OWEN B. BAKER ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT;

HARRY F. SOWASH..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Murder—Misdirection—Evidence—Similar acts—Admissibility—Corroboration—Accomplices

The appellants were convicted of the murder of the captain of the boat *Beryl G.* containing a cargo of liquor intended to be illegally delivered in the United States. The appellants, with two others, set forth in a boat called *Denman II* and left for Sidney Island with the intention of taking from the *Beryl G.* her cargo of liquor. According to the story of one of the appellants and an accomplice the *Beryl G.* was towed from Sidney Island by the *Denman II,* and the bow anchor, having been detached was sunk with the bodies of the captain and of his son, which had been fastened together by a pair of handcuffs. It had been proven that Baker had bought a yachtman's cap with a white top and ornamented profusely with gold braid in order to give himself the appearance of a revenue officer, and that this cap, together with two revolvers

and handcuffs and a flashlight had been brought by Baker on board the *Denman II*. The case against Baker, as exhibited in the evidence on behalf of the Crown, was that in concert with the others he attacked the crew of the *Beryl G.*, under the pretence that he and his associates were officers of the law, one of them being disguised in such a way as to present the appearance of a revenue officer, and the party being equipped with and displaying such arms and implements as such officers might be expected to use in dealing with the possessors of a contraband cargo of liquor. Evidence was offered by the Crown in rebuttal, of the fact that Baker on one occasion recently, and on another at a considerably earlier date, had employed similar equipment and precisely this ruse for the purpose of deceiving and disarming the opposition of bootleggers while he took over their illegal possessions.

Held that, as bearing upon the issue thus raised (as to design) it was relevant to shew a similar use of such implements by Baker on a recent occasion—within a month; and, such evidence being given, evidence of the use of similar implements in a similar way on an earlier occasion, several years before, would be admissible as tending to establish a practice.

Quaere whether the admission of such evidence could be supported on the ground that it tended to corroborate the evidence of the accomplices.

Held, also, that the criticism against the trial judge's charge to the jury—that he insufficiently warned the jury as to the risk of finding a verdict against the accused on the uncorroborated testimony of an accomplice—possessed little or no importance when considered in light of the undisputed and indisputable facts proven or admitted by the accused.

APPEALS from the judgments of the Court of Appeal for British Columbia, affirming the convictions of the appellants of the crime of murder.

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

R. V. Sinclair K.C. for the appellant Baker.

Austin O'Connor for the appellant Sowash.

J. A. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—When the undisputed and indisputable facts are understood and the course of the trial is appreciated, it becomes evident that only two questions of any importance are raised by these appeals. The first concerns a criticism directed against the charge of the learned trial judge, and the second concerns the admissibility of certain evidence offered by the Crown in rebuttal. Both these questions must be considered in light of the evidence and the issues to which it was directed. Though the evidence is volum-

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inous, the case is not a complicated one, and the essential facts and the critical points in controversy at the trial can be easily grasped.

In the summer and autumn of 1924, one Marinoff, who lived in Tacoma, was engaged in running liquor from British Columbia into the state of Washington. One Willis kept a stock of liquor in a boat-house near Barclay, on the west coast of Vancouver Island, and Marinoff was a purchaser from him. In the early days of September, Marinoff purchased from Willis 350 "cases," so called, of Scotch whisky and gin, and it was arranged that, according to a practice followed in the execution of previous sales, the liquor should be sent in the *Beryl G.*, manned by William Gillis and his son, to an anchorage in a cove at Sidney Island, which is an island situated a little west of the boundary line between Canada and the United States running through Haro Strait, there to be delivered to Marinoff's agents. The *Beryl G.*, with her cargo, duly arrived at the appointed place, and about five or six o'clock in the evening on the 15th of September, 110 cases out of this cargo were delivered to Marinoff's agents, and reached his hands in due course in the United States. Marinoff's agents left the *Beryl G.* anchored (with one bow anchor weighing from 100 to 150 pounds, and a much lighter one at the stern), with the intention of returning for the remainder of the cargo. Two days later the *Beryl G.* was discovered a few miles from Sidney Island, adrift. The bow anchor had disappeared, her cargo was gone, and the craft presented unmistakable indications of a sanguinary struggle. Neither of the Gillises has been seen or heard of since, and the appellants have been convicted of the murder of the father.

