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*Feb. 18, 19
*Mar. 16

JAMES ALFRED KELSEY .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Extra-judicial admissions—Whether jury need be warned of danger of convicting solely on confession—Sufficiency of charge—Whether defence theory adequately put to the jury.

On the strength of his three self incriminating declarations, the appellant was charged with a murder which had remained unsolved for more than two years. Two of his admissions were made verbally to friends of his and the third was contained in a statement to the police in his own handwriting and accepted by the Courts as having been given freely and voluntarily. The appellant did not give evidence before the jury and the theory of the defence was that although he had in fact made the statements they were untrue. His conviction was affirmed by the Court of Appeal for Ontario. Two questions of law were submitted on appeal to this Court, namely, whether the jury had been adequately instructed as to the theory of the defence and whether they should have been warned as to the danger of convicting when the only evidence connecting the accused with the crime was his unsworn extra-judicial admissions.

Held (Cartwright J. dissenting), that the appeal should be dismissed.

Per Rinfret C.J., Rand, Kellock, Estey, Locke and Fauteux JJ.: There was no legal duty for the trial judge to warn the jury of the danger of convicting the appellant of murder even if, in their view, the only evidence to connect him with the crime consisted of his unsworn extra-judicial admissions.

There was in fact independent evidence tending to support the accused's admissions of having participated in the commission of the murder; the jury were adequately instructed as to the theory of the defence, namely, that the admissions were untrue, and of the numerous points which, in the appellant's submission, should have been brought to their attention, some were actually submitted to them by the trial judge and those which were not had either no foundation on the

evidence or if they had, were denuded of any real significance in the test of the truthfulness of the material admission. The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.

Per Cartwright J. (dissenting): The authorities cited by the appellant do not formulate a rule of law that, in cases in which the only evidence to connect one accused of murder with the crime consists of his unsworn extra-judicial admissions, the trial judge must warn the jury that it is dangerous to convict.

It was however the duty of the trial judge to impress upon the jury the necessity of testing the truth of the admissions made by the accused by an examination of the other facts proved, and to call their attention to the circumstances mainly relied upon by the defence as tending to cast doubt upon the truth of the admissions, and this duty he failed to perform.

APPEAL from the oral judgment delivered by the Court of Appeal for Ontario, affirming the appellant's conviction for murder.

A. E. Maloney for the appellant.

W. B. Common Q.C. for the respondent.

The judgment of the Chief Justice, Rand, Kellock, Estey, Locke and Fauteux, JJ. was delivered by:—

FAUTEUX J.—On the 18th of September 1952, a jury of the Supreme Court of Ontario found that the appellant, "on or about the 9th day of December 1949, at the Township of Thorold, in the County of Welland, did unlawfully murder Sam Delibasich".

An appeal against this verdict was unanimously dismissed; the oral reasons delivered by the Chief Justice of the Province, at the conclusion of the argument, being:—

We see no reason for disturbing the verdict of the jury in this case. We think that statements of the accused admitted in evidence were voluntary statements and properly admitted. We consider the charge of the learned trial judge to the jury was adequate. The appeal must be dismissed.

The appellant then obtained leave to appeal to this Court on two questions of law, namely:—

(*a*) Did the learned judge err in failing to instruct the jury adequately as to the theory of the defence?

(*b*) Did the learned trial judge err in failing to instruct the jury as to the danger of convicting the accused of murder where the only evidence to connect him with the crime consists of his unsworn extra-judicial admissions?

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For a proper consideration of these questions, the main features of the case may, at first, be related.

Sam Delibasich, a taxi operator of the city of Welland, was last seen alive in that city at 6.30 p.m. on Friday, the 9th of December 1949. In the late afternoon of the following day, Saturday the 10th, his cab was observed in the west-end of the city of Toronto, in a parked position in front of a building, number 2111 Bloor Street West, by a resident of these premises, one Mrs. Bell who, a few days after, reported to the police the fact of its continued presence. A week later, on Saturday the 17th, the body of Delibasich was discovered, by a hunter, in the middle of a ploughed field off of the Hurricane East Road, at some 4 or 5 miles from the city of Welland. The Provincial Police were immediately alerted; a call went out for the cab which the Toronto police—already apprised of its presence on Bloor Street—towed into custody.

