HIS MAJESTY THE KING.....APPELLANT;

AND

CHRIS. SCHMIDT.....RESPONDENT.

1948

*June 10
*June 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Incest—Brother and sister—Trial by jury—Evidence of consanguinity—Admissions by accused—Hearsay—Criminal Code section 204.

The accused was found guilty on a charge of having committed incest with his sister. At the trial, the proof of consanguinity was based mostly on two letters which the complainant said she had received

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

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from the accused, in one of which he addressed her as "Sis." and the other in which he had signed "Brot. Chris. Smith." The Court of Appeal quashed the conviction on the ground that there was no evidence as to the relationship between the accused and the complainant.

Held: A person accused of incest may admit the relationship and the jury was entitled to treat both letters as admissions against him and to say that a blood relationship was meant by the expressions used.

APPEAL from the judgment of the Court of Appeal for Ontario, (1) quashing (Roach J.A. dissenting) the conviction of the respondent on a charge of incest with his sister, contrary to section 204 of the Criminal Code.

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

W. B. Common, K.C. for the appellant.

H. W. Allen for the respondent.

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

KERWIN J.:—The accused was found guilty on a charge that he, well-knowing the complainant Elsie Schmidt to be his sister, did unlawfully commit incest with her contrary to section 204 of the Criminal Code. Subsection 1 thereof, so far as applicable, provides:— ". . . every brother and sister, . . . who cohabit or have sexual intercourse with each other shall each of them, if aware of their consanguinity, be deemed to have committed incest". By subsection 2 "brother" and "sister", respectively, include half-brother and half-sister. The Court of Appeal for Ontario (1) quashed the conviction, Roach, J.A., dissenting. The two points upon which there is a difference of opinion in that Court are: First, whether there was an admission by the accused of the alleged relationship between him and Elsie Schmidt and, second, even if that be so, whether that admission was evidence upon which the jury might convict. These are the sole points for determination in this appeal.

What is relied upon as admissions appears in two letters written by the accused. The first is dated July 15, 1947, and written from some place in Saskatchewan to Elsie,

(1) [1948] 2 D.L.R. 826.

commencing "Dear Sis" and signed "Chris". The second is dated August 6th, 1947, on the letter-head of the Waterloo County gaol where the accused was at the time incarcerated, having been charged with the crime of which he was subsequently convicted. This letter is addressed "Dear Elsie" and is signed "Brot. Chris Smith". No point is made as to the surname, either "Schmidt" or "Smith" apparently having been used indiscriminately. The majority of the Court of Appeal (1) were willing to assume that the abbreviation "Brot" meant brother but were of opinion that there was no evidence to show in what sense that term and "Dear Sis" were used. Mr. Justice Aylesworth, speaking for himself and Mr. Justice Henderson, put the matter thus:

> "Sister" and particularly "sis or "Brot" (if by the latter is meant brother) are not terms by any means restricted to use between blood relatives. These expressions land themselves with equal facility to many other relationships for example, an adopted child, or a child merely taken into a family and raised therein as a family member, readily turns to their use.

Mr. Justice Roach was of opinion that in view of the background, to which reference will be made later, the jury were entitled to accept these terms as evidence of a blood relationship between the two.

On the second point the majority of the Court of Appeal (1) took the view that if the accused believed he was a brother of the complainant, there was nothing to show that such a belief was founded on anything except hearsay. On the other hand, the dissenting judge believed that what was written by the accused was an admission entitled to be relied upon in the same way, although not necessarily with the same force, as if the accused, while in the witness box and while denying the act of intercourse, had under oath stated that he and Elsie were brother and sister.

The two points may conveniently be considered together. The background referred to by Mr. Justice Roach appears in his reasons and in those of Mr. Justice Aylesworth. What follows is taken from the latter:—

> The complainant, Elsie Schmidt, testified that accused was twenty years her senior and her eldest brother; that neither of the parents (Sophie and Phillip Smith) had "remarried"; that accused was not at home very much; that she saw him for the first time when she was at the home in Saskatchewan and six years of age and for the second time, again in the home, in 1942 when she was twelve or thirteen years of age; that he

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returned about September, 1944, some two weeks before she left to attend school in Alberta; that he came again to the home in the spring of 1946 and stayed there until July 1947 when she came to her sister in Kitchener; that the accused came to Kitchener where the offence is alleged to have taken place.

Martha Doherty gave evidence that she was the sister of the complainant and of the accused; that she was sixteen years younger than accused; that she lived at home with her parents in Saskatchewan until 1942 and that up to that time she and all of her sisters and brothers except the accused, (that is to say, Martha, George, Olga and Elsie) lived at home; that the first time she remembered the accused coming to the home she was about ten years of age and that thereafter he was home "off and on" for two or three months at a time; that "our parents told us he was our brother" and "we always felt towards him like he was our brother"; that the attitude of the parents was the same towards the accused as to "The rest of us" that neither of the parents had married "previously"; that all of the children were children of the same parents; that her parents came from Russia and that the accused was born in Russia.

