was unanimously dismissed by the Court of Appeal. He now appeals to this Court, by leave granted under s. 1025 of the *Criminal Code*, on grounds that the trial judge erred (*a*) in his instructions as to the possible verdicts and in omitting to mention the possibility of a disagreement, and (*b*) in his instructions as to the plea of insanity and in his statement of the evidence in support thereof. Subsequently, of its own motion, the Court ordered a new hearing on a point dealing with an alleged improper cross-examination of the accused as to statements made to the police but not proved to have been voluntarily made.

Held (Locke, Cartwright and Fauteux JJ. dissenting), that the appeal should be dismissed.

Per Kerwin C.J., Taschereau, Rand, Estey and Abbott JJ.: There is no obligation upon a trial judge to explain to the jury that they may disagree.

The trial judge had adequately presented the issue of insanity and the evidence in support thereof.

Per Kerwin C.J., Taschereau and Abbott JJ.: Assuming that the cross-examination was improper, there was no duty on the trial judge in the circumstances to point out to the jury that this was not evidence. There had been no substantial wrong or miscarriage of justice, even if the trial judge should have gone into the matter.

Per Rand J.: Assuming that the statements were inadmissible, there had been no miscarriage of justice since the remaining evidence was so overwhelming and conclusive.

Per Kellock J.: Such a statement could not be used even in cross-examination until its voluntary nature had been established. However, no substantial wrong or miscarriage of justice had occurred since the cross-examination simply brought out in more detail what was involved in the evidence not objected to.

Per Estey J.: Assuming that the cross-examination was improper, there had been no miscarriage of justice since any of the suggestions made in the course of the cross-examination were either contained in or directly implied in statements already in evidence.

Per Locke and Fauteux JJ. (dissenting): The right to disagree was not excluded in the trial judge's charge.

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke, Cartwright, Fauteux and Abbott JJ.

The trial judge had adequately presented the issue of insanity, but not the medical theory of the defence.

Per Locke, Cartwright and Fauteux JJ. (dissenting): The trial judge should not have permitted the statements to be used in cross-examination without first having decided as to their free and voluntary character. The avowed purpose of the cross-examination was to destroy the factual basis, i.e. the lack of memory of the accused, upon which the medical expert for the defence mainly rested his opinion as to the insanity of the accused. It is impossible to affirm that had this illegal cross-examination not taken place, the jury would necessarily have convicted the appellant.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the conviction of the appellant on a charge of murder.

L. Corriveau for the appellant.

N. Dorion Q.C., P. Miquelon Q.C. and *P. Flynn* for the respondent.

The judgment of Kerwin C.J., Taschereau and Abbott JJ. was delivered by:

The CHIEF JUSTICE:—The appellant was convicted of having murdered one of his children and his appeal to the Court of Queen's Bench (Appeal Side) for the Province of Quebec (1) was dismissed unanimously. By leave granted by Mr. Justice Estey under s. 1025 of the *Criminal Code* he was given permission to appeal to this Court on the following points of law:—

(*a*) Did the learned trial judge err in his instructions relative to the possible verdicts the jury might render and, in particular, in omitting to mention the possibility of their disagreeing?

(*b*) Did the learned trial judge err in his instructions relative to the plea of insanity and his statement of the evidence in support thereof?

There appears to be no doubt that he killed not only the one child referred to, but his other three children. The defence was insanity and the accused gave evidence on his own behalf and also called Dr. Moffatt.

(1) Q.R. [1954] Q.B. 594.

1954

HEBERT
v.
THE QUEEN

Kerwin C.J.

As to the first point,—The learned trial judge in a careful charge explained that any verdict had to be unanimous and also that there were four possible verdicts:—

(1) Coupable;
(2) Coupable d'homicide involontaire;
(3) Non coupable;
(4) Non coupable pour cause de folie.

Reliance was placed upon what was said in this Court in *Latour* v. *The King* (1). In that case a new trial was directed for certain reasons and then the judgment continued with the following obiter dictum at p. 30:

> The other matter in which comments may be added, although the point was not raised by the appellant, is related to the following direction given to the jury:
>
> *This is an important case and you must agree upon a verdict. This means that you must be unanimous.*
>
> This is all that was said on the subject. If one of the jurors could have reasonably understood from this direction—and it may be open to such construction—that there was an obligation to agree upon a verdict, the direction would be bad in law. For it is not only the right but the duty of a juror to disagree if, after full and sincere consideration of the facts of the case, in the light of the directions received on the law, he is unable conscientiously to accept, after honest discussion with his colleagues, the views of the latter. To render a verdict, the jurors must be unanimous but this does not mean that they are obliged to agree, but that only a unanimity of views shall constitute a verdict bringing the case to an end. The obligation is not to agree but to co-operate honestly in the study of the facts of a case for its proper determination according to law.

The terse manner in which the trial judge in that case had referred to the matter is to be noted. In the present instance the trial judge made it quite clear to the jury what were their duties. He stated, more than once, that they must be unanimous and again, more than once, explained the various conclusions at which they could unanimously arrive. These conclusions are the verdicts enumerated above. To give effect to the appellant's argument would mean that a trial judge should invite a jury to disagree. This is a far different matter from an intimation, veiled or otherwise, that, notwithstanding the views of one or more jurors, it was necessary that one of certain defined conclusions be arrived at, or verdicts returned. After going over the trial judge's charge in its entirety, I am satisfied that there is no basis for the argument on the first point.

(1) [1951] S.C.R. 19.

The second ground of appeal is divisible into two parts, the first of which is: Did the trial judge err in his instructions relative to the plea of insanity? Our attention was called to what was said in the charge at p. 617 of the record,—

> Et, ici encore, la defense doit apporter une preuve qui vous satisfasse raisonnablement par sa prépondérance, que l'accusé était en somme dans cet état d'esprit exigé par l'article 19.

and objection is raised to the words "par sa prépondérance". As to this, reliance was placed upon the following statement of Anglin J. in *Clark* v. *The King* (1):

> No doubt, however, "proved" in subsecticon 3 of section 19 of our Code must mean "proved to the satisfaction of the jury", which, in turn, means to its reasonable satisfaction.

and to this extract from the reasons of Mignault J. at p. 632:

> I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. Further than that I would not go.

However, at p. 626, Anglin J. stated that he found nothing "to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong." And earlier on the same page of his reasons (632), Mignault J. had stated that proof in ordinary matters did not suppose that the evidence removed all doubt; "it is the result", he continued, "of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter or expert opinion". Duff J., with the concurrence of Brodeur J., referred to the burden of proof resting upon a party to establish a given allegation of fact in civil proceedings as being merely to produce such a preponderance of evidence as to shew that the conclusion he

(1) (1921) 61 Can. S.C.R. 608 at 625.

1954

HEBERT
v.
THE QUEEN

Kerwin C.J.

seeks to establish is substantially the most probable of the possible views of the facts, (referring to *Cooper* v. *Slade* (1)). We were also referred to the commencement of the reasons for judgment in *Smythe* v. *The King* (2), delivered by Sir Lyman Duff on behalf of the Court:

> It was settled by the decision of this Court in *Clark* v. *The King* (1921) 61 S.C.R. 608, that where a plea of insanity is advanced on a trial for murder the law does not require the accused, in order to succeed upon that issue, to satisfy the jury that insanity has been proved beyond all reasonable doubt; it is sufficient in point of law if insanity is proved to the reasonable satisfaction of the jury.

However, it is to be noted that Sir Lyman later referred to Best on Evidence as to a mere preponderance of probability in civil proceedings being sufficient and then continued:

> It is the rule that prevails generally in civil cases, as this Court decided in the case above mentioned (the Clark case).