From the investigation, particularly of the body, of the place and surroundings where it was found and of the cab itself, no clues connecting any one with the murder could be found. However, and as the evidence before the jury indicates, the following facts were then ascertained. The body of the victim was lying some 300 feet from the road, face down, with the arms extended and frozen stiff. The clothing was intact and mud-stained. No footprints and no indication of a scuffle were found in the field. The autopsy revealed on the front of the body depressions leading to the opinion that, while warm, it had lain on an irregular surface, the imprint of which was left during the freezing process. There were several wounds, the fatal ones having been inflicted on the head by a blunt instrument and six others—three before and three after death—caused by a rigid, round and pointed instrument. Death was attributed to fracture of the skull and injury of the brain.

The victim was known to usually carry on his person, in a wallet, substantial sums of money, but an amount of $13 only, mostly in silver, and loose in his pocket, was found. The operator's badge and operating permits usually attached to the sun-visor of the cab, and any other identification papers were missing. Whether there was in the cab any indication of a struggle or any blood is not shown in the evidence.

This crime had remained unsolved for more than two years when the Crown acquired direct evidence, in the form of three self-incriminating declarations made by the appellant—each of them at different times and to different persons—on the strength of which the latter was prosecuted for murder. Two of these admissions were made verbally by the appellant to friends of his, the first, in September, 1951, to one Aubrey Leslie Merritt, whom he had known since childhood, and who, after long hesitation, i.e., in January, 1952, apprised the police of the same; the second, to Blanche Lucy Benner, of the city of Welland, with whom he had intimate relations and who reluctantly related these admissions to the police after his arrest. The third appears in a statement to the police made by the appellant in his own handwriting and accepted by the two Courts below as having been given freely and voluntarily.

The substance of the facts related by the appellant on these three occasions is:—On the night of the disappearance of Sam Delibasich, the appellant and his brother Lloyd met at the Reeta Hotel in Welland where they consumed a small quantity of beer. They there and then agreed "to make some quick money" and to hire Delibasich's cab, drive out of town, "knock him out" and take his cab to Toronto to sell it.—Incidentally, it may be noted that the appellant, his brother and their mother were also of the city of Welland, and knew the taxi operator very well.—In furtherance of this plot, they called Delibasich, hired his cab and drove with him to St. Catharines when, nearing Port Robinson Road, they required him to stop. Their victim was then struck, at first with a hammer and then with an ice-pick, the latter instrument being used "to finish him", according to what the appellant said to Merritt, or "to make sure", according to what he wrote himself in his statement to the police. Having abandoned the body in a field, they proceeded to Toronto, stopping, en route, at Toronto Bay to throw into Lake Ontario the hammer, the ice-pick and some of the belongings of the victim. Attempts to sell the cab at used car lots in Toronto being vain, it was left on the street. They spent the night in the city and then returned to Welland.

The evidence also shows that a few days after having confessed to police officers, the appellant freely consented to accompany them to Toronto in order to indicate, in the

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course of the journey, the various points having any bearing on the case. He thus pointed out the road leading to the field where the body had been found, the route followed to reach the point of the Bay from where he and his brother threw the hammer, the ice-pick, the operator's badge and the various papers of the victim into the lake. Though definitely unfamiliar with the city of Toronto, he also indicated one of the used car lots at which they vainly attempted to sell the cab and also the place where the latter had been abandoned on Bloor Street. The latter point was not more than 200 feet away from the place where the cab had, more than two years before, been observed by Mrs. Bell the day after the murder. The appellant was unable to locate, in the same district, the hotel where they were alleged by him to have registered under fictitious names, nor did the police subsequently succeed in doing so: it appears however from the evidence that hotel registration records were rather poorly kept if at all in the hotels of this particular district of the city.

This, in substance, was the evidence in the record at the close of the case for the prosecution.