In the first week of September, the appellants, Baker and Sowash, together with Stromkins, who was the principal witness for the Crown at the trial, and one Charlie Morris, were in Victoria (whither they had come from Seattle); and it is admitted by Baker and Sowash that, as Stromkins testifies, they then had in view jointly an expedition to the west coast of Vancouver Island, with the object of taking possession of liquor they hoped to find cached in places said to have been disclosed to them as likely places by the customs officials and the provincial

police of British Columbia. The police had, Baker insists in his evidence, assured them through one Majowski, a detective from Seattle, that, such liquor having been illegally in the possession of persons who had hidden it, and having been hidden for illegal purposes, anybody who should find it might take it without violating the law of British Columbia, and get it into the United States if he could. This comparatively harmless design was one, at least, of the objects of the expedition. They set forth in a boat owned by Stromkins, called *Denman II*, and coasted as far north as Port Renfrew, but returned on the 12th or 13th to Esquimalt empty handed. They remained in Victoria until the night of the 15th, when they, that is to say, Baker, Sowash, Charlie Morris and Stromkins, started from Cadboro Bay in the *Denman II*. Baker says that from Cadboro Bay they went direct to Anacortes, in the state of Washington, and there parted company. Stromkins and Sowash say that, on Baker's proposal, or the proposal of Baker and Morris, they left for Sidney Island with the intention of taking from the *Beryl G.*, whose anchorage was well known, her cargo of liquor; that this purpose was carried out; that William Gillis and his son were killed in the course of its execution; that the liquor was cached in various places, some on the beach at Sidney Island, some on Gooch Island, some on South Pender Island and some on Moresby Island (though as to this there is some discrepancy between the evidence of Stromkins and that of Sowash).

As regards this whole chapter of events, to which Stromkins and Sowash testified—from the departure, at ten o'clock on the evening of the 15th, until the disposal of the liquor was completed—Baker advanced a blank denial. Not only did he say that he was not there himself, but that *Denman II.* and Stromkins and his passengers were all elsewhere—en voyage from Cadboro Bay to Anacortes; that this part of the story of Stromkins and Sowash is pure fabrication. Two or three days after the 16th of September, when, according to the story of Baker, as well as that of Sowash and Stromkins, all had arrived at Anacortes, and Baker, Sowash and Morris had separated from Stromkins, leaving him with his boat, Baker admits that he, with Sowash and Morris, made arrangements with one Clausen,

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of Seattle, to go to the British Columbia islands and bring whisky and gin cached there to the American side, on the terms that Clausen was to receive for his services one-third of the liquor recovered; and that with Clausen, he and Sowash set out on this expedition from Seattle, on the 18th or 19th. They first went to Moresby Island and, under the direction of Baker, discovered and took away with them some twenty cases of whisky and gin, containing 12 quart bottles each, which, however, they were obliged to throw overboard under pressure of pursuit by an American revenue cutter. After this misadventure, they entered Lake Union, where Clausen's boat, the *Dolphin,* was allowed to lie for about a week, when they, Clausen, Baker and Sowash, set forth again, and this time they went to Sidney Cove, on the northeast side of Sidney Island, and, under the direction of Baker, discovered on the beach above high water mark, a lot of eighteen cases of Scotch whisky and gin (the exact quantity of such liquor which Stromkins states was left above high water mark in this locality on the night of the 15th out of the looted cargo of the *Beryl G.*); two lots of the same kind of liquor on Gooch Island, and another on South Pender Island. All these various lots were together brought to a place on South Pender Island, and deposited there. The liquor so collected was later—in part with the assistance of Clausen, in part with the assistance of one Smith—introduced into Washington state and apparently was sold, under the direction of Baker, who controlled the distribution of the proceeds and still held, at the time of the trial, he declared, $3,200 for Stromkins as his share. It should be mentioned that the liquor which constituted the cargo of the *Beryl G.* was done up in sacks, described by the witnesses as "cases," of 12 quart bottles each, of Scotch whisky or gin; and it is undisputed that all the whisky and gin recovered from the various places of deposit visited under the direction of Baker by Clausen, Baker and Sowash was in such sacks, except where the sacks had been ruptured by the action of the water.