I am satisfied that the objection taken to the judge's charge in this case on the first part of the second ground is without foundation.

The next part of the second ground was whether the trial judge erred in his charge to the jury in his statement of the evidence in support of the plea of insanity. Upon this branch of his argument counsel for the accused quite properly pointed out that what was sought to be shown was that the appellant was insane at the time of the killing of the children. Two doctors gave evidence on behalf of the Crown and counsel for the accused admitted that one of these, Dr. Larue, did distinctly state that, in his opinion, the accused at that time was not insane. It is contended, however, that the other doctor called by the Crown, Dr. Martin, related his opinion not to that event but to the time, or times, when he examined the accused some days later. This might appear to be so if one looks only at that part of the latter's evidence referred to by counsel, but a reading of what immediately precedes, and other parts of Dr. Martin's evidence, makes it quite clear that he had not so confined his opinion and, therefore, the trial judge was not in error when, in his resume of the evidence of the two Crown doctors, he stated that they (meaning both Crown

(1) 6 H.L. 646. (2) [1941] S.C.R. 17.

doctors) had testified that Hébert knew what he was doing at the moment of the crime and was able to distinguish right from wrong.

The final part of the second ground of appeal is that the trial judge incorrectly stated the evidence of Dr. Moffatt, called on behalf of the accused. For the trial judge to have charged the jury in the manner suggested by counsel for the appellant would have entailed his repeating a great part not only of the examination in chief, but also of the cross-examination of the doctor, since it was apparently difficult to determine exactly what Dr. Moffatt's conclusions were. Undoubtedly they were based upon the presumption that the story of the accused as told in the witness box (and which Dr. Moffatt said was the same as the accused had previously told him) was a true version of what had actually occurred. The questions put by jurors to the doctor showed that they were alive to the nature of the problem they were to decide and, of course, as the trial judge told them, they were not bound to accept the evidence of any witness, either in whole or in part. The evidence included that of the accused and there was put in a letter, or note, by him, although it was uncertain when it had been written. It was made clear to the jury that they were the judges of the facts and that they were not bound in any way by the judge's recollection of the testimony. After reading Dr. Moffatt's evidence and the judge's charge, I conclude that the appellant has failed to substantiate this final branch of the second ground of appeal.

What has been said was sufficient to dispose of the only questions raised before us on the original argument when judgment was reserved. During consideration of the matter a point arose and later we heard whatever Counsel had to say with respect to it, which is whether Crown Counsel improperly cross-examined the appellant as to the statements allegedly made by him to Captain Matte, or other police officers, and whether the trial judge's charge was proper in relation thereto. In order to avoid any difficulty Mr. Justice Estey granted leave to appeal on this point.

The particular statement emphasized is one allegedly made by the accused to Captain Matte and put down in writing. This was not referred to in the evidence given on the voir dire, although oral statements made by the accused

1954

HEBERT
v.
THE QUEEN

Kerwin C.J.

to Captain Matte and Officers Pettigrew and Fontaine were put in evidence. In the presence of the jury the accused was cross-examined as to what is supposed to be in the writing made by or at the instance of Captain Matte. For the purposes of this appeal I assume that this cross-examination was not proper.

It is said that in three respects the alleged written statement goes beyond what was said orally by the accused to the other two officers: (1) There was no mention of the drinking of beer by the accused; (2) there was no statement that the accused started his operations in the first room of his house; (3) there was no statement that he killed René first. It is then said that the trial judge should have explicitly pointed out to the jury that nothing suggested by Crown Counsel in that part of his cross-examination was evidence, and that they should bear in mind that the three matters mentioned were not included in the oral statements made by the accused. In my opinion, having told the jury that they were to be bound by the evidence given at the trial, and having placed the issues in relation to that evidence before them, there was no obligation on the trial judge under all the circumstances to refer to the matter in the manner suggested.

As to the cross-examination itself, I am of opinion that there was no substantial wrong or miscarriage of justice and that even if the trial judge, contrary to my opinion, should have gone into the other matter as suggested, that defect, if any, also would come under the saving provisions of s-s. (2) of s. 1014 of the *Criminal Code*.

The appeal should be dismissed.

RAND J.:—The harrowing facts of this case cannot be permitted to becloud the issue. What is urged is that the defence was not adequately placed before the jury. That defence was this. The circumstances of the life of the accused, aggravated latterly by those of his marriage, had gradually generated emotional pressures of such despair and frustration that they finally overwhelmed the will in an orgy of killing and contemplated suicide. In the throes of the paroxysm a temporary blackout of the mind made it impossible for the accused to appreciate the nature of what he was doing or that it was morally or legally wrong. No

attempt was made to analyse or portray his mental state during this physical convulsion, that is, the nature of the intellectual, volitional or sense activity which directed the actions, or whether there was no such direction and the actions were, in some manner, involuntary.

The fact that men sometimes yield to such tensions is as old as humanity and nothing is added by dignifying its manifestation as a theory or describing it as a "réaction dépressive accompagnée par un état de confusion, ou de panique". But treating it as it was advanced and describing it as specifically as its nebulous and elusive nature could be gathered from the evidence of the expert called by the defence, it was fairly and fully transmitted to the jury by the trial judge From the record of the proceedings, it is obvious that they were keenly alive to what was being suggested. With this on the one side and the mass of factual evidence against it, largely given by the accused himself, on the other, carefully placed in juxtaposition in the course of the charge, they had before them every significant factor to the determination they were called upon to make.

On the renewed argument the further ground was stressed that in cross-examination of the accused he was questioned on statements he had made to a police officer on the day following his arrest which were apparently reduced to writing. If they were inadmissible because of a presumed influence of favour or fear arising from the circumstances in which they were made, then I agree that neither s. 10 nor 11 of The Canada Evidence Act permits cross-examination on them. For the purposes of evidence they are tainted with untrustworthiness and the reasons that exclude them from direct introduction prevent their being slipped in the back way by cross-examination: *Rex* v. *Treacy* (1): *Rex* v. *Scory* (2). I am by no means satisfied that they were not admissible, but it is unnecessary to decide that and I will assume that they were, and that the trial judge should have directed the jury to dismiss from their minds any implication from the questions asked or the answers given.

A confession had been made before there was any suspicion even that a crime had been committed. The accused was obviously tortured in mind and conscience and

(1) (1944) 60 T.L.R. 544.

(2) [1945] 2 D.L.R. 248.

1954

HEBERT
v.
THE QUEEN

Rand J.

he sought relief by not only volunteering all of the essential facts of the tragedy but by going to his home and there giving a graphic confirmation of them while the officers seemingly were still somewhat incredulous. The statements could have done little, if anythting, more than to supply a few minor details of the circumstances or the order or course of the events. Up to this time there had been no suggestion by the accused that he could not remember any detail and no question on cross-examination of any of the officers went to such a point. Only when the defence was being adduced was the so-called blackout brought up. But there was before the jury a writing found on the table in the house and admittedly made by the accused which, whether written immediately before or after the crime, was conclusive against the existence of this phenomenon.

The only other ground urged calling for an observation is based on the reference in the judgment of this Court in *Rex* v. *Latour* (1) to the unanimity of a verdict. But the language used there must be read in relation to the facts of that case. There was obviously no intention of suggesting that a verdict was obligatory or that a trial judge must bring to the minds of the jury the fact that they could disagree.

Notwithstanding what I assume to have been improper cross-examination, the remaining evidence before the jury was so overwhelming and conclusive that, acting judicially, they must have brought in the verdict they did.