In defence, the subject matter of the evidence adduced was limited to the character of the appellant. In this respect, the record shows the absence of any previous convictions, that his past conduct rendered unlikely his connection with the crime of murder and established the particular frankness of the appellant. Though testifying on the *voir dire,* in an unsuccessful attempt to prevent the production of his statement to the police, the appellant did not however give any evidence before the jury, leaving thus unchallenged by him the fact and the truth of his various declarations. With the addition that nothing could be shown or found in the record which would indicate or suggest any reason or motive prompting the appellant to falsely charge himself and his own brother with the murder of a person they both very well knew, this summary relates the main features of the case.

Turning now to the points of law raised in this appeal and dealing with the first one, i.e. whether the trial Judge erred in failing to instruct the jury adequately as to the theory of the defence.

The defence did not deny the fact but only the truthfulness of the appellant's admissions. This was the theory of the defence at trial and the sole one suggested at the hearing before this Court. More than once it was stated to the jury by the trial Judge in his charge. It is contended however that this was not done adequately because the trial Judge failed to direct the attention of the jury to some 19 or 20 alleged arguments purported to be related to the theory of the defence. Whether all these arguments, which a subsequent and minute examination of the record suggested to counsel for the appellant, were actually formulated or even thought of before the jury by counsel then acting for the accused, could not be asserted to us and is very doubtful if one is to rely on the less numerous objections made at trial immediately after the address of the judge. Be that as it may and as to the merits of the contention itself, I must say that, after having carefully considered each of the points on which it rests, I fail, in the light of the particular features of this case, to see any real substance in it. In brief, some of these points were actually submitted to the jury by the trial Judge and those which were not are either without foundation on the evidence or, if they have, are denuded of any real significance in the test of the truthfulness of the material admission. This is all, I think, it is necessary to say on the matter except as to two of these twenty points, which themselves illustrate the nature of the others. Some comments may be found expedient in view of the importance given to them by counsel for the appellant.

It is suggested that the trial Judge should have commented on:—

(*e*) The failure of the police and the appellant to locate the hotel at which he and his brother were supposed to have registered and the inability of the police to find any such hotel notwithstanding their intensive efforts to do so.

(*h*) The lack of any evidence of blood or signs of a struggle in the victim's taxi which serves strongly to contradict the appellant's statement to the police.

On (*e*):—As already indicated, the evidence shows that registration records in hotels located in that particular district were very poorly if at all kept. Moreover, at least two years had elapsed since such registration was alleged to have been made and the moment that verification of

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the fact was attempted. Under such circumstances, I fail to see what real significance such evidence could have on the question of the truthfulness of the appellant's admissions.

As to (*h*):—It was conceded that the presence or absence of blood in the cab was not even dealt with in the evidence nor was either the absence or presence of signs of a struggle in the victim's taxi.

The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance. Had the autopsy, for instance, revealed poisoning instead of fracture of the skull as the cause of death, this undoubtedly would have, in this case, been a point of substance relevant to the theory of the defence. Far from conflicting with the appellant's admissions, independent proof of certain facts in the case tends to support his material admission, i.e. his participation in the commission of the murder. These facts are:—The indication by the appellant of the place he and his brother abandoned the cab corresponding to the one at which it was found; the statement of the appellant that the ice-pick was used once the victim had been struck with the hammer "to finish him" or "to make sure" tallying with the opinion of the medico-legal expert that six wounds had been made by a rigid, round and pointed instrument, three before and three after death; the fact of the immediate disappearance of his brother from Welland after the murder; the fact that nothing can be found or was shown on the evidence in the nature of a reason or a motive moving the appellant to make false admissions charging himself and his own brother with the murder of a person they both knew very well.

In law, the general rule as again stated recently in *Azoulay* v. *The Queen* (1), is that the trial Judge in the course of his charge should review the *substantial* part of the evidence and give the jury the theory of the defence so that they may appreciate the value and effect of that evidence and how the law is to be applied to the facts as

(1) [1952] 2 S.C.R. 495.

they find them. It is, of course, unnecessary that the jury's attention be directed to all of the evidence, and how far a trial Judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial. In the words of Goddard, L.C.J. in *Derek Clayton-Wright* (1):

> The duty of the Judge . . . is adequately and properly performed . . . if he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, *of the real matters* upon which the defence is based. He must give . . . a fair picture of the defence, but that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else.