Before proceeding to notice the grounds of appeal, some additional facts, as well as some passages in the evidence which are not undisputed, should be mentioned. According to the story of Stromkins and Sowash, the *Beryl G.* was towed from Sidney Island to Halibut Island on the

night of the 15th by *Denman II*, and the bow anchor, having been detached, was sunk with the bodies of the Gillises, father and son, which had been fastened together by a pair of handcuffs. These handcuffs, as well as a flashlight, which he used in boarding the *Beryl G.*, had been in possession of Baker, who also had with him on board the *Denman II* at least two revolvers, with one of which he shot the elder Gillis. It was shewn that there was, on the 16th, a wind prevailing in the vicinity of Halibut Island of about 36 miles an hour, and expert evidence was given to the effect that the *Beryl G.*, when sighted on the 17th, was approximately in a position where, having regard to the weather and the tides, she might be expected to be found if left on the night of the 15th, as in the testimony was averred, in the vicinity of Halibut Island with only her stern anchor holding her. Before leaving Seattle for Victoria, Baker bought a yachtsman's cap with a white top and ornamented profusely with gold braid, on the advice, as he said, of Clausen, who suggested that he might use it in a critical juncture to disarm suspicion by giving himself the appearance of a revenue officer. Stromkins and Sowash say that this cap, together with the revolvers, the handcuffs and the flashlight mentioned above, were brought by Baker on board the *Denman II* on the night of the 15th. Baker denies that he ever had in his possession handcuffs or a flashlight, and he asserts that for many years before the trial he had not carried a revolver.

The criticism directed against the learned trial judge's charge to the jury—that he insufficiently warned the jury as to the risk of finding a verdict against the accused on the uncorroborated testimony of an accomplice,—is seen to possess little or no importance when considered in light of the facts. The learned trial judge did explain in a most unexceptionable way that the evidence of an accomplice must be weighed and examined with care and suspicion, and that although the jury might convict on such evidence, it would be dangerous to do so. He did explicitly warn the jury that Sowash must be treated as an accomplice, although he did fail to give in express terms the same warning as to Stromkins. A passage in his charge, in which he says in so many words that Sowash corroborates Stromkins, obviously relates exclusively to the Crown's case against

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Sowash himself, and directs attention to Sowash's own admissions. The learned trial judge did not, it is true, explain to the jury that corroboration in the relevant sense means corroboration not only in respect of some fact tending to shew that the crime was committed, but also in respect of some evidence implicating or tending to implicate the accused.

Indeed, there is perhaps reason to impute to the charge some tendency to mislead in a sense unfavourable to the accused in this respect, as well as in the explicit labelling of Sowash as an accomplice as contrasted with the absence of any such description of Stromkins in so many words; and had the corroboration which the jury actually had before them been either scanty or of questionable weight, it might have been necessary to consider the probable effect of these features of the learned judge's observations with some care.

But the learned trial judge would have done much less than justice to the force of the uncontroverted facts—facts established by the admissions of the appellants or by independent and unchallenged evidence—if he had led the jury to believe that they were at liberty to regard the evidence of Stromkins in its essential elements or of Sowash in so far as it implicated Baker as destitute of corroboration. Considering the gravity of the crime, corroboration of real substance and weight was no doubt demanded, but it was produced in superfluity. Sowash's case requires no comment; indeed, as to this point, is hardly susceptible of useful comment. As concerns Baker's case, there was one capital issue and one only, for the jury to pass upon. As already intimated, that issue was simply this: Was the narrative of Stromkins and Sowash dealing with the trip of the *Denman II* to Sidney Island on the night of the 15th and the attack on the *Beryl G.*, and the subsequent disposal of the cargo, a fabrication from beginning to end, or was it not? That is to say, was Baker's story of the uneventful crossing to Anacortes the true story? If this issue were found against Baker, that would be the end of the controversy.

First must be noticed the evidence of Clausen, who deposes to a conversation with Baker, in which Baker told him the liquor they were collecting was the cargo of the

Beryl G., which he and his associates had taken by force. The killing was not admitted, Baker's story being that the Gillises had been marooned on one of the islands. But this evidence of Clausen, if believed, was of course, as touching the real issue raised by Baker's defence—as to the attack on the *Beryl G.*, from the *Denman II*—conclusive against Baker. Clausen, of course, was deeply involved with Baker by his association with him in the collection and sale of the cargo after he became aware, according to his own account, that he was dealing with goods procured by acts of robbery and violence. But however justly suspicious one may be that we are not in possession of the whole story of Clausen's relations with Baker, there is no evidence in the juridical sense that Clausen was from the beginning a party to Baker's design (Clausen's loan to Baker proves nothing); and, whatever might have been the position if Baker had been charged with another offence, there is no ground for treating Clausen for our present purpose as an accomplice in the murder.