I would, therefore, dismiss the appeal.

KELLOCK J.:—I do not find it necessary to refer to any of the points originally raised on behalf of the appellant. After reserving judgment however, the court, of its own motion, raised a question not argued by counsel for the appellant, and leave being given to argue the point, the argument has now been heard.

According to evidence not in any way objected to, it appears that the killing occurred some time during the night of Tuesday, April 21, 1953. The appellant says that following the killing, he remained at home until Thursday, the 23rd, when, having invented a story that his children had met death in a railway accident, he went to the morgue to

(1) [1951] S.C.R. 19 at 30.

make burial arrangements. After the appellant had left, the police were notified of the visit and the witnesses Pettigrew and Fontaine were despatched from police headquarters to investigate.

From the description they had received of the appellant they were able to identify him on the street and he agreed to go with them to the police station. During the course of this trip, he told them voluntarily that he had had trouble with his wife, that he was tired of life, that he had killed his four children, that if they did not believe him they could come to his home and see for themselves and that he knew he would be hung but that he had done it just the same. He added that he had intended to take the lives of three other people. The appellant repeated the substance of these statements to Police Captain Matte at the station and then accompanied the three police officers to his home.

On arrival, he opened the door for them and showed them throughout, conducting Captain Matte to the bathroom where he produced an axe saying to Captain Matte "c'est avec ca".

In the kitchen Matte found on the table a note which the appellant admitted he had written. This speaks of the difficulty he had with his wife, that she had desired separation and custody of the children, but that he had promised she would never get them. It includes the statement: "moi sest féni je vas êtres pandu mais je vas maurire avec mais anfant". Whether the appellant wrote the note before or after the deaths of the children is not established.

The three police officers were duly called by the Crown and deposed as above. The appellant gave evidence on his own behalf, testifying that he did not remember the killing having fallen asleep and wakened up after the event, when he attempted suicide. There was some evidence of bleeding at the neck when the police first met him. During cross-examination, Crown counsel proceeded to examine the appellant with relation to a statement made to Captain Matte on the morning of April 24 after he had been arrested. Although objected to, the cross-examination was allowed by the learned trial judge in the view that it was proper with relation to credibility. In my view, this ruling

1954

HEBERT v. THE QUEEN

Kellock J.

was erroneous, the law being well settled that a statement of this character cannot be used even in cross-examination until its voluntary nature has been established.

The question is, therefore, as to whether or not a new trial ought to be directed or whether, in the circumstances, it can properly be said that notwithstanding this error and the failure of the learned judge to refer to the matter at all in his charge, "no substantial wrong or miscarriage of justice has actually occurred"; s. 1014(2) of the *Criminal Code*. In my opinion, in the circumstances of this case, the subsection ought to be applied.

It is to be observed that at no time during April 23 did the appellant suggest that he had suffered from any failure of memory. How long afterwards this suggestion was put forward does not appear. On the contrary, the appellant had no difficulty whatsoever in telling what had occurred as above. He himself produced the axe and, unlike his evidence at the trial when he said that he had concluded from the presence of the axe beside him he must have committed the deed, he told the police that it was with it he had done the killing.

Again, whether the note of the appellant was written by him before or after the killing is immaterial. If before, it would evidence a clear intention to commit the deed; if after, it indicates clearly that the deed had been knowingly done. In these circumstances, the jury, in my opinion, must necessarily have come to the conclusion that the defence of loss of memory was an afterthought. I am fortified in this view by the circumstance that this must also have been the view of the professional advisers of the appellant as they did not raise the point but argued it only after it had been raised *proprio motu* by the court. The cross-examination simply brought out in more detail what was involved in the evidence not objected to. While, as I have said, the course followed by Crown counsel was wrong, I feel obliged in the circumstances to say that the subsection should be applied and that the appeal should be dismissed.

ESTEY J.:—The appellant submits that the learned trial judge erred, when instructing the jury as to the possible verdicts they might render, in that he failed to mention the possibility of their disagreeing. This submission is founded

upon a dictum in *Latour* v. *The King* (1), to the effect that a judge ought not to tell the jury they must agree upon a verdict in a manner that precludes disagreement. The observations in that case were prompted by the imperative and unqualified language used in directing the jury. It does not suggest that a trial judge must point out to the jury that they may disagree. A juror is bound by his oath to decide according to the evidence and if, after a careful and complete consideration of all the facts and circumstances, his conclusion is different from that of the other jurors it is his duty to disagree. The learned trial judge in the present case discussed the issues, the relevant law and facts and pointed out that there were four possible verdicts—murder, manslaughter, not guilty, or not guilty because of insanity. He then discussed the difference between murder and manslaughter and, if they concluded the appellant had committed murder or manslaughter, they might find him not guilty because of insanity. Then, after referring to certain matters relative to the verdict not material to this discussion, the learned trial judge stated:

> Vous devrez maintenant, messieurs, vous rappeler que le verdict que vous rapporterez, quel qu'il soit, doit être un verdict unanime, c'est-à-dire que tous les douze, vous devez être de la même opinion et rapporter le même verdict.

The learned trial judge, throughout this portion of his charge, was discussing the possible verdicts that the jury might render and impressed upon them that in order to arrive at a verdict they must be unanimous. A verdict, as stated in the Oxford Dictionary, is "the decision of a jury in a civil or criminal cause upon an issue which has been submitted to their judgment." A disagreement is not a verdict. It exists only because of the inability of the jury to arrive at a decision and, therefore, a verdict. In this context the jury would understand that he was discussing a verdict as a decision and not in any way referring to the possibility of a disagreement or denying their right to disagree. There is no obligation upon a judge to explain to a jury they may disagree. In fact, a trial judge does not accept a disagreement until he is satisfied that there is no reasonable possibility of the jury arriving at a unanimous decision.

(1) [1951] S.C.R. 19 at 30.

1954

HEBERT
v.
THE QUEEN

Estey J.

The second submission is in relation to the learned trial judge's instructions relative to the plea of insanity and his statements of the evidence in support thereof. In the course of his charge the learned trial judge explained the law relative to insanity as a defence in a manner that no exception has been taken thereto. The burden of proving this plea rests upon the defence, but is not, as he explained, a burden such as the Crown must discharge before a jury would be justified in finding an accused guilty of the offence as charged, but that it was sufficient if, upon the evidence, they were reasonably satisfied that the appellant was insane, they would find him not guilty because of insanity. Counsel for the appellant objected to the word "prépondérance" as used by the learned trial judge on several occasions and more particularly because, as the Crown had called two experts and the defence but one, the jury might, because of the use of this word, be led to give greater weight to the evidence of two rather than one. In addressing juries learned judges have often stated that a jury may be reasonably satisfied if the weight or preponderance of, or if upon a balance of probabilities, the evidence directs them to a certain conclusion or decision. It would appear that the learned trial judge was using the word "prépondérance in this sense and that it would be so understood by the members of the jury, who would not be led to give effect to the number of witnesses rather than the evidence. This conclusion is supported by the learned trial judge's pointing out:

> Vous n'êtes pas tenus de croire ou d'accepter ces témoignages ou leurs opinions, pas plus qu'il s'agissait des autres témoins. Vous pouvez les rejeter en bloc, vous pouvez vous en servir pour juger. Le rôle de l'expert consiste à éclairer, à vous guider, mais leurs dires et leurs opinions ne vous lient pas, et vous devez considérer non seulement leurs témoignages, vous en tenez compte si vous voulez, non seulement leurs témoignages, mais l'ensemble de la preuve, pour vous former une opinion quant à l'état d'esprit de l'accusé. Vous avez votre bon sens, vous avez votre jugement, alors les faits qui ont été rapportés par d'autres témoins dans la preuve, la conduite de l'accusé, son comportement, ses écrits, ses déclarations, son attitude dans la boîte aux témoins, tout cela, messieurs, ça constitue de la preuve et ça doit servir à vous guider pour vous demander si c'est l'accusé qui a fait ce qu'on lui reproche et si c'est lui qui l'a fait, savait-il, pouvait-il savoir à ce moment-là ce qu'il faisait.

