1947

*Mar. 13
*Apr. 28

E. S. WHITE APPELLANT;

AND

HIS MAJESTY THE KING RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Offence of indecent assault—Judge sitting without a jury—Self-misdirection—Judge's report—No finding as to statements by complainant or accused—Acquittal based on evidence of a witness—Reversal of acquittal by court of appeal—New trial—Evidence—Witnesses—Credibility of—Application by court of appeal of section 1014(2) Cr. C.—"No substantial wrong or miscarriage of justice"—Reasonable doubt as to guilt of accused—Whether verdict be the same if proper self-direction by trial judge—Sections 1013(4), 1013(5) and 1014(2) Cr. C.*

The appellant was charged with the offence of indecent assault upon C, alleged to have taken place at a dental clinic while C was under examination. Complete discrepancy is disclosed between the testimony of the complainant and that of the accused. A witness, B, working in the clinic, gave evidence that he passed the open door of the room upon two occasions, without stating the time and the intervals of time between them, and that he had noticed that the accused was then writing at a table. The magistrate acquitted the accused, and, in his judgment, said that the case was one to be decided entirely on the credibility of the witnesses, that there should be a conviction or a dismissal of the charge whether the evidence of the complainant or that of the accused was accepted; and he added that, if the

*Present:—Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

evidence of B was accepted, "there must be a dismissal of the charge," stating later that he was "bound in law to accept his evidence". The Court of Appeal allowed the appeal of the Crown and directed that the accused be retried upon the same charge. Upon an appeal by the accused to this Court,

*Held* that the judgment appealed from should be affirmed.

*Per* the Chief Justice and Kellock and Estey JJ.:—The evidence of B does not go so far as to contradict the evidence of the complainant nor corroborate the evidence of the accused upon the points that are material to the determination of the issue; and, even if B's evidence was believed, it was still necessary for the magistrate to consider all the evidence and the credibility and the weight to be given to the statements made by the respective witnesses. The magistrate has not considered the evidence upon any such basis, but rather has founded his decision upon a misdirection that if B's evidence was believed "there must be a dismissal." Comments as to the issue of credibility of witnesses.

*Per* Kerwin J.:—The proposition upon which the magistrate proceeded cannot be supported: he does not state whether he believed the evidence of the complainant or of the accused, and, in proceeding to discuss the evidence of B apart from that of the complainant and accused, he failed to perform the responsibility resting upon him.

The appellant also contended that, under s. 1014(2) Cr. C., the Court of Appeal should have dismissed the appeal by the Crown, as "no substantial wrong or miscarriage of justice has actually occurred".

*Per* the Chief Justice and Kellock and Estey JJ.:—The appellate court, when there has been no decision arrived at upon a consideration of the evidence, particularly in a case where the evidence is so restricted to a few facts and where any adjudication must depend so largely upon the credibility and the weight to be given to the evidence of the respective parties, is unable to conclude that, under s. 1014(2) Cr. C., "no substantial wrong or miscarriage of justice has actually occurred."

*Per* Kerwin J.:—The appellant's claim should be dismissed. Effect must be given to the will of Parliament in permitting appeals by the Crown from acquittals (s. 1013(4) Cr. C.) and to the provisions of s. 1014(2) Cr. C. by which, according to s. 1013(5) Cr. C., the powers of a court of appeal are, *mutatis mutandis*, to be similar to the powers given by the former. Applying those provisions to this case, the proper rule to be followed by the Court of Appeal was that the onus was on the Crown to satisfy the Court that the verdict would not necessarily have been the same if the magistrate had properly directed himself. But, without in any way weakening the salutary rule that an accused is entitled to the benefit of a doubt as to his guilt, when a court of appeal has to apply the provisions of s. 1014(2) Cr. C., it must be concluded in the present case that the magistrate would not necessarily have acquitted the appellant if he had given himself the proper direction.

*Rex* v. *Covert* (28 C.C.C. 25), *Rex* v. *Bourgeois* (69 C.C.C. 120), *Rex* v. *Probe* (79 C.C.C. 289) and *Rex* v. *O'Leary* (80 C.C.C. 327) discussed.

1947

WHITE v. THE KING

APPEAL by the accused from the judgment of the Court of Appeal for Ontario, allowing an appeal by the Attorney General for Ontario against the acquittal by Magistrate James B. Garvin on a charge of indecent assault and directing that the accused be retried upon the same charge.

*G. Arthur Martin K.C.* for the appellant.

*W. B. Common K.C.* for the respondent.

The judgment of the Chief Justice and of Kellock and Estey JJ. was delivered by

ESTEY J.—The magistrate found the accused not guilty of the offence of indecent assault. The facts material to the offence were deposed to by the complainant and contradicted by the accused. The complainant stated that the offence took place at a dental clinic while she was under an examination by the accused, a qualified dentist in the Dental Corps. A witness Black gave evidence that he was at the time working in the same clinic and that upon two occasions he passed the room where he saw the complainant and the accused. The door of the room was open and upon each occasion he noticed that the accused was writing at a table. Just when or at what intervals of time he passed the room is not disclosed, nor does the evidence disclose either the plan or size of the clinic.

