1956

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YVAN MONETTE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Rape—Declarations of accused made to police officers while under arrest—Introduced by Crown in rebuttal—No voir dire—Whether statements admissible.

The appellant was tried before a jury and convicted upon a charge of rape. His conviction was unanimously affirmed, without written reasons, by the Court of Appeal.

The Crown, to rebut the evidence given by the accused that he had never seen the victim, called a witness who, notwithstanding the objection of counsel for the accused, was allowed to introduce incriminatory answers and declarations allegedly made by the accused to police officers while under arrest. The Crown did not attempt to prove that these answers and declarations had been made freely and voluntarily.

Held: The appeal should be allowed, the conviction quashed and a new trial directed.

The burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. The phases of trial at which the Crown seeks to introduce such statements, whether it be part of its case in chief, or upon cross-examination of an accused heard in defence, or in rebuttal of evidence adduced by the defence, is foreign to and in no way affects the ratio of the principle confirmed under the authorities. In the absence of affirmative

*PRESENT: Kerwin C.J., Taschereau, Cartwright, Fauteux and Abbott JJ.

proof of the free and voluntary character of the statements, the impeached evidence was illegally admitted before the jury, and it could not be said that the verdict would have been the same without such illegal evidence.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the appellant's conviction before a jury on a charge of rape.

A. Chevalier Q.C. for the appellant.

G. W. Hill, Q.C. for the respondent.

The judgment of the Court was delivered by:—

FAUTEUX J.:—By a unanimous judgment, the Court of Appeal for the Province of Quebec (1) maintained, without written reasons, the conviction of the appellant on a charge of rape.

The grounds upon which leave to appeal to this Court was granted involved, amongst others, the point whether answers given by the accused, while under arrest for the offence, to questions put to him by a detective in authority, were admissible to contradict his testimony at trial, in the absence of any *voir dire* as to the free and voluntary character of these answers.

Examined in chief, on his defence, the accused denied having ever seen the victim of the offence. In cross-examination, he admitted that the police had several conversations with him but, when referred to the substance of the latter, he testified having said nothing indicating any knowledge of the facts of the charge, declaring rather, in the occurrence, that he thought his failure to inform the authorities of a change of address, with respect to the registration of his automobile, was the reason for his arrest.

To contradict this testimony, the Crown, in rebuttal, called Detective Joyal who, notwithstanding the objection made by counsel for the defence, was allowed to refer to these conversations and give the following evidence, unpreceded by any examination on *voir-dire:*—

Q. Est-ce qu'il a dit qu'il la connaissait?
R. Non. Il n'a pas dit qu'il la connaissait non plus.
Q. Est-ce qu'il a dit qu'il avait été en automobile avec elle?

(1) Q.R. [1953] Q.B. 751.

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R. Non. Je peux rapporter les paroles: "Je peux pas reconter ce qui s'est passé, vous allez me donner dix ans de pénitencier".
Q. Il a dit simplement: "Je peux pas raconter ce qui s'est passé, vous allez me donner dix ans de pénitencier"?
R. C'est cela.
Q. Est-ce qu'il a dit qu'il était ailleurs ce soir-là?
R. Non plus.

In *Sankey* v. *The King* (1) and in *Thiffault* v. *The King* (2), this Court made it very clear that the burden of establishing to the satisfaction of the Court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown; and that such a burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The phases of trial at which the Crown seeks to introduce such statements, whether it be as part of its case in chief, or upon cross-examination of an accused heard in defence, or in rebuttal of evidence adduced by the defence, is foreign to and in no way affects the ratio of the principle confirmed under these authorities. As stated by Humphreys J. delivering the judgment of the Court of Appeal in England, in *Rex* v. *Treacy* (3), a statement made by a prisoner under arrest is either admissible or not; if it is admissible, the proper course for the prosecution is to prove it, and, if it is not admissible, nothing more ought to be heard of it; and it is wrong to think that a document can be made admissible in evidence which is otherwise inadmissible simply because it is put to a person in cross-examination.

In *Hebert* v. *The Queen* (4), Cartwright J., at page 141, refers to the Canadian jurisprudence in the matter. In the latter case, the Crown, upon cross-examination of the accused, made use of such statements. Kellock, Locke, Cartwright and Fauteux JJ. decided that such evidence was inadmissible, and Estey J., without determining the matter, said that "a cross-examination upon such a statement, by the great weight of authority in our Provincial Courts as well as in the Court of Criminal Appeal in England has been condemned". The other Members of the Court, who

(1) [1927] S.C.R. 436.
(2) [1933] S.C.R. 509.
(3) (1934) 60 T.L.R. 544 at 545.
(4) [1955] S.C.R. 120.

refrained from expressing their views in the matter, did so because, being of the opinion that the application of the provisions of section 1014(2) was warranted on the evidence, it was unnecessary to determine the question.

In the present case, there was no serious attempt, on behalf of the Crown, at the hearing of this appeal, either to justify the admissibility of such evidence or an application of section 1014(2). The answers given to the police by the appellant were incriminatory and, had they been proved to have been freely and voluntarily given, would undoubtedly have been proper evidence as part of the case for the Crown; and while the propriety of introducing such evidence on rebuttal might be open to question, this particular aspect of the case was not raised by the appellant; counsel for the latter being content to rest the appeal on the major question flowing from the lack of affirmative proof of the free and voluntary character of these answers.

Under all the circumstances of this case, the Court being unanimously of opinion that, in the absence of such affirmative proof, the impeached evidence was illegally admitted before the jury and that it could not be said that the verdict would have been the same without such illegal evidence, the appeal was maintained and a new trial ordered.

Appeal allowed, conviction quashed and new trial ordered.

Solicitor for the appellant: *A. Chevalier.*

Solicitor for the respondent: *R. T. Hebert.*