Moreover, counsel for the accused contended the learned trial judge had dealt more fully with the evidence of the experts for the Crown than he had with that of the expert

called on behalf of the defence. It is the duty of a trial judge to define the issues and discuss the evidence in relation thereto. He need not, however, review the evidence in detail. In the course of his charge he stated:

> L'expert de la défense a eu des entrevues avec Hébert. Il a étudié les renseignements qu'il a obtenus, relatifs à son passé, sa vie conjugale et, en supposant que ce que Hébert a dit était vrai, il a diagnostiqué chez l'accusé, ce qu'il a appelé "une réaction dépressive accompagnée par un état de confusion ou de panique." Il en conclut qu'au moment où Hébert aurait fait ce qu'on lui reproche, que c'est lui qui l'a fait, il ne pouvait connaître à ce moment-là la différence entre le bien et le mal.

Later the learned trial judge returned to the early life of the accused, his marital difficulties and their possible effect upon his mentality and again impressed upon the jury that it was their duty to give such effect thereto as they, in their judgment, might see fit. The learned trial judge did not, as the jury would no doubt understand, attempt to review in detail the evidence for either the Crown or the defence. In my view it cannot be said that the learned judge has not fully presented the issue of insanity or that he has emphasized the evidence for the Crown more than that for the defence.

The third submission on behalf of the accused is that Crown counsel, in cross-examination of the appellant, referred to a statement, that appellant had made to the police and which had not been proved to have been voluntarily made, in a manner that constituted error in law. The appellant made statements to Lieutenant Pettigrew and Constable Fontaine on his way to the police station and immediately upon his arrival made a further statement to Captain Matte. These were all proved to have been voluntarily made and placed in evidence by the Crown. It appears that later Captain Matte, upon a number of occasions, had him brought to his office where at least one statement made by the appellant was recorded by a stenographer. No effort was made in the course of the Crown's case to place this statement in evidence, nor was it proved to have been voluntarily made. Counsel for the Crown, however, in the course of his cross-examination of the appellant, while not showing to him the statement, did ask questions as to a portion of its contents and in the course thereof suggested that the appellant had consumed liquor on the night of, and prior to, the murder of his children;

1954

HEBERT
v.
THE QUEEN

Estey J.

that he had started at the first room and that René was the first to have died; further, that he had reflected upon his position of having four children without money to buy the necessities of life and his wife's mode of living and decided to murder his children. The appellant replied throughout this portion of his examination that Captain Matte had, upon these occasions, asked him questions, but that he did not remember his replies, as he had not cared what he then said because he had made up his mind to die with his children.

A cross-examination upon such a statement, by the great weight of authority in our provincial courts, as well as in the court of criminal appeal in England, has been condemned. However, it is unnecessary to determine this point here, as, upon the assumption that this was an improper examination, it would appear that, having regard to the facts and the circumstances of this case, there has been no miscarriage of justice within the meaning of s. 1014(2) of the *Criminal Code*.

Tuesday night, when the appellant and his four infant children were the only persons in his house, the latter were all put to death. Thereafter appellant remained in the house with the doors locked and the curtains drawn until Thursday afternoon, when he went to Marceau's undertaking parlour, where the manager, Pouliot, was the first person to whom he had spoken since the death of the children.

Some time before leaving for Marceau's the appellant wrote, in his own handwriting, a statement which reads:

Ma femme est partie et je lui ai ôté mes enfants et j'ai promis qu'elle aurait jamais les enfants à elle, ça dépend de ma belle-mère et ma belle-sœur qui garde ma femme, moi j'aime mieux mourir tout de suite avec mes enfants que rester sur la terre et toujours pâtir. J'ai eu un téléphone qu'elle voulait une séparation et garder les enfants, mais c'est fini, j'aime mieux être pendu, moi je vais mourir avec mes enfants; ma femme est partie dépenser l'argent des enfants, elle est venue chercher le chèque, nous autres nous avons pas d'argent, elle va se rappeler leur avoir ôté le manger dans la bouche des enfants; tout ça dépend de ma belle-mère et me belle-sœur de garder ma femme.

The first portion of this statement, as filed in court, would seem to read as follows:

Ma femme est partie et veut m'ôter mes enfants et j'ai prômis qu'elle n'aurait jamais les enfants.

It was so read to Dr. Moffatt in the course of his cross-examination.

At Marceau's undertaking parlour appellant explained to Pouliot that the four children had been killed in a railway accident and that he desired to make arrangements for their funeral. Pouliot immediately communicated with the police and it was shortly thereafter that the appellant was asked by Lieutenant Pettigrew and Constable Fontaine to accompany them to Captain Matte's office. As they proceeded in the police automobile the accused made a number of voluntary statements which were placed in evidence. As to these statements Lieutenant Pettigrew stated, in part:

> C'est tout ce qu'il a dit, qu'il était tanné de la vie que sa femme faisait et que c'était pour cette raison qu'il avait tué ses quatre enfants.
> .....
> Il a dit qu'il avait tué ses enfants, qu'il savait qu'il était pour être pendu et qu'il le faisait pareil. A part ça....
> .....
> Alors, il aurait dit: "Vous m'arrêtez en temps parce que j'en avais trois autres à tuer."

Constable Fontaine stated:

> Il a dit que c'était parce que ça allait pas bien avec sa femme et qu'il aimait ses enfants.

They proceeded to Captain Matte's office and there the appellant repeated much of what he had said in the automobile and that if they did not believe him he could show to them the four bodies. Captain Matte, with others and the appellant, proceeded to the latter's home. There appellant unlocked the door, showed the four infant bodies to the police, then went into the bathroom, where he picked up an axe, handed it to the police and said: "C'est avec ca." It was during this visit that the above statement, written by the accused, was found upon the kitchen table, as to which Captain Matte deposed:

> Alors que j'accompagnais l'accusé, nous sommes arrivés à la table, il a fait un geste pour s'emparer de ce papier là et d'un crayon qui était avec, le crayon ici.

The appellant, at the trial, stated his wife had been away since Saturday night and, as a consequence, he had been forced to remain at home and, therefore, not to go to his work on Monday and Tuesday; that on the Tuesday night, after preparing the children for bed and while they were playing, he had informed them that he would have to place

1954

HEBERT
v.
THE QUEEN

Estey J.

them in homes. The two older protested. When they had gone to bed he had reflected upon the conduct of his wife, his financial position and his responsibility to his children; that he wept and went to sleep. Later he woke up and found an axe beside him, his children all dead and a scratch about three inches long on his own throat.

The real issue at the trial was whether the appellant had no knowledge of what he was doing as he put his children to death. The two experts called on behalf of the Crown, who had submitted the appellant to a physical examination and had conversed with and questioned him upon four occasions between April 25 and November 6 inclusive, were of the opinion that the appellant did, at the time his children died, know what he was doing and understood the nature and quality of the act which he had committed. These experts were of the opinion that there are only two types of individuals who may be unconscious for a short time and recover, as the appellant did after the death of his children. First, a person who receives a blow upon the head or suffers a shock in an accident may be unconscious for a time and recover. The second is a person who suffers from epilepsy.

