1943

*March 9.
*April 2.

ALEXANDER GACH ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Evidence—Statements by accused to police officers before charge or arrest made—Admissibility.

The appeal was from the affirmance by the Court of Appeal for Manitoba (two Judges dissenting) of appellant's conviction of having unlawfully received gasoline ration books, knowing them to have been stolen. Two police officers, bearers of a search warrant, had gone to appellant's home (before any charge or arrest was made) and talked to him, one of them, H., stating that "it would be better" for appellant to return the books. At the end of their visit they told appellant that he was to accompany them to the police barracks to talk to A., a police inspector, who, on their arrival, talked to and questioned appellant. Later some gasoline ration books were received by the police from some person through the mail. At the trial, evidence was given by the police officers of statements by appellant in the aforesaid interviews, the evidence of A. in this respect being that mainly relied on by the magistrate in convicting appellant. No ration books had been found on appellant or in his home, nor was he identified at the trial as one to whom stolen ration books had been sold or delivered.

Held: The conviction should be quashed.

Per the Chief Justice and Kerwin J.: Evidence of statements by appellant to A. (and also of statements by appellant to H., if they occurred after H.'s said statement) were inadmissible, as having been made under fear of prejudice or hope of advantage exercised or held out by a person in authority (*Ibrahim* v. *The King,* [1914] A.C. 599, at 609; *Sankey* v. *The King,* [1927] S.C.R. 436, at 440). On the record it must be held that there was no evidence that appellant ever had the books or that the books sent through the mail were some of those that had been stolen.

Per Rinfret, Hudson and Taschereau JJ.: Before being questioned by said officers, who were persons in authority, appellant should have been warned, and the burden was upon the Crown to show that the proper warning was given. Though not yet arrested, appellant was practically in custody. Physical custody was not necessary, under the circumstances, to make inadmissible the evidence of appellant's statements made under questioning without the proper caution having been given; the same rule should apply as when a person has been arrested, because the reasons that justify the rule in that case are equally applicable when the suspect is threatened with being charged with the commission of a crime. Principles stated in *Rex* v. *Knight and Thayre,* 20 Cox's Cr. C. 711, at 713; *Lewis* v. *Harris,* 24 Cox's Cr. C. 66, and *Rex* v. *Crowe and Myerscough,* 81 J.P. 288, should govern the present case. The appeal should, therefore, be allowed, and, as there was no evidence left to substantiate the charge, the conviction should be quashed and appellant acquitted.

*PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

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THE KING.

APPEAL from the judgment of the Court of Appeal for Manitoba (Prendergast, C.J.M., Dennistoun, Trueman, Robson and Richards, JJ.A.) dismissing (Dennistoun and Robson, JJ.A., dissenting, on grounds which are set out in the judgment of Taschereau J. *infra*) an appeal from the appellant's conviction by a police magistrate of having unlawfully received eleven gasoline ration books which had theretofore been stolen, knowing the same to have been stolen.

The reasons for judgment in this Court now reported deal mainly with the question as to admissibility in evidence of statements made by appellant in certain interviews between police officers and him. These interviews took place on August 7, 1942. The charge was laid on September 16, 1942.

A. R. Micay for the appellant.

E. J. Thomas for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The appellant was tried before the Police Magistrate at Winnipeg on a charge of having "unlawfully received eleven gasoline ration books of the value of $5.50, the property of His Majesty the King, which had theretofore been stolen, he then well knowing the same to have been stolen." He was found guilty mainly on the strength of the evidence of Inspector Anthony of the Royal Canadian Mounted Police as to what occurred in an interview between Anthony and the appellant.

No reference is made in the magistrate's reasons for conviction to what had previously transpired when two other officers had visited the appellant at the latter's house. I find it impossible on the transcript of the evidence to decide whether that part of the evidence of one of these officers, Hannah:—"I then talked to him and tried to get him to return them to me voluntary, saying I thought it would be better for him to do so", refers to a time before or after, when, according to the other officer, Lyssey, the appellant said in the presence of the two officers:—"What if I have them; it is his word against mine: he brought them here anyway",—the "his" and "he" referring to one

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Nagurski who had been convicted of stealing ration books but who declined, in the witness box, to identify the appellant as the person to whom he had sold them. If Hannah's statement to the appellant, which included the phrase, "I thought it would be better for him to do so", occurred prior to the appellant's statement which included the sentence, "he brought them here anyway", it would clearly vitiate the latter as having been made under fear of prejudice or hope of advantage exercised or held out by a person in authority. *Ibrahim* v. *The King* (1), *Sankey* v. *The King* (2). If the magistrate had found that Hannah's statement had been made later and that what otherwise transpired between the appellant and the two officers had not brought the case within the rule, I would not be disposed to interfere, as Gach had not been arrested.

As I have already mentioned, the magistrate proceeded mainly on the evidence of Anthony, and this evidence was clearly inadmissible as it referred to a conversation that occurred after the appellant had been told by Hannah "it would be better for him to do so". The appeal should therefore be allowed, but in order to decide what order should be made, I have examined all the evidence in detail. It has already been noted that Nagurski did not identify the appellant. No ration books were found on the latter or in his house. Eight ration books were returned through the mail, each in a separate envelope. In the unsatisfactory state of the record, I have come to the conclusion that there was no evidence that the appellant ever had the books or that the books sent through the mail were some of those that had been stolen.