The rule is simple and implements the fundamental principle that an accused is entitled to a fair trial, to make a full answer and defence to the charge, and to these ends, the jury must be adequately instructed as to what his defence is by the trial Judge. Whether the rule has in any given case been complied with may at times be difficult to determine. In the present matter and for the reasons above given, I agree with the members of the Court of Appeal for Ontario that the charge was sufficient.

The second ground of appeal is that the trial judge erred "in failing to instruct the jury as to the danger of convicting the accused of murder where the only evidence to connect him with the crime consists of his extra-judicial admissions."

This ground rests on the assumption of the fact that the record discloses a complete lack of independent evidence tending to support the truthfulness of the material admission made by the appellant. That such an assumption does not flow from a consideration of the evidence and of all the circumstances of this case I have endeavoured already to demonstrate. However, and on the basis of a different view being held in the matter, the question of law must be considered.

That the appellant could be legally convicted of murder by a jury solely on his extra-judicial admissions, i.e. without any corroborating evidence, is not disputed. What is suggested and what for the success of the appeal on this

(1) 33 Cr. App. R. 22 at 29.

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point must be accepted, is that there was in this case a legal duty for the trial judge to warn the jury of the danger of doing so. No authorities or precedents in point were quoted on behalf of the appellant, nor was it possible to find anyone to support this contention.

The only two cases to which our attention was directed did not state or recognize such a rule of law. The first one is *Rex* v. *Sykes* (1). The question there considered by the Court of Appeal was "how far the jury can rely on these confessions," i.e. the confessions made in that particular case. Nothing in what was then stated by Ridley J., on behalf of the Court, purported to be tantamount to a statement of a rule of law such as the one here contended for, but was indeed only an approval of the impeached instructions given to the jury by the Commissioner in that particular case. The question of warning was not dealt with. In the second case, *Rex* v. *Rubletz* (2), the *ratio decidendi* is that the trial judge, having determined that the confession made by the accused was free and voluntary, so instructed the jury, but in a manner confusing the two issues, i.e. the one related to the free and voluntary character of the confession and the other in respect to its veracity. On the latter point Turgeon C.J., speaking for the Court, stated at page 252:—

> If this confession was not free and voluntary, it would not be before the jury at all. Being there, it is the jury's duty to find whether or not it is true. This issue is different from the issue of admissibility which was before the Judge, and necessitates an inquiry going much further afield. Unfortunately, the instruction given to the jury on this all-important subject seems to me to have fallen short of what was required and to have tended to make the jury think that, if the statement was free and voluntary, it was true.

Nowhere in the case does the Court suggest that a warning should have been given to the jury. Reference may be made to what the Chief Justice said at page 251:—

> It does not follow, because a person comes forward freely and voluntarily and declares that he has committed a crime, declares, for instance, that another person supposed to have died a natural death, was in reality murdered by him, that his declaration must be accepted as true and that he must be convicted of murder. A jury may convict him: *Rex v. Falkner & Bond* 168 E.R. 908; *R.* v. *Tippet* 168 E.R. 923; but before doing so they ought to be instructed by the Judge in such a manner as to call their attention to all the circumstances surrounding the case and which may affect the truth or falsity of the confession.

(1) 8 Cr. App. R. 233.

(2) 75 Can. C.C. 239.

In my opinion, the learned trial judge in the present case having complied with the rule above considered in relation to the first ground of appeal, nothing more, on the matter, was required in his address to the jury.

The appeal should be dismissed.

CARTWRIGHT J. (dissenting):—The facts out of which this appeal arises are stated in the reasons of my brother Fauteux. I shall not repeat them but wish to mention the following additional details which appear to me to be of some importance. The witnesses, Merritt and Mrs. Benner, each of whom testified that the accused had confessed to taking part in killing Delibasich also testified that they did not believe his confession. After the accused had been arrested on a charge of murder his first statement to the police amounted to an assertion of his innocence. Shortly afterwards, following a question and an admonition, the accused, in the presence of the police officers, wrote out the confession which was admitted as Exhibit 8 at the trial.