The expert called on behalf of the appellant deposed that he had conversed with and questioned the appellant upon three occasions between November 3 and 6, and, having regard to his history and his conduct on the night in question, he stated:

> . . . j'ai porté le diagnostic de réaction dépressive, qui était accompagnée par un état de confusion, un état de panique.

Dr. Moffatt did not describe nor did he explain the symptoms of "réaction dépressive." He was questioned at length with regard to the effect of being depressed. After explaining that "dépression" was not of itself a mental illness, he stated it was a symptom and might lead to a mental illness. He was asked:

> Q. Vous donnez le symptôme le plus caractéristique?
>
> R. Chez d'aucun oui, chez d'autres, non. Peut-être l'anxiété aurait causé un état dépressif quelconque. Quand le dépression est assez avancée, elle cause une psychose, une maladie mentale, le refus de manger, l'incapacité de dormir le soir.

There was no evidence suggesting that he had ever refused to eat, or suffered difficulty with respect to his appetite or his ability to sleep.

That the jury fully appreciated this issue is evidenced by the questions which their members asked the experts. It is significant that, when a juryman asked if it was possible that one who puts others to death and remains living himself may be able to forget completely all that he did in putting the others to death, Dr. Moffatt replied:

> Certainement, tout dépend de l'état où il était au moment où il a commis son meurtre. S'il est dans une confusion, dans un état de confusion mentale, de choc émotionnel, une confusion de panique, c'est possible. J'ai moi-même vu, au cours d'accident, sortir quelqu'un d'une machine, quelqu'un qui n'avait aucune blessure, absolument rien, mais dont l'état d'émotion était tellement aggravé, tellement évident, qu'on leur demandait leurs noms, leurs adresses et qu'ils ne s'en rappelaient pas.

Dr. Moffatt here illustrates his point of view by referring to a person who suffers a shock much like that described by the psychiatrists called for the Crown.

The burden of establishing, to the reasonable satisfaction of the jury, that the accused was insane, as that term is applied and understood in *McNaghten's Case* (1), at the time he put the children to death rested upon the defence. The appellant's written statement, his false version at the undertaking parlour, his verbal and voluntary statements to the police, as well as his conduct when he and the police were present at his house, were all, in effect, contrary to the contention that he did not know the nature and quality of his act or what he was doing upon the night in question. Moreover, when analyzed, the evidence of the experts for the Crown, who examined the appellant as to both his physical and mental condition, supports their conclusions with reasons that could not but impress the jury.

While Dr. Moffatt, called on behalf of the defence, refers to the life of and his interviews with the appellant, he does not indicate, in a direct and specific manner, what it was in the conduct or conversation that led him to conclude that the appellant, in committing the acts we are here concerned with, did not appreciate the nature and quality of his acts

(1) 10 Cl. & F. 200.

1954

HEBERT
v.
THE QUEEN

Estey J.

and was unable to distinguish between right and wrong. In this regard the language of Lord Chief Justice Reading is appropriate:

> The tests in McNaghten's case must be observed, and it is not enough for a medical expert to come to the Court and say generally that in his opinion the criminal is insane. There must be some evidence of insanity within the meaning of the rule in McNaghten's case. *Holt* v. *The King* (1).

Then as to the possible effect upon the jury of any of the suggestions made by counsel for the Crown in the course of the cross-examination here objected to, it should be observed that they were either contained in or directly implied in statements already in evidence. It is not, therefore, a case in which entirely new facts were so introduced, but, rather, circumstances which, in relation to the whole of the evidence, would be but a repetition of that which would already be present to the minds of the jury.

When all of the evidence is considered, this becomes a case in which it may well be said, in the language of my Lord the Chief Justice (then Kerwin J.) in *Schmidt* v. *The King* (2), "that the verdict would necessarily have been the same" even had the cross-examination here objected to not taken place. This case is quite distinguishable from *Allen* v. *The King* (3), where counsel for the Crown sought, through cross-examination, to place in evidence that given by a witness at the preliminary who was not called at the trial. In the course of his reasons for judgment Fitzpatrick C.J., as well as Mr. Justice Anglin (later C.J.), referred to the fact that there was other sufficient evidence to support the conviction. In the case at bar the evidence is such, apart from the cross-examination objected to, as would leave no doubt in the minds of a reasonable jury that the appellant was, at the time he committed the crime, not insane as that word is applied and understood in law.

It is also distinguishable from *Markadonis* v. *The King* (4), where a young man of eighteen was charged with the murder of his sister. No motive was established and the revolver used to commit the crime was not produced and apparently was never found. Evidence was given at the trial to the effect that in the middle of the second night after the murder the accused was taken from his cell and,

(1) (1920) 15 C.A.R. 10 at 12.
(2) [1945] S.C.R. 438 at 440.
(3) (1911) 44 Can. S.C.R. 331.
(4) [1935] S.C.R. 657.

along with three police officers, taken out to a road to search for the revolver. The accused was cross-examined upon the incidents of that trip and his answers were made the basis for rebuttal evidence. Mr. Justice Davis, at p. 664, stated:

> The whole course of conduct and conversation of the accused on that trip was clearly inadmissible in the absence of any proof that the statements made were voluntary and upon proper warning.

In the circumstances of that case, as reported, such evidence added to the facts already in evidence and could not but be prejudicial to the defence.

The facts and circumstances of this case are so very conclusive that the language in *Stirland* v. *The Director of Public Prosecutions* (1) is appropriate. When referring to a proviso in the English statute similar to that of s. 1014(2) of our *Criminal Code,* it is stated:

> . . . if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

This passage is quoted with approvel in *Schmidt* v. *The King, supra.*

In my opinion the appeal should be dismissed.

LOCKE J. (dissenting):—I agree with my brothers Cartwright and Fauteux and would quash the conviction in this matter and direct that there be a new trial.

CARTWRIGHT J. (dissenting):—In this case I find it necessary to deal with only one of the questions which were argued before us, i.e., whether Crown counsel improperly cross-examined the appellant as to certain statements allegedly made by him to Captain Matte.

It is not necessary to go into the facts at any length. The appellant was convicted of the murder of one of his children. At the trial it was not seriously questioned that he had killed this child and his three other young children. The main issue was as to whether or not he was insane at the time of such acts.

Doctor Moffatt, called as a witness for the defence, testified that in his opinion the appellant at the time of the killing was by reason of mental illness unable to appreciate

(1) [1944] A.C. 315.

1954

HEBERT
v.
THE QUEEN

Cartwright J.

the nature and quality of his acts or to know that they were wrong. Doctor Martin and Doctor Larue called as witnesses by the Crown testified that they were of the contrary opinion.

It is clear that Doctor Moffatt founded his opinion in part on the assumption that the accused had in fact no memory as to what occurred at the time of the killing, and, as Mr. Miquelon very properly stated, the question whether or not the accused did have such memory was of vital importance on the issue of insanity.

In giving his evidence in chief the appellant deposed that he had no memory as to what happened during the critical period. In cross-examination he was asked a number of questions by Crown counsel who then held in his hands what purported to be a transcript of a number of questions put to the accused by Captain Matte and of the answers given by the accused to such questions. This interrogation was said to have taken place at about eleven p.m. on the Thursday following the killing, some hours after the appellant had told the police officers that he had killed his children and had been taken into custody on a charge of murder. The answers which the accused was said to have given during this interrogation indicated that he was able at that time to recall the details of the killing of his children and so tended to discredit his evidence given at the trial as to his having no memory of that occurrence.

