1945

*Feb. 9, 12, 13
*Feb. 20

WILLIAM SCHMIDT..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial—Evidence—Appeal from affirmance by court of appeal of conviction for murder—Appellant and others jointly indicted and tried together—Written confessions by other accused admitted in evidence—Sufficiency and timeliness of warning by trial Judge to jury that confession put in is evidence only against person making it—Defining "murder" to the jury—Criminal Code, s. 259 (a) (b)—Criminal Code, s. 69 (2) (several persons forming common intention to prosecute unlawful purpose, etc.)—Inapt illustration to jury—Application of the law to the evidence—No substantial wrong or miscarriage of justice (Criminal Code, s. 1014 (2)).

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming (Laidlaw J.A. dissenting) the conviction of appellant on a charge of murder. The appeal to this Court was dismissed.

C. L. Yoerger for the appellant.

C. L. Snyder K.C. and *N. L. Croome* for the Attorney General of Ontario.

The judgment of the Court was delivered by

KERWIN J.—William Schmidt appeals against the affirmance of his conviction for murder by the Court of Appeal for Ontario based on the dissenting opinion of Mr. Justice Laidlaw. By section 1023 of the *Criminal Code* our jurisdiction is limited to any question of law expressed in such dissent.

Schmidt was jointly indicted and tried, together with three other persons. Two of the latter (as well as the accused) had made written confessions which, after the usual inquiry by the trial judge, were admitted in evidence. Mr. Justice Laidlaw's first matter of dissent is that the trial judge "ought to have warned the jury immediately each statement was admitted, to not pay any attention or give any weight whatsoever to that evidence except as against the person who made the

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau, Rand, Kellock and Estey JJ.

(1) [1945] 1 D.L.R. 136; 82 Can. Cr. C. 296.

statement." This is an advisable practice but there is no such absolute rule. A trial judge, during the course of the trial of two or more persons jointly indicted and tried, must make it clear to the jury that a statement by one of the accused is evidence only against him. This, as will appear, the trial judge did in the present case.

It is doubtful if Mr. Justice Laidlaw was of the opinion that, although no application for a separate trial was made, one should have been directed by the trial judge *proprio motu* at some late stage of the trial, but certainly he was of opinion that there was "a prejudice and substantial injustice" to Schmidt. The trial judge, of course, exercised no discretion because he was not asked to do so. Assuming that when that occurs a Court of Appeal may set aside a conviction and direct a separate trial if it is of the opinion that an appellant has not had a fair trial, and assuming that a dissent on a matter of that kind is a question of law, this is not a case where such an order is warranted. The record discloses that, after the trial judge had passed upon the admissibility of the confessions and they were about to be placed in evidence before the jury, the following occurred:—

Mr. FITCH [who was counsel for Schmidt]: My Lord, I would suggest that it should be made perfectly plain that these statements made by Tillonen and Tony [meaning Anthony Skrypnyk] are evidence as against them and not against Schmidt.

His LORDSHIP: The jury will so be instructed, Mr. Fitch.

Mr. FITCH: I mean, it is going in as if it was evidence against all the defendants, when it is not.

His LORDSHIP: Quite right.

On three occasions in his charge, the trial judge referred to this matter as follows:—

I should tell you further, as has been mentioned by some of the defence counsel in addressing the jury, that the statement made by each of the accused is only evidence against that accused. Whatever he may have said in that statement against the other accused, it is not evidence against such other. In dealing with those statements I trust that you will keep that in mind.

* * *

Now, Anthony Skrypnyk made a statement. As I said before, these statements are only evidence against the person making them.

* * *

Tillonen also made a statement, only evidence against himself.

We are unable to agree in Mr. Justice Laidlaw's description of these references as "meagre" or that the appellant did not have a fair trial.

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Kerwin J.

The next matter of dissent is that "the learned trial judge did not properly define 'murder' as applicable to the case against the appellant Schmidt." While the trial judge did not read section 259 of the *Code* to the jury, it is plain that he did refer to the necessary elements of the crime of murder in the only applicable paragraphs thereof, (*a*) and (*b*). The other relevant sections were read to the jury but it is said the illustrations of the application of subsection 2 of section 69, given by the trial judge, were misleading. We agree that they were not apt as regards the case made against Schmidt under that subsection. It is true that later in his charge the trial judge stated the law correctly but he did not apply the law to the evidence as fully as he might have done. However, on the whole of the record, we agree with the majority of the Court of Appeal that within the meaning of subsection 2 of section 1014 no substantial wrong or miscarriage of justice has occurred.

The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King* (1), from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted. The principles therein set forth do not differ from the rules set forth in a recent decision of the House of Lords in *Stirland* v. *Director of Public Prosecutions* (2), i.e., that the proviso that the Court of Appeal may dismiss the appeal

> 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.

In this case a reasonable jury on a proper direction would have undoubtedly convicted Schmidt and the appeal is therefore dismissed.

Appeal dismissed.

Solicitor for the appellant: *C. R. Fitch.*

Solicitor for the respondent: *C. P. Hope.*

(1) [1926] S.C.R. 539. (2) [1944] A.C. 315.