The accused did not give evidence before the jury, but it is not, I think, open to question that both the fact of the three statements having been made and their truthfulness, if made, were put in issue by the plea of "not guilty." The theory of the defence was that although the accused had in fact made the statements they were untrue and he had had nothing to do with the killing of Delibasich.

Leave was granted to appeal to this Court on the following points:—

(*a*) Did the learned trial judge err in failing to instruct the jury adequately as to the theory of the defence?

(*b*) Did the learned trial judge err in failing to instruct the jury as to the danger of convicting the accused of murder where the only evidence to connect him with the crime consists of his unsworn extra-judicial admissions?

As to the second of these points counsel for the appellant relied on certain observations in the unanimous judgment of the Court of Criminal Appeal in *R.* v. *Walter Sykes* (1). In that case there was ample evidence, as in the case at bar, that a murder had been committed. The accused had made statements to two witnesses, one of whom was a police inspector, to the effect that he was the murderer. Later he had retracted these statements.

(1) 8 Cr. App. R. 233.

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The following passages in the judgment at pages 236 and 237 are relevant:—

It would have been unsatisfactory to convict on the evidence had it not been assisted by the confession, and probably it would have been unsatisfactory if the conviction rested on the confessions only, without the circumstances which make it probable that the confessions were true.

The main point, however, is one independent of all these details, the question how far the jury could rely on these confessions. I think the Commissioner put it correctly; he said:

> A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show that it was true? is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?

It was said that the murder was the talk of the countryside, and it might well be that a man under the influence of insanity or a morbid desire for notoriety would accuse himself of such a crime. I agree that this is so, but it was a question for the jury, and they ought to see whether it was properly corroborated by facts, and so they were directed. We think that this part of the case was quite sufficiently left to the jury, and the Court thinks that there is no reason for giving leave to appeal.

This case was cited with approval by Turgeon C.J.S. giving the unanimous judgment of the Court of Appeal for Saskatchewan in *Rex* v. *Rubletz* (1), also relied upon by counsel for the appellant. The learned Chief Justice said in part:—

It does not follow, because a person comes forward freely and voluntarily and declares that he has committed a crime, declares, for instance, that another person supposed to have died a natural death, was in reality murdered by him, that his declaration must be accepted as true and that he must be convicted of murder. A jury may convict him: *R. v. Falkner & Bond,* 168 E.R. 908; *R.* v. *Tippet,* 168 E.R. 923; but before doing so they ought to be instructed by the Judge in such a manner as to call their attention to all the circumstances surrounding the case and which may affect the truth or the falsity of the confession.

The learned judge decided that the statement was nevertheless a free and voluntary one, and I think he was right in so deciding. But a free and voluntary statement may, nevertheless, be false. Men have been known to accuse themselves falsely of the most heinous offences, fully conscious, sometimes, of the falsity of their avowal, and imagining at other times, that their souls were in fact charged with crime. If this confession was not free and voluntary, it would not be before the jury

(1) 75 Can. C.C. 239.

at all. Being there, it is the jury's duty to find whether or not it is true. This issue is different from the issue of admissibility which was before the judge, and necessitates an inquiry going much further afield.

I do not read these judgments as formulating a rule of law that, in cases in which the only evidence to connect one accused of murder with the crime consists of his unsworn extra-judicial admissions, the trial judge must warn the jury that it is dangerous to convict; but I think that they furnish a guide as to the way in which, in such cases, the judge should perform the duty which always rests upon him of laying the theory of the defence adequately and fairly before the jury.

In such cases, and especially when the accused has not given evidence, I think it incumbent upon the trial judge, (i) to impress upon the jury the necessity of testing the truthfulness of the admissions by an examination of the other facts and circumstances proved, and (ii) to call their attention, not necessarily to all the circumstances, but to those mainly relied upon by the defence as tending to cast doubt upon the truthfulness of the confession. In the case at bar I have reached the conclusion that neither of these duties was adequately performed.