Ordinarily an admission of a fact made by a party is evidence against him of that fact. The statement in section 1053 of the third edition of Wigmore on Evidence that admissions are not subject to the rule for testimonial qualifications of personal knowledge is borne out by the decision, referred to by the author, of the Court of Appeal of Alberta in *Stowe* v. *Grand Trunk Pacific Railway Co.* (1), affirmed in this Court (2). In such a case as this there is no reason why a statement by the accused of his relationship with the complainant is not evidence any more than if he had stated it in the witness box, as referred to by Roach, J. Certainly the accused could have pleaded guilty to the charge and in principle and logic I can find no reason for saying that an admission out of Court is not admissible and relevant evidence. In Evan Jones (3) the Court of Criminal Appeal in England decided that an admission, in writing, of a person charged with incest with his daughter was sufficient to prove the relationship. In argument before us stress was laid on the fact that in that case the accused in his notice of appeal at first asked for leave to appeal against sentence only. That, however, could have had no effect upon the question as to whether at the time of the trial the father's evidence, which was the only evidence, was sufficient to permit the case to go to the jury. The decision of the British Columbia Court of Appeal in The *King* v. *Smith* (4), where the only evidence as to the

(1) [1918] 39 D.L.R. 127.
(2) [1919] 59 S.C.R. 665.
(3) [1932] 24 Cr. A.R. 55.
(4) [1908] 13 C. Cr. C. 403.

relationship of parent and child in a case of incest was that of the girl, herself, aged eleven years, must be taken as a decision that in the particular circumstances of that case, the Judge in the County Court Judge's Criminal Court was right when he decided that there was not sufficient proof of relationship.

It should be held that a person accused of this offence may admit the relationship. It is suggested that there are reasons why an admission might be taken from a father that would not operate in the case of brother and sister but circumstances may be imagined where some objection might in theory be raised even as to the evidence of the mother who at the time of confinement was in a large hospital. While the guilt of an accused must be proved beyond reasonable doubt, juries are properly charged not to let fanciful ideas take possession of their minds in coming to a conclusion as to whether that onus has been satisfied. With respect, that remark applies to the suggestion in the present case that the terms "Dear Sis" and "Brot" might have been used by the accused even if no blood relationship existed.

In the light of all the circumstances detailed above, the jury were entitled to say that a blood relationship was meant by the expressions used, and the charge of the trial judge being unobjectionable, the appeal should be allowed. However, as other questions were raised by the accused before the Court of Appeal, the proper order is that the case should be remitted to that Court for further consideration as was done in *The King* v. *Boak* (1) and *The King* v. *Duer* (2).

The judgment of Taschereau, Rand and Kellock JJ. was delivered by

KELLOCK J.:—The point of dissent upon which this appeal comes to us is that in the view of the majority there was no evidence as to the relationship between the accused and the complainant, while the view of Roach, J.A., dissenting, was that there was both oral and written evidence upon which the jury properly convicted.

The complainant and her sister, Martha, called on behalf of the Crown, testified in the first place to treatment of

(1) [1925] S.C.R. 525. (2) [1944] S.C.R. 435.

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the accused as a member of the family and the sister testified also to statements made to her by her parents that the accused was their brother. In the third place, there were the two letters which the complainant said she had received from the accused, in one of which he had addressed her as "Sis" and the other in which he had signed "Brot. Chris. Smith".

Dealing first with the letters, I think the abbreviation "Brot." is to be interpreted as having been used as an abbreviation of the word "brother" and the jury were entitled to treat both letters, if they considered the handwriting of the accused to have been proved, as admissions against him.

In *Woods* v. *Woods* (1), there was in question a criminal proceeding for incest against the accused in having intermarried with the daughter of his own sister. The relationship involved in the present case was therefore involved in that case, that is, whether the accused and the mother of the person he had married were brother and sister. Evidence was given as to an admission made by the accused that the person he had married was his own niece. Doctor Lushington at page 521 said:

> The next point is that we have the acknowledgment of George Woods himself of the existence of the relationship between the parties. This is evidence against himself, and similar evidence has been admitted in criminal cases, even where life has been at stake, . . .

As to the evidence secondly referred to above, it is plain that the parents are still alive and living within the jurisdiction. Accordingly, while it was competent for the sisters to testify as to their observation of the treatment of the accused in the family, it was not open to Martha to testify as to statements made to her by her parents when they are still living, there being no explanation for their not having been called. *Pendrell* v. *Pendrell* (2); Taylor on Evidence, 12th Ed., 410.

The situation, therefore, is that the jury have convicted upon a record which contains inadmissible evidence although its admission was not objected to. The lack of objection, however, is immaterial; *Rex* v. *Farrell* (3). I do not think it would be right to allow the conviction to stand on the basis of the admissible evidence including the admissions in view of the nature of the admissions in all the

(1) 2 Curt. 516; 163 E.R. 493.
(2) [1731] 2 Str. 924.
(3) 20 O.L.R. 182 at 187.

circumstances. Both the words "Sis" and "Brother" are used at times in circumstances where there is no blood relationship and it is for the jury to estimate the weight to be given to them against the background of the other evidence: *Newton* v. *Belcher* (1).

In my opinion, therefore, the appeal should be allowed and we should make the order which the Court of Appeal ought to have made, namely, direct a new trial; *Northey* v. *The King* (2) and cases cited; *Manchuk* v. *The King* (3); *Savard and Lizotte* v. *The King* (4).

Appeal allowed and new trial directed.

Solicitor for the appellant: *W. B. Common.*

Solicitor for the respondent: *John J. Robinette.*

(1) 12 Q.B. 921; 116 E.R. 1115.
(2) [1948] S.C.R. 135 at 142.
(3) [1938] S.C.R. 341.
(4) [1946] S.C.R. 20.