Clausen's statement is denied by Baker. But Baker, confronted with the necessity of producing an alternative explanation of his expeditions with Clausen and Sowash in the *Dolphin*, gives an explanation of which it is only necessary to say that in itself it is a highly improbable one and destitute of a shred of support from independent sources.

It is in the light of this improbable explanation of Baker's that the corroborative cogency of the admissions of Baker and Sowash must be weighed; and in light of it, the facts already mentioned, the venture as originally conceived, the departure of all the conspirators together on the night of the 15th, the concerted action of all but Stromkins in the recovery of the liquor, the situation of the caches, indicating that they had been selected under stress of emergency, Baker's knowledge of their situation, all tend strongly to confirm the conclusion that the collection of the liquor from these places was only one of the latest steps in execution of a design with which the party set out.

Had Baker not been called as a witness, and had the facts admitted in his own evidence been put in evidence through the testimony of an independent witness, could it have been suggested either that Stromkins or Sowash was an

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uncorroborated witness as against Baker, or even that upon that subject any question could possibly arise? His own admissions were conclusive in a higher degree than the testimony of any other witness could be; and his explanation, given by himself, cannot be said to weaken the case against him. There seems little room for doubt that the accused suffered no substantial wrong because the trial judge did not more elaborately discuss the subject of corroboration with the jury. So also, in face of the admissions of Baker and Sowash, it seems idle to suggest prejudice resulting either from the refusal to postpone the trial or the admission of the memorandum of proposed evidence which got into the hands of the jury.

A question remains, however, which requires careful examination, and that is the question affecting the admissibility of the evidence, adduced in rebuttal, of the witnesses Johnston and Marinoff. It seems impossible to support the admission of this evidence as going to credit alone; the rule is rudimentary that, except in certain well-known classes of cases within which the present case does not fall, a cross-examiner is bound to accept the answers of the witness unless the testimony so given is in itself relevant to one of the issues between the parties. Subject, at all events, to a qualification which seems to be open to question (*Thompson* v. *The King* (1)), namely, that the admission of the testimony in question could be supported on the ground that it tended to corroborate the evidence of Stromkins and Sowash, the point to be considered is whether this evidence was in the legal sense relevant to any issue between the Crown and Baker. The view taken by some of the judges in the court below may, perhaps, be put in this way: The case against Baker, as exhibited in the evidence on behalf of the Crown, was that in concert with the others he attacked the crew of the *Beryl G.*, under the pretence that he and his associates were officers of the law, one of them being disguised in such a way as to present the appearance of a revenue officer, and the party being equipped with and displaying such arms and implements as such officers might be expected to use in dealing with the possessors of a contraband cargo of liquor. Evi-

(1) [1918] A.C. 221, at p. 233.

dence, therefore, of the fact that Baker on one occasion recently, and on another at a considerably earlier date, had employed similar equipment and precisely this ruse for the purpose of deceiving and disarming the opposition of bootleggers while he took over their illegal possessions, was admissible on the same principle as the possession of the ordinary implements of burglary would be admissible to prove a charge implicating the accused in a burglary in which such implements had been used.

This seems at first sight to be open to some criticism. It may be said that the issue was not whether Baker was personally implicated in an act of piracy involving murder, in which such implements and methods were employed, or, in other words, whether Baker was present and took part in an attack on the *Beryl G.* from the *Denman II;* the issue of substance was: Did any such attack take place at all? The evidence establishing that such methods were employed establishes, if accepted, that the crime was committed, as Stromkins and Sowash say it was—and that being established, there could be, as between the Crown and Baker, no substantial issue left. This criticism appears, however, when analyzed, to go to the form in which the view is expressed, rather than to the substance of it. It can be stated in another form, when, as will appear, the criticism seems to miss the mark.