Counsel for the appellant objected to the use of the transcript and to any cross-examination in regard to it but the learned trial judge overruled the objection. I think it clear that the learned trial judge should not have permitted any use to be made of the transcript in question without first hearing evidence in the absence of the jury with a view to determining whether or not the appellant's answers had been given voluntarily. The learned judge appears to have been of opinion that although not admissible as part of the Crown's case the questions said to have been put to the accused and the answers said to have been made by him could be put to him in cross-examination. In this, in my respectful opinion, he was in error.

In *Rex* v. *Wilmot* (1), Ford J.A. with whom MacGillivray J.A. agreed said:—

> It is conceded that the statements, if made at all, were made to a person in authority and that the Crown could not prove their voluntary character so as to make them admissible. This being so, in my opinion not only should the Crown be not permitted to prove them in rebuttal any more than in chief, but that it is improper to permit cross-examination as to them. Indeed they should, in my opinion, be treated for all purposes as non-existent or as having no probative value of any kind, either as going to the credit of the accused as a witness or otherwise.

This view of the law was adopted by the Court of Appeal for British Columbia in *Rex* v. *Byers* (2) and by the Court of Appeal for Saskatchewan in *Rex* v. *Scory* (3). A similar view was expressed by Langlais J. in *Rex* v. *Heroux* (4).

In *Rex* v. *Scory* (*supra*) Mackenzie J.A., who gave the unanimous judgment of the Court, after referring to *Rex* v. *Wilmot*, *Rex* v. *Byers* and *Rex* v. *Heroux* continued, at page 323:—

> In a still more recent case involving the same question, *R.* v. *Treacy* (1944) 60 T.L.R. 544, the Court of Criminal Appeal in England rendered the same view. Thus in delivering the judgment of the Court, Humphreys J., said (p. 545): "In our view, a statement made by a prisoner under arrest is either admissible or not. If it is admissible, the proper course for the prosecution is to prove it, and give it in evidence, and to let the statement, if it is in writing, be made an exhibit, so that everybody knows what it is and everybody can inquire into it and do what they think right about it. If it is not admissible, nothing more ought to be heard of it, and it is wrong to think that a document can be made admissible in evidence which is otherwise inadmissible simply because it is put to a person on cross-examination."
>
> Having regard to the protection which our criminal law in accordance with its well-known policy *in favorem vitae* casts about every accused person to protect him on his trial against the introduction of his own involuntary statements, the above decisions on counsel's last contention should, in my opinion, be followed not only because of their obvious authority but also because they are logically sound.

I have carefully considered the reasons of Campbell C.J. who expressed a contrary opinion in *Rex* v. *Jones* (5) and in *Rex* v. *Essery* (6) and the reasons of Harvey C.J. who dissented in *Rex* v. *Wilmot* (*supra*) but, with the greatest respect for these views, I am of opinion that the passage quoted above from the judgment of Mackenzie J.A. correctly states the law.

(1) (1940) 74 C.C.C. 1 at 19.
(2) (1941) 77 C.C.C. 164.
(3) (1944) 83 C.C.C. 306.
(4) (1943) 80 C.C.C. 348.
(5) (1944) 84 C.C.C. 299.
(6) (1944) 84 C.C.C. 304.

1954

HEBERT
v.
THE QUEEN

Cartwright J.

It is argued for the respondent that even if this cross-examination was illegal no substantial wrong or miscarriage of justice has occurred and the appeal should be dismissed. With the greatest respect for all those who hold the contrary view, I find it impossible to affirm that had this illegal cross-examination not taken place the jury would necessarily have convicted the appellant.

It was open to the jury to believe the appellant's evidence as to his having no memory of the period in which the killings occurred and, if they did believe it, it was for them to say whether they accepted Doctor Moffatt's opinion in preference to that of the two medical witnesses called by the Crown. All three of these doctors were men of high standing in their profession and it is scarcely necessary to observe that a jury may act upon the evidence of one witness although it is in conflict with the evidence of two or more other witnesses. But the opinion of Doctor Moffatt depended in large measure upon the assumption that the appellant had in fact no memory of the period in which the children were killed. The reason that the jury did not act upon Doctor Moffatt's opinion may well have been that they did not find that the appellant was without memory of the critical period and their failure to so find may well have been the result of the illegal cross-examination.

I would allow the appeal, quash the conviction and direct a new trial.

FAUTEUX J. (dissenting):—Suivant des admissions extra-judiciaires, jugées libres et volontaires, l'appelant a reconnu, sans toutefois en donner aucune circonstance, avoir, dans le cours du mois d'avril 1953, tué ses quatre jeunes enfants pour lesquels, cependant, il n'entretenait, suivant la preuve, que des sentiments d'affection. Accusé du meurtre de l'un d'eux, il plaida qu'au moment de ces actes, il était incapable d'en juger la nature et la gravité et de se rendre compte qu'ils étaient mal. Le bien-fondé de ce plaidoyer fut affirmé par un expert de la défense et nié par deux experts de la poursuite. Trouvé coupable, il logea un appel devant la Cour du Banc de la Reine (1), lequel fut rejeté par jugement unanime. Hébert obtint alors, en vertu de l'article

(1) Q.R. [1954] Q.B. 594.

1025 du *Code Criminel*, l'autorisation d'en appeler devant cette Cour sur des questions de droit formulées comme suit:—

(*a*) Did the learned trial Judge err in his instructions relative to the possible verdict the jury might render and in particular in omitting to mention the possibility of their disagreeing?

(*b*) Did the learned trial Judge err in his instructions relative to the plea of insanity and in his statement of the evidence in support thereof?

Au soutien du premier moyen (*a*), on a invoqué, de la décision de cette Cour dans *Latour* v. *The King* (1), un passage apparaissant à la page 30 où l'on exprime l'opinion que, des instructions du Juge au procès, les jurés pouvaient raisonnablement déduire que le droit à un désaccord était exclu dans la cause. Dans *Frank Frederick Creasey* (2), Lord Goddard, Juge en chef de la Cour d'Appel d'Angleterre, signale bien que de similaires directives ont déjà, dans le passé, reçu la désapprobation des tribunaux d'appel, telle, par exemple, la suivante: "It is essential that you should give a verdict". C'est, cependant, en regard de toute l'adresse du Juge que la question doit être appréciée. Ainsi considérée, je ne crois pas qu'on puisse, en l'espèce, dire que le droit à un désaccord ait été exclu.

Au second moyen (*b*), il y a deux griefs. J'écarterais le premier, ayant trait aux directives sur le plaidoyer de folie, et ce, pour les raisons données par l'honorable Juge en chef. Je retiens, cependant, le second, savoir:—

Did the learned trial Judge err . . . in his statement of the evidence in support thereof? (i.e., au soutien du plaidoyer de folie).

grief dans la considération duquel il convient d'inclure un point soulevé lors du délibéré et subséquemment discuté au cours d'une réaudition, après que, au cas où nécessaire, permission d'appeler ait été donnée, savoir:—

Whether Crown counsel improperly cross-examined the appellant as to the statements allegedly made by him to Captain Matte or other police officers and whether or not the trial Judge's charge was proper in relation thereto.

La véritable—pour ne pas dire l'unique—question qui se posait devant le jury était de savoir si, au moment où l'accusé tuait ses quatre jeunes enfants, il était dans un état mental le rendant incapable de juger la nature et la gravité de ses actes et de se rendre compte qu'ils étaient mal. Il était donc de capital importance que l'exposé de la preuve

(1) [1951] S.C.R. 19. (2) (1953) 37 C.A.R. 179.