In the argument before us and in his factum, counsel for the appellant referred to nineteen matters which, in his submission, might well cause the jury to doubt the truth of the confession, of which only two were specifically mentioned by the learned trial judge in his charge. I do not propose to examine each of the items in this list. Several of them appear to me to be unimportant but I wish to refer to three of them. (i) It is apparent from the evidence of Inspector Wood that the accused had told him that after abandoning Delibasich's taxi-cab in Toronto, he and his brother walked to a hotel at which they registered and spent the night of December 9, 1949; but a most careful and extensive search by the police had failed to locate any record of registration or other evidence to substantiate this. (ii) If the confession was true, the motive for the murder was robbery but some $13 was found on the person of the deceased. (iii) If the confession was true, it would seem probable that there would have been some blood-stains in the taxi-cab but there was no evidence as to whether any such stains were found by the police. None

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of these three matters was referred to by the learned trial judge in his charge. Counsel for the accused specifically requested that the attention of the jury be called to the item thirdly mentioned. I am respectfully of the opinion that they should have been put before the jury and further, since the theory of the defence was that the accused had fabricated the confession, the learned trial judge should have pointed out that there was no detail in the confession verified by any evidence extraneous to it which might not have come to the accused's knowledge through reading of the crime in the press. The learned trial judge in another connection mentioned to the jury that he remembered reading about the occurrence in the newspapers. No doubt, as in the Sykes case, "the murder was the talk of the countryside." I do not intend to suggest that had any or all of these matters been mentioned to the jury their verdict would necessarily, or probably, have been different, but I can not satisfy myself it might not have been.

How then did the learned trial judge present the theory of the defence to the jury? The following passages in the charge appear to me to be the only ones which deal with it:—

> While I am on this subject, I want to say to you that that is the way you may interpret the evidence of the statement, this very important statement which has been put in and which was given by the accused. It will be before you in evidence. It is true that this is not sworn evidence but, gentlemen, it is evidence in the case. You may interpret that statement like any other evidence. You may believe all of it; you may think that statement is true. There may be parts that you may think are not true, or you may think as the defence asks you to, that it is not true at all.
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> But in this case most of the evidence is direct. It is direct evidence of the accused himself if you believe it. He has signed a statement telling what happened. There is the evidence of two witnesses who say he told them what happened. That, gentlemen, is direct evidence, and it is a question of whether you believe it or not.
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> Gentlemen, in this case I have concluded that I do not need to charge you upon the question of manslaughter, and for this reason. I have not heard any evidence upon which a jury could find a verdict of manslaughter. Believe me, if there was any such evidence it would be my duty to draw it to your attention, and I would be most happy to do so, but I cannot on this evidence, on the evidence I have heard, find any evidence that would justifiy a verdict of manslaughter. Indeed, and I ask Mr. Martin, who has so ably defended this young man, to see if I state it correctly, the whole theory of the defence is that this accused had nothing to do with this crime; that these stories were not true, and if that theory is accepted by you, or if you have an honest doubt whether that is the correct theory or not, the verdict will be a complete acquittal.
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> . . . . .

The theory of the defence, and you must consider it, gentlemen, because it is always important, is that that statement which was signed by the accused is not true at all; that having told the story once, he went right along with the thing. You must give consideration and thought as to that, gentlemen. But I suggest to you that you must also consider, and it is entirely for you to say, would a person sign a statement like that after being warned that he was charged with murder and was not required to say anything; would he do that if it were not true? You may think so. You are the judges of the facts, and it is entirely for you to say.

With the deepest respect for the learned trial judge, I find myself in agreement with the submission of counsel for the appellant that the theory of the defence was mentioned only to be brushed aside. Conceding that the theory was not a strong one, it was nonetheless necessary that it be adequately presented to the jury and for the reasons I have set out above I think this was not done.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed.

Solicitors for the Appellant: *Edmonds & Maloney.*

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

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*PRESENT: Kerwin, Taschereau, Estey, Locke and Cartwright JJ.