At the conclusion of the hearing the magistrate reserved judgment and later acquitted the accused, his judgment reading in part as follows:

> The case is one that must be decided entirely on the credibility of the witnesses. If the evidence of the complainant is accepted, there must be a conviction. On the other hand, if the evidence of the accused is accepted, there must be a dismissal of the charge. Also, in my judgment, if the evidence of the witness Black is accepted, there must be a dismissal.

An examination of the evidence of the witness Black, while relevant in determining the credibility of both the complainant and the accused, is upon the main issue restricted to his observations upon two occasions as he passed the door. It does not go so far as to contradict the evidence of the complainant nor corroborate the evidence of the accused upon the points that are material

to the determination of the issue. If therefore Black's evidence was believed, it was still necessary for the magistrate to consider all of the evidence, the credibility and the weight to be given to the statements made by the respective witnesses and to determine whether the accused was guilty or not guilty.

It is clear that the magistrate has not considered the evidence upon any such basis but rather has founded his decision upon a misdirection that if Black's evidence was believed "there must be a dismissal."

The appellate court, when there has been no decision arrived at upon a consideration of the evidence, particularly in a case where the evidence is so restricted to a few facts and where any adjudication must depend so largely upon the credibility and the weight to be given to the evidence of the respective parties, is unable to conclude that under section 1014(2) Cr. C. "no substantial wrong or miscarriage of justice has actually occurred."

It would appear also that the magistrate misdirected himself relative to the determination of Black's credibility. He stated:

> In my judgment the evidence of Black substantially meets all the above tests and I feel that I am bound in law to accept his evidence.

He based his statement upon *Rex* v. *Covert* (1). In that case the accused was charged that he did unlawfully keep intoxicating liquor in a place other than a dwelling house. The prosecution adduced evidence that the accused had upon his premises a bar or a counter and was in possession of intoxicating liquor and then relied upon the statutory provision that placed upon the accused the burden of proving that he had not committed the offence. The accused in giving his evidence gave an explanation which, if believed, discharged the statutory burden placed upon him and entitled him to an acquittal. Notwithstanding this and apparently without indicating a reason therefor the magistrate found the accused guilty. Mr. Justice Beck, with whom the majority of the court concurred, condemned the decision which he described as made "arbitrarily and in disregard of the evidence." When the learned judge stated: "It cannot be said without limitation that a judge

(1) (1916) 28 C.C.C. 25.

1947
WHITE
v.
THE KING
Estey J.

can refuse to accept evidence," he no doubt had in mind the failure on the part of the magistrate to act judicially rather than arbitrarily. Certainly the tests he suggests do not deprive the magistrate of any of his powers but would rather seem to emphasize that he discharge his duty and not only determine the question of credibility but indicate that he has done so.

The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law and, in so far as the language of Mr. Justice Beck may be so construed, it cannot be supported upon the authorities. Anglin J. (later Chief Justice) in speaking of credibility stated:

> by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence. *Reymond* v. *Township of Bosanquet* (1).

The foregoing is a general statement and does not purport to be exhaustive. Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

The judgment of the appellate court directing a new trial should be affirmed and the appeal dismissed.

KERWIN J.—The appellant was acquitted by a magistrate of a charge that he did unlawfully indecently assault one Emily Cumming, a female, contrary to section 292

(1) (1919) 59 Can. S.C.R. 452, at 460.

of the Criminal Code. The Attorney General of Ontario appealed to the Court of Appeal for that province against the acquittal on the grounds that the magistrate misdirected himself in stating that he was bound in law to accept the evidence of one Black, a witness at the trial, and that the magistrate was wrong in coming to the conclusion that he could exercise no discretion in weighing the credibility of that evidence. The Court of Appeal allowed the appeal and directed that the accused be retried upon the same charge.

In giving judgment, the magistrate said:

> The case is one that must be decided entirely on the credibility of the witnesses. If the evidence of the complainant is accepted, there must be a conviction. On the other hand, if the evidence of the accused is accepted, there must be a dismissal of the charge. Also, in my judgment, if the evidence of the witness Black is accepted, there must be a dismissal.

After stating that Black was to some extent an independent witness and that if his evidence was to be accepted, he, the magistrate, did not see how there could be a conviction, he continued:

> I think the evidence of Black should be examined having regard to the principle of law laid down in *Rex* v. *Covert* (1).

This was a judgment of Beck J. on behalf of the majority in the Appellate Division of the Supreme Court of Alberta and the magistrate quoted therefrom the following paragraphs:

> We are bound to presume the accused was innocent, until proved guilty; he gave all the available evidence and that evidence, if true, explained away the inference or presumption against him.
>
> It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused, and that it was open to him to do so; but in my opinion it cannot be said without limitation that a judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:
>
> (1) That the statements of the witness are not in themselves improbable or unreasonable;
>
> (2) That there is no contradiction of them;
>
> (3) That the credibility of the witness has not been attacked by evidence against his character;
>
> (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
>
> (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

(1) (1916) 28 C.C.C. 25.

1947

WHITE
v.
THE KING

Kerwin J.