1954

HEBERT
v.
THE QUEEN

Fauteux J.

sur ce point soit fait adéquatement; c'était toute la cause. Cette preuve soumise aux jurés et qu'il nous faut maintenant considérer pour juger du mérite de ce grief, portait sur deux points:—(i) la théorie médicale soumise par le docteur Moffatt, l'expert de la défense, et (ii) les faits, gestes et declarations de l'accusé, surtout celles dont la véracité—assumée par le docteur Moffatt pour fins de son opinion—fut mise en question par la Couronne et ses experts.

La théorie médicale de la défense. Le docteur Moffatt a conclu qu'au moment de l'acte, l'appelant était incapable de distinguer le bien du mal parce qu'il était alors affecté d'un trouble mental qu'il désigne techniquement comme "une réaction dépressive accompagnée par un état de confusion ou de panique". Cette conclusion, il la motive comme suit:—A raison d'événements particuliers qui se sont produits au cours de l'enfance, aussi bien qu'au cours de l'adolescence et, ensuite, de la vie conjugale de l'appelant, ce dernier souffrait de mélancolie, mais non dans le sens précis qu'on donne en psychiatrie à la maladie mentale classifiée sous ce nom; il avait ainsi développé une instabilité émotionnelle affectant sa résistance et l'empêchant d'avoir, sur ses facultés intellectuelles, un contrôle normal, offrant en conséquence, et à l'occasion d'une crise émotionnelle, un terrain propice à la naissance et l'action d'un trouble mental. De plus, l'accusé ayant affirmé, au cours d'examens par le docteur Moffatt, et juré, dans son témoignage à l'audition, qu'il n'avait aucune mémoire des circonstances dans lesquelles les actes reprochés avaient été commis, l'expert de la défense déduisit du fait de cette carence de mémoire qu'au moment où l'accusé tuait ses quatre jeunes enfants, il était dans un état de confusion mentale et de panique. Le docteur Moffatt a bien précisé qu'il ne prétendait pas que l'accusé souffrait de cette maladie mentale classifiée en psychiatrie comme mélancolie et que l'état de confusion dont il parlait était un trouble mental reconnu par les auteurs anglais, américains et allemands et, comme tel, différent de la confusion mentale, résultant d'une cause organique, dont parlent les auteurs français. En somme, mise en contraste avec l'opinion des experts de la Couronne, celle du docteur Moffatt s'inspire d'une théorie médicale différente dans sa conception et son

expression de celle exposée par les experts de la Couronne et se fonde, en l'espèce, principalement sur l'hypothèse de la véracité des affirmations de l'accusé quant à cette carence de mémoire. Nous n'avons pas à départager les médecins et à décider d'une préférence pour l'une ou l'autre des théories par eux exposées; ceci était du ressort exclusif des jurés et la difficulté qu'ils pouvaient avoir à ce faire rendait encore plus impérative l'obligation d'une adéquate exposition de ces théories et, particulièrement, de celle de la défense. A la vérité, et au cours de l'audition de la preuve médicale, l'un des jurés manifesta ouvertement son inquiétude à rencontrer l'obligation que lui et ses collègues avaient de départager les experts. Pour dissiper cet état d'esprit, on les rassura en les informant que des directives appropriées leur seraient données au cours de l'adresse du Juge. En tout respect, cependant, je dois dire qu'en ce qui concerne la théorie médicale de la défense, on s'est contenté, dans l'adresse, d'indiquer uniquement la conclusion précitée du docteur Moffatt sans signaler ce qui divisait les experts dans la conception et l'expression de leurs théories médicales respectives et sans aucunement rappeler les motifs sur lesquels s'appuyait la théorie exposée en défense. L'opinion d'un expert n'a que la valeur des motifs sur lesquels elle se fonde. Je suis d'avis que la théorie médicale de la défense au soutien du plaidoyer de folie n'a pas été exposée comme elle aurait dû l'être et que, pour cette première raison, ce grief de l'appelant est bien fondé.

Outre la théorie médicale de l'expert de la défense, la preuve apportée au soutien du plaidoyer de folie et qui devait être exposée aux jurés comportait, entre autres faits, les déclarations de l'accusé et, particulièrement, son affirmation sous serment relative à son absence de mémoire, affirmation dont la véracité, comme déjà indiqué, fut assumée par le docteur Moffatt pour les fins de son expertise, mais mise en question par la Couronne et ses experts. D'où l'on voit que dans l'exposé de cet aspect particulier de la preuve, il était de singulière importance, pour permettre aux jurés de se prononcer justement sur le point, de ne pas les inviter virtuellement, comme il a été fait, à décider de la véracité de cette affirmation, en la considérant avec les déclarations ci-après qui la contredisent, lesquelles furent—ainsi qu'il appert ci-après—illégalement admises au

1954

HEBERT
v.
THE QUEEN

Fauteux J.

dossier, à l'initiative de la Couronne, et ce, tel que déclaré par les deux procureurs la représentant à la réaudition, dans le but d'attaquer la crédibilité de l'accusé et, plus précisément, de détruire, en démontrant le contraire de l'affirmation ci-dessus, le véritable fondement de l'opinion émise par le docteur Moffatt.

Le dossier révèle que le capitaine Matte, officier de la Sûreté en charge de la cause, a plusieurs fois au cours de la détention de l'appelant, questionné ce dernier afin d'en obtenir une relation des circonstances dans lesquelles il avait tué ses enfants, circonstances que ne comportaient aucunement ses aveux extrajudiciaires jugés libres et volontaires et admis au dossier. Il appert, de plus, que les questions et réponses, faites au cours de ces examens conduits par cet officier de police, avaient été sténographiées et qu'au procès, un document les rapportant était entre les mains du procureur de la Couronne et utilisé par lui pour le contre-interrogatoire de l'accusé. Dès la première tentative de la Couronne d'introduire une telle preuve au dossier, le procureur de la défense s'objecta comme suit:—

Objecté:—

D'abord, je voudrais savoir si réellement cet aveu-là a eu lieu et dans quelles conditions cet aveu-là a eu lieu et quel était également l'état mental de cet homme-là à ce moment-là.

Ce à quoi la Couronne répondit:—

On est aussi bien de vider le problème, j'ai bien l'intention d'entrer dans les déclarations qu'il a faites pour le contredire.

L'objection de la défense fut renvoyée et c'est alors qu'entre autres questions et, en substance, on a demandé à l'accusé s'il n'était pas vrai:—qu'il avait déclaré au capitaine Matte avoir consommé quatre ou cinq bouteilles de bière avant de tuer ses enfants (p. 259); qu'il lui avait raconté en détails ce qui s'était passé chez lui (p. 284); qu'il lui avait raconté qu'il s'était assis sur une chaise, s'était bercé un peu, avait pensé à tout et que c'est alors qu'il s'était décidé à faire les actes reprochés (p. 290); qu'il avait commencé par la chambre d'en avant, qu'il avait commencé par tuer René. (p. 291). A la vérité, non seulement on lui a posé ces questions, mais, en les formulant, on a indiqué les réponses incriminantes que l'accusé était supposé avoir données au détective Matte. Enfin, par ce procédé, on a réussi à faire entrer au dossier des déclarations dont la substance allait à

contredire le témoignage de l'appelant et, particulièrement, sa déclaration dont la véracité avait été assumée par le docteur Moffatt pour les fins de son expertise.

