MICHAEL ANGELO VESCIO.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1948

*Oct. 8, 12, 13, 14

*Nov. 2

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Murder—Withdrawal of accused's counsel because postponement refused—Appointment of another counsel by Court—Refusal of Court to hear another counsel retained by accused's family—Illness of juror—Discharge of jury—New jury containing some members of original jury—Criminal Code ss. 929, 942, 960, 1014 (2).

The accused was arrested and charged with murder on August 8, 1947, and within a few days retained the services of counsel W. After many adjournments, the preliminary hearing started on October 8 and he was committed for trial on October 21. On that same day he was brought up for arraignment. His counsel W. moved to have the trial adjourned to the next assize and said that he was contemplating an application for a change of venue. The presiding judge refused the motion to traverse and set the date for the trial at November 10. Counsel W. then withdrew from the case and the judge stated that he would appoint someone if the accused did not appoint counsel within a day or two. The following day, accused's sister addressed the Court in accused's presence and asked for an adjournment, saying that they did not want W. to withdraw and that they wanted their own counsel and not one appointed by the Court. However the presiding judge appointed R. as accused's chief counsel and postponed the trial for a week beyond the date previously fixed; the arraignment was also postponed to the day of trial. When the trial opened, R. appeared for accused but before arraignment M., a counsel, addressed the Court, saying "I am appearing on behalf of the accused, retained by his family". The trial judge informed M. that the Court had appointed counsel and refused to hear M. as to the nature of the application which he proposed to make. On arraignment, accused pleaded not guilty but when asked if he was ready for trial answered "No Sir". Thereupon R. said that this was accused's answer and not his and that he was prepared to go on.

During the trial, when the jury was recalled to the courtroom after a trial within the trial, one member was found to be absent because of illness. The jury was then discharged but instructed to remain on the panel, and a new jury was drawn. Nine members of the new jury had been on the previous jury, which had sat for two days. The trial judge admitted the evidence which was the subject of the trial within the trial.

The majority of the Court of Appeal having affirmed the conviction, appellant raised two grounds of appeal in this Court, (*a*) that he was not permitted to make full answer and defence by counsel of his choice and (*b*) that the jury was not properly constituted.

Held: that, by his conduct, the accused has ratified the choice of counsel made by the Court.

*PRESENT: The Chief Justice and Kerwin, Taschereau, Rand, Kellock, Estey and Locke JJ.

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Even if the trial judge should not have declined to hear M., as it was shown that the proposed application was for a further postponement of the trial, the accused suffered no prejudice and the incident taints in no way the fairness of what has been done. There was no substantial wrong or miscarriage of justice.

Held: also, that when discharged, the jury cease to be the jury in that case, their functions are terminated and consequently they were free to act again in the new trial.

Rex v. *Luparello* 25 C.C.C. 24 approved.

Rex v. *Chong Sam Bow* (1925) 1 W.W.R. 240 overruled.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing (Dysart and Adamson JJ.A. dissenting) the appellant's appeal from his conviction, at trial before Williams C.J. K.B. and a jury, on a charge of murder.

H. Walsh for the appellant.

O. M. M. Kay for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Estey JJ. was delivered by

TASCHEREAU J.: Michael Angelo Vescio, the appellant in the present case, was charged with the murder of one George Robert Smith, and on the 25th day of November, 1947, was found guilty by a jury at the City of Winnipeg, at the Fall Assizes. The Honourable Chief Justice Williams imposed the death penalty.

The appellant appealed to the Court of Appeal for the Province of Manitoba, and the appeal (1) was dismissed Dysart and Adamson, JJ. dissenting.

The grounds of dissent in the judgments of Dysart and Adamson, JJ. may be summed up in one general statement, that the accused was deprived of his right to make a full answer and defence to the charge laid against him, by counsel of his own choice, that there was consequently a mistrial of such a fundamental nature, that section 1014(2) of the Criminal Code does not apply.

The first Notice of Appeal to this Court based on the above dissenting judgments was served on the 27th of April, 1948, and was followed on the 28th of May by a second Notice, pursuant to an order of the Honourable Mr. Justice Rand, made under section 1025 of the Criminal

(1) [1948] 2 W.W.R. 161.

Code. Leave to appeal to this Court was granted on the ground that the judgment of the Court of Appeal for the Province of Manitoba conflicts as to the constitution of the jury, with a judgment of the Court of Appeal for British Columbia (*Rex* v. *Chong Sam Bow* (1)).

The information on which the accused was charged was laid on the 7th day of August, 1947, the warrant was executed the next day, and the preliminary hearing which commenced on the 8th of October came to an end on the 21st of the same month, on which date the accused was committed for trial.

The Fall Assizes of the Eastern Judicial District opened at two P.M. on the same day with Mr. Justice Major presiding. Mr. C. W. Tupper appeared for the Crown and immediately asked that Vescio be arraigned on the indictment charging him with the murder of George Robert Smith. This application was strenuously opposed by Mr. Harry Walsh who appeared for Vescio, and who asked that the case be traversed to the next Assizes in February, on the ground that he was not ready to proceed. The next day, on the 22nd of October, Mr. Justice Major refused the application and set the date for trial for the 10th of November. It is then that Mr. Walsh made the following declaration:—

in which case I must withdraw from the defence. I would ask in fairness to the accused that your Lordship should defer arraignment until he has an opportunity to consult counsel.