To permit a trial judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence.

The *Covert* case (1) arose in connection with an application by way of *certiorari* to quash a summary conviction under the *Liquor Act* of Alberta and was decided before the judgment of the Judicial Committee in *Rex* v. *Nat Bell Liquors Limited* (2). There a number of judgments in various courts were overruled and it was decided that a conviction by a magistrate for a non-indictable offence could not be quashed on *certiorari* on the ground that the depositions show that there was no evidence to support the conviction. The *Covert* case (1) is mentioned at page 141 of the report.

What the Court of Appeal had before it in the present case was an appeal and the proposition upon which the magistrate proceeded cannot be supported. Nowhere does he say whether he believed the evidence of the complainant or of the accused, and to proceed to discuss the evidence of Black apart from that of the complainant and accused is really to shirk the responsibility resting upon him. Unless, therefore, there is some other valid ground of attack, the order of the Court of Appeal ordering a new trial cannot be impugned.

It was contended, however, that, under subsection 2 of section 1014 of the Criminal Code, the Court of Appeal should have dismissed the appeal. This subsection reads:

> 2. The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

We do not know if the point was argued nor, since no written reasons were delivered, whether it was considered, in the Court of Appeal. The test in applying subsection 2 in the case of an appeal by an accused from a conviction is well known and was reiterated in this Court in *Schmidt* v. *The King* (3). But it is said that on an appeal by an Attorney General from an acquittal a different rule is to be followed and reliance is placed upon two decisions in

(1) (1916) 28 C.C.C. 25.
(2) [1922] 2 A.C. 128.
(3) [1945] S.C.R. 438.

the Saskatchewan Court of Appeal, *Rex* v. *Bourgeois* (1), and *Rex* v. *Probe* (2). The effect of these decisions is that upon an appeal by an Attorney General from an acquittal, even if substantial error has been shown, the Court should not grant a new trial where doubt could be entertained by the tribunal of fact as to the guilt of the accused. This conclusion was based upon a consideration of the rule that the accused is entitled to the benefit of a doubt as to his guilt. While not referred to on the argument of this appeal, it was decided in *Rex* v. *O'Leary* (3), by the British Columbia Court of Appeal, that when the appellate court was satisfied from the report of the magistrate that he would have convicted in the particular case without corroboration of an accomplice, no substantial wrong or miscarriage of justice had actually occurred because, even if the trial judge had not misdirected himself, he must have reached the same conclusion as he actually did.

The first two cases, of course, go much further than the last, and the reasoning upon which they proceeded cannot be justified. The dissenting opinion of Martin J., now Chief Justice of Saskatchewan, in the first case is to be preferred. As he points out, Chief Justice Anglin, speaking for this Court in *Belyea* v. *The King* (4), refers to subsection 5 of section 1013 of the Criminal Code as enacted in 1930 by which the procedure upon an appeal by an Attorney General and the powers of the Court of Appeal shall *mutatis mutandis,* and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections 1012 to 1021 Cr. C. inclusive. Chief Justice Anglin stated

> that the effect of the words *"mutatis mutandis"* is that clause (*a*) (of subsection 3 of section 1014 Cr. C.) must be made to read, on an appeal (by an Attorney General) being allowed, to
>
> (*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered.

That in fact was what was done in the *Belyea* case (4).

The point with which we are concerned under subsection 2 of section 1014 Cr. C. was apparently not argued in

(1) (1937) 69 C.C.C. 120.
(2) (1943) 79 C.C.C. 289.
(3) (1943) 80 C.C.C. 327.
(4) [1932] S.C.R. 279, at 297.

1947

WHITE
v.
THE KING

Kerwin J.

*Pitre* v. *The King* (1), so that the remarks at the end of the judgment of Smith J. may properly be considered as *obiter dicta* but to give to this subsection the meaning ascribed in the judgments in Saskatchewan where a court of appeal has before it an appeal by the Attorney General from a conviction would be to permit an appellate court to encroach upon the field of the tribunal of fact. Without in any way weakening the salutary rule that an accused is entitled to the benefit of a doubt as to his guilt, effect must be given to the will of Parliament in permitting appeals from acquittals and to the provisions of subsection 2 of section 1014 Cr. C. by which, according to the terms of subsection 5 of section 1013 Cr. C., the powers of a court of appeal are *mutatis mutandis* and so far as the same are applicable to appeals upon a question of law alone, to be similar to the powers given by the former. Applying those provisions to the present case, the proper rule to be followed by the Court of Appeal was that the onus was on the Crown to satisfy the Court that the verdict would not necessarily have been the same if the magistrate had properly directed himself. No doubt there will be circumstances such as arose in *Rex* v. *O'Leary* (2) where not only that cannot be shown but the opposite is true, but that situation does not arise here. In the present case it must be concluded that the magistrate would not necessarily have acquitted the appellant if he had given himself the proper direction.

The appeal should be dismissed.

TASCHEREAU J.:—I am of opinion that this appeal should be dismissed.

*Appeal dismissed.*

---

(1) [1933] S.C.R. 69.

(2) (1943) 80 C.C.C. 327.