Dans quelles conditions furent conduits ces interrogatoires et furent données ces réponses que le capitaine Matte, d'une part, trouva nécessaire de faire consigner par un sténographe et que la Couronne, d'autre part, jugea essentiel au succès de sa cause de porter à la connaissance des jurés, le dossier est silencieux. Aucun voir dire, aucun examen de tous les témoins qui, suivant les exigences de la jurisprudence de cette Cour (*Sankey* v. *The King* (1); *Tiffault* v. *The King* (2)), devaient être entendus pour permettre au Juge de décider si, oui ou non, ces déclarations pouvaient, à la lumière des principes reconnus en la matière, être admises devant les jurés. Dans *Gach* v. *The King* (3), cette Cour, à la page 255, approuvait la proposition suivante formulée par le Juge Sankey, tel qu'il était alors, dans *Rex* v. *Crowe and Myerscough* (4):

> If a police officer has determined to effect an arrest or if the person is in custody, then he should ask no questions which will in any way tend to prove the guilt of such person from his own mouth.

Aussi bien, la Couronne, au procès comme devant cette Cour, n'a-t-elle cherché à justifier l'introduction de cette preuve au dossier que par les dispositions des articles 10 et 11 de la *Loi de la preuve,* lesquelles autorisent d'attaquer la crédibilité d'un témoin en le contre-interrogeant sur ses déclarations antérieures incompatibles avec son témoignage. Le point de savoir si dans le contre-interrogatoire d'un accusé entendu comme témoin, il est loisible à la Couronne de référer à des déclarations faites par lui à la police alors que le caractère libre et volontaire de ces déclarations n'a pas été décidé, a été considéré dans plusieurs causes. Dans ses notes, mon collègue le Juge Cartwright réfère à ces décisions et, comme lui, je suis d'opinion que la Couronne ne peut davantage, sur cette base, justifier, en l'espèce, la position prise par elle au procès et devant cette Cour. L'introduction de cette preuve était donc totalement illégale et d'une illégalité qui, je crois, aurait justifié, sinon commandé, la mise à fin du procès comme *mistrial.* Aussi bien, et le procès s'étant continué, était-il impératif que

(1) [1927] S.C.R. 436.
(2) [1933] S.C.R. 509.
(3) [1943] S.C.R. 250.
(4) (1917) 81 J.P. 288.

1954

HEBERT
v.
THE QUEEN

Fauteux J.

dans l'exposé de cet aspect de la preuve faite au soutien du plaidoyer de folie, les jurés, au lieu d'être invités, comme ils l'ont été, à considérer toutes les déclarations de l'accusé, sans distinguer celles qui avaient été prouvées légalement de celles illégalement introduites au dossier, reçoivent la direction la plus claire et la plus solennelle d'écarter totalement de leur considération les dernières pour juger de la véracité de l'affirmation relative à la perte de mémoire. Ce n'était pas satisfaire à l'obligation qu'il y avait de faire un exposé légal de la preuve, faite en défense au soutien du plaidoyer de folie, que d'inviter les jurés, pour en juger, à faire entrer dans leur considération des preuves illégalement admises. Pour cette seconde raison, je crois donc que le grief de l'appelant est fondé.

Sur la loi relative à l'obligation d'exposer adéquatement la théorie de la défense, il suffit, je crois, de référer à quelques passages des deux dernières décisions de cette Cour sur le point. Dans *Kelsey* v. *The Queen* (1), on a rappelé comme suit, à la page 227, le principe d'où découle cette obligation:—

> The rule is simple and implements the fundamental principle that an accused is entitled to a fair trial, to make a full answer and defence to the charge, and to these ends, the jury must be adequately instructed as to what his defence is by the trial Judge.

De la décision d'*Azoulay* v. *The Queen* (2), la considération des passages suivants est pertinente:—

> The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. (p. 498).
>
> Three experts, two of which were called by the appellant, gave very elaborate explanations on medical matters, and their respective opinions on the result of the autopsy that was performed on the body of the deceased woman. It was, I think, the duty of the trial judge, in summing up this highly technical and conflicting evidence, to strip it of the non-essentials, and as O'Halloran, J.A. said in *Rex* v. *Hughes* 78 Can. C.C. 1, to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permitted. Unfortunately, this has not been done, and the explanations and grounds of defence have not adequately been put before the jury. (p. 499).
>
> The authorities contemplate that in the course of his charge a trial judge should as a general rule, explain the relevant law and so relate it to the evidence that the jury may appreciate the issues or questions they must pass upon in order to render a verdict of guilty or not guilty. Where, as here, the evidence is technical and somewhat involved, it is particularly

(1) [1953] 1 S.C.R. 220. (2) [1952] 2 S.C.R. 495.

important that he should do so in a manner that will assist the jury in determining its relevancy and what weight or value they will attribute to the respective portions. (p. 503).

Reste à considérer la suggestion de la Couronne d'appliquer, en l'espèce, les dispositions de l'article 1014 (2) édictant que même si les griefs soulevés par l'accusé sont bien fondés, la Cour peut renvoyer l'appel s'il n'y a pas eu de tort réel ni de déni de justice. A raison de la gravité des violations ci-dessus relatées, il me paraît impossible d'accéder à cette demande. Rendant le jugement pour le Comité Judiciaire du Conseil Privé dans *Makin* (1), Lord Herschell, à la page 70, dit:—

The evidence improperly admitted might have chiefly influenced 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. 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 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.

Dans *Maxwell* v. *Director of Public Prosecutions* (2), Lord Sankey, L.C., parlant pour lui-même, Lord Blanesburgh, Lord Atkin, Lord Thankerton et Lord Wright, dit à la page 176:—

But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the proviso to section 4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

Ces principes exprimés par la Chambre des Lords se passent de commentaires et leur application, au Canada, est d'autant plus justifiée que la loi canadienne, contrairement à la loi anglaise, autorise la tenue d'un nouveau procès au lieu d'un acquittement.

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

(2) (1934) 24 C.A.R. 152.

1954

HEBERT
v.
THE QUEEN

Fauteux J.

Ajoutons que, pour bénéficier des dispositions de l'article 1014 (2), la Couronne doit établir que, sans cette preuve illégale au dossier, le verdict eut été le même. Et c'est là la position qu'elle prend. Devant les jurés, cependant, elle considéra l'affaire bien autrement, puisqu'alors, elle jugea essentiel à l'avancement de sa cause de porter à leur connaissance cette preuve illégale. Et même devant nous, en cherchant à se justifier de l'avoir introduite, ses deux procureurs ont plaidé avec vigueur les propositions suivantes que l'un d'eux avait couchées par écrit, avant d'en donner communication verbale à cette Cour, à la fin de l'argument de la Couronne:—

1. The issue was whether the accused was telling the truth when he testified that he did not remember the circumstances.

2. The object of this evidence was to show that he could not be believed.

3. This evidence was most relevant to the issue, in view of what Doctor Moffatt had said.

La Couronne a bien raison d'affirmer que la crédibilité de l'accusé constituait le principal problème soumis aux jurés. Mais, précisément pour cette raison, la Couronne ne peut maintenant demander de considérer comme négligeable cette preuve illégale qu'elle a jugé essentiel d'introduire sur cette question cruciale que les jurés avaient à déterminer. Les deux positions sont manifestement irréconciliables. Aussi bien m'est-il impossible de conclure que l'intimée a établi, comme elle en avait le fardeau, que, sans la présence de cette preuve, le verdict eut été le même.

Je maintiendrais l'appel, annulerais le verdict et ordonnerais un nouveau procès.

Appeal dismissed.

Solicitor for the appellant: *Lawrence Corriveau.*

Solicitors for the respondent: *Noël Dorion and Paul Miquelon.*