I would allow the appeal and quash the conviction.

The judgment of Rinfret, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—On the 16th of September, 1942, in the City of Winnipeg, the appellant was charged of having "unlawfully received eleven gasoline ration books of the value of $5.50, the property of His Majesty the King, which had theretofore been stolen, he then well knowing the same to have been stolen."

(1) [1914] A. C. 599, at 609. (2) [1927] S. C. R. 436, at 440.

The appellant was convicted, sentenced to three months' imprisonment, and the Manitoba Court of Appeal confirmed this conviction, Mr. Justice Dennistoun and Mr. Justice Robson dissenting.

The dissenting Judges based their dissent on five grounds:—

1. There was no sufficient evidence that Gach was the man with whom Nagurski dealt for the purchase of the gasoline ration books.

2. Nagurski's testimony needed both support and corroboration—both of which were lacking.

3. The statements of accused to the police officers were procured
   (1) without previous warning or caution, and
   (2) by inducement that it would be better for accused, etc.

Wherefore, admission of this evidence was improper.

4. That the statements alleged by accused to the police were not admissions of crime.

5. That there was no evidence that accused had the books and the police testimony as to receipt of certain books through the post was improperly admitted.

The evidence at the trial was very short. The first witness, one Edward Nagurski, admitted having stolen ration books, which he sold for $17.00. When asked in cross-examination if he could identify the accused, his answer was: "No, I am not certain."

All the other witnesses, Nicholas Lyssey, Clarence Hannah, Melville Anthony, are members of the Royal Canadian Mounted Police. Lyssey and Hannah, bearers of a search warrant, called at the residence of the appellant. They informed him that Nagurski had made a statement to the effect that he had sold to the appellant eleven gas ration coupon books for $17.00, and proceeded to question him. They told him that he "could be prosecuted", and that "in any event it would be better for him to hand them over." At the end of the conversation they informed the accused "that he was to accompany them to the barracks" to talk to Inspector Anthony.

Inspector Anthony repeated to the appellant "that as far as he was concerned he might in any event be charged" and "that he would be charged in all probability."

In answer to these various questions, the appellant said: "What if I have them, it is his word against mine; he brought them here anyway". He added: "I have not any gasoline ration books, what is this all about?" "My

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mother just died last night, and I do not know where I am at." "You have advised me that I would be charged, so if I returned them, I would not have any chance."

Anthony also says in his evidence:—

> I agreed he was perfectly right, and he asked how the books could be returned, and I told him it was up to himself. If he had them that he could hand them into me, or I said there is a good postal service in Winnipeg, and he wanted to go. It was his mother's funeral, and I let him go. On the eighth of August I received from the Post Office eight ration books enclosed in airmail envelopes, addressed R C M P Winnipeg.

I think that this appeal should be allowed.

Before being questioned by these officers who were persons in authority, the appellant should have been warned. It is true, that at that time he was not arrested yet, but he was practically in custody.

As Darling, J. says in *Booth and Jones* (1):—

> I say "practically" because physical custody is not necessary to make such evidence inadmissible.

Moreover, the presence of these officers with a search warrant, in the house of the appellant, his transfer to the barracks to be questioned by Inspector Anthony, the suggestion that it would be "better for him to talk and give the coupons back" created an atmosphere prejudicial to the appellant.

There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given. This rule which is found in Canadian and British Law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

I believe that under the circumstances of this case, the same rule must apply—for the reasons that justify it in the case of an accused person, are equally applicable when the suspect is threatened of being charged with the commission of a crime.

The appellant should not have been questioned unless properly warned, and the burden was upon the Crown to show that such warning has been given. *The Queen* v. *Thompson* (2).

(1) (1910) 5 Criminal Appeal Reports 177, at 180.

(2) [1893] 2 Q.B. 12.

In *Rex* v. *Knight and Thayre* (1), Channell, J. says:—

It is, I think, clear that a police officer, or any one whose duty it is to inquire into alleged offences, as this witness here, may question persons likely to be able to give him information, and that, whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken any one into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so.

In *Lewis* v. *Harris* (2), it was held by the King's Bench Division:—

A statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable, provided that the person was not at the time in custody on the charge, that the constable on making the inquiry had not formed the intention of instituting proceedings whatever the answer might be, and that no inducement was held out or threat made to induce such person to make the statement.

And in *Rex* v. *Crowe and Myerscough* in the Central Criminal court (3), it was held by Sankey, J.:—

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.

I believe that these principles should govern this case, and I therefore come to the conclusion that the evidence of the three officers was improperly admitted.

The appeal should, therefore, be allowed, and, as there is no evidence left to substantiate the charge, the conviction should be quashed and the accused acquitted.

Appeal allowed and conviction quashed.

Solicitors for the appellant: *McMurray, Greschuk, Walsh, Micay & Molloy.*

Solicitor for the respondent: *John Allen.*

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(1) (1905) 20 Cox's Criminal Cases 711, at 713.

(2) (1913) 24 Cox's Criminal Cases 66.

(3) (1917) Vol. 81, Justice of the Peace, p. 288.