The principle of law to be applied is hardly in doubt, but the most apt statement of it for the present purpose is, I think, to be found in the judgment of Lord Sumner (in which Lord Parker concurred), in *Thompson's Case* (1), in these passages:—

> No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but, sometimes for one reason sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences and sundry species of frauds, such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words,

(1) [1918] A.C. 221, at pp. 232, 233, 235 and 236.

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and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its character, may be better off in regard to admissibility of evidence than a man whose acts are at any rate capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one. Still, so it is * * *

I certainly do not think it could be held that, as a matter of course, even in the case of crimes of this class, the articles found in a man's possession, not as parts of the transaction which is being enquired into, but at a separate time and place, could, as such, be put in evidence against him merely because they were such as criminals possess or use, and in the absence of any circumstance in the crime tending to show specific connection between it and the articles in question. If a man could be convicted of a particular burglary, in which it was clear that no tools had been used at all, merely because at another place and time burglar's impleplements were found on his premises, it is difficult to see what limit could be put to the admissibility of general evidence of bad character, and the fact that evidence of articles found on the premises of accused persons is constantly given without much question, though I doubt not in the vast majority of cases quite rightly, is really only misleading, unless at the same time we ask the question what exactly does this purport to prove and by what probative nexus does it seek to prove it. * * * All lawyers recognize, as part of their professional premises, that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the man*. Laymen are apt to think that the difference, if any, is in favour of admitting the former. There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime.

Was there, then, an issue before the jury in respect of which the impeached testimony was relevant in the sense indicated in these passages in Lord Sumner's judgment? I think there was. At a very early stage the Crown pointedly raised the issue by eliciting from Stromkins evidence indicating that the design with which Baker and his companions became associated was not limited to the comparatively harmless one of picking up unguarded deposits of liquor without resorting to violent measures; but to take such liquor whenever a convenient opportunity arose, and if necessary to employ force and to facilitate success by the stratagem said to have been actually put into effect. Evidence was adduced of Baker's purchase of a cap and, as already mentioned, of his possession of revolvers and a flashlight and handcuffs, and of a significant remark by him on sighting the *Beryl G.* at the mouth of Sooke Har-

bour. It would have been competent to the Crown to call evidence of a practice among criminals of Baker's class to use such implements in the way suggested, as tending to shew that the possession of them was not accidental or innocent. The possession of the implements, especially if so supplemented, would be evidence that the design of the expeditions and of the whole venture on which they were engaged was as the Crown contended. It is within the principle of the observations quoted, and of the decision of this Court in *Brunet* v. *The King* (1), and of that of the Court of Criminal Appeal in *The King* v. *Armstrong* (2), to hold that, as bearing upon the issue thus raised (as to design) it was relevant to shew a similar use of such implements by Baker on a recent occasion—within a month; and such evidence being given, it would appear that evidence of the use of similar implements in a similar way on an earlier occasion, several years before, would be admissible as tending to establish a practice. The existence of such a design would in itself be relevant on the cardinal issue whether, when the party left Cadboro Bay, Baker having these implements with him, they left with the intention of attacking the *Beryl G.* or crossing to Anacortes direct.

An objection was raised concerning the admissibility of a passage in Stromkins' evidence professing to report a remark made by Morris to Stromkins on the *Denman II* immediately after the killing of the Gillises which, perhaps, deserves a word of notice. Morris' remark consisted in the exclamation, "The cold-blooded murderers!" The admissibility of this evidence does not, in view of the circumstances, appear to be open to serious doubt. The learned trial judge was entitled to find, for the purpose of determining the question of admissibility, that the criminal acts of Baker and Sowash, to which Stromkins had testified, were within the scope of the objects of a conspiracy with which Morris was identified, and identified so narrowly as to constitute him the *alter ego* of Baker and Sowash in relation to the incidents of the crime and contemporaneous comments upon them. In point of law, such a comment, uttered in such circumstances by Morris, was, as the learned trial judge was entitled, for that purpose,

(1) [1918] 57 Can. S.C.R. 83. (2) [1922] 2 K.B. 555.

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to find, the comment of the appellants. (*Rex* v. *Brandreth* (1), per Richards L.C.B.)

The appeals should be dismissed.

Appeal dismissed.

Solicitors for the appellant Baker: *Moresby, O'Reilly & Lowe.*

Solicitor for the appellant Sowash: *R. D. Harvey.*

Solicitor for the respondent: *W. D. Carter.*

(1) 32 How. St. T., at 857.