After a brief argument between the Court and Mr. Walsh, Mr. Justice Major said:—

I will give two days for decision in the matter. If I do not hear anything by Thursday I will appoint counsel to represent him. I will adjourn this until Thursday. I expect the Crown counsel to advise me what has been done.

On Thursday no counsel appeared for Vescio, but his sister Mrs. Bernhardi who was in the audience, applied for an adjournment of three or four months. She insisted that she did not want Mr. Walsh to withdraw; "we want to keep him", said she. Mr. Justice Major adjourned the case until the 17th of November and explained to Mrs. Bernhardi that in view of the fact that Mr. Walsh had declined to continue to act, it was the duty of the Court to appoint counsel for him.

(1) (1925) 1 W.W.R. 240.

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Taschereau J.

On Friday, the 24th of October, at the opening of the Court Mr. Justice Major appointed Mr. Ross, K.C. as "chief counsel" to defend the accused and the case stood adjourned until the 17th of November for trial.

On that date the case came for trial before Chief Justice Williams, Mr. O. M. M. Kay appeared for the Crown and Mr. J. L. Ross for the accused. It was then, that Mr. E. J. McMurray, K.C. who is the senior partner of Mr. Walsh said at the opening of the Court: "I may say my Lord that I am appearing on behalf of the accused, retained by his family". The Chief Justice then said that he could not recognize Mr. McMurray in that capacity, that a counsel had been appointed for the accused 3½ weeks before, that he was in Court and prepared to go on. Mr. McMurray offered to tell the Court the nature of the application which he intended to make, but the Chief Justice replied that he "did not think it was advisable to do so, because he regretfully declined to hear him". Mr. McMurray then withdrew, the accused was arraigned and pleaded not guilty. The trial lasted seven days and a verdict was given on the 24th of November.

It is the contention of the appellant that a gross and substantial miscarriage of justice was occasioned to the accused and a mistrial took place, when Major, J. denied the accused counsel of his own choice, thus denying him his right to "make full answer and defence by counsel learned in the law", and forced upon the accused counsel whom he was not willing to accept and through whom he did not wish to speak. It is also submitted that the refusal of the learned trial judge to hear Mr. McMurray, was a refusal of the accused of counsel of his own choice or of additional counsel to Mr. J. L. Ross.

It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the jury if he so wishes, instead of having it made for him by counsel (*Rex* v. *Woodward* (1)). Mr. Kay acting for the respondent did not challenge this, but submitted that in the present case the appellant accepted Mr. Ross as his counsel. With this proposition I agree.

(1) [1944] A.E.R. 159.

The appellant had selected Mr. Walsh as his counsel, but unfortunately Mr. Walsh withdrew leaving the appellant without counsel. It might have been advisable for the learned trial judge to ask the appellant if he desired a counsel, or if he wished to defend himself, and thus the situation would have been made clearer; but I do not think that under the circumstances, the failure to ask this preliminary question had the effect of vitiating the whole trial, as suggested by the appellant. By his conduct the accused has ratified the choice which he now says has been forced upon him.

Immediately after the withdrawal of Mr. Walsh, Mr. Justice Major adjourned the arraignment to allow the accused to appoint a new counsel. When the Court resumed on the 24th, Mrs. Bernhardi who was present, objected to the voluntary withdrawal of Mr. Walsh, but the accused remained silent. Mr. Ross cross-examined the witnesses, addressed the jury, was in Court during six days, and during 3½ weeks had the opportunity of conferring with the appellant, and we cannot of course assume that he did not. During all these proceedings not a word was said by the appellant that can lead us to believe that he even ever thought of repudiating the choice made by the Court. It is then that the accused should have done so, if he had any idea of conducting his own case or of selecting a new counsel, and not now. In dealing with this matter I have kept in mind the case of *Reg.* v. *Yscuado* (1) but with due deference, I do not agree with all the statements made by Erle, J. as to the inferences which may be drawn from the silence of an accused when the Court requests a member of the Bar to give his services to a prisoner.

The conduct of the accused is to my mind a sufficient sanction of what has been done, and is a bar to his tardy claims of unfair trial and miscarriage of justice.

As to the refusal of the learned trial judge to hear Mr. McMurray on the date of the opening of the trial, I would like to make the following observations. For 3½ weeks, Mr. Ross had been acting as counsel for Vescio, and on the 17th of November, he appeared on his behalf and was ready to proceed. There had already been three different applica-

(1) (1854) 6 Cox C.C. 386.

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tions made to traverse the case to the Winter Assizes which had all been refused, and it is now clearly established by the Crown and uncontradicted by the appellant, that when Mr. McMurray appeared in Court, "retained by the family", he wished to make a new application to postpone the case, and we know that this application would have been refused. It has also been made clear that neither Mr. McMurray nor Mr. Walsh intended to proceed with the case and defend the accused. Vescio suffered therefore no prejudice, and this incident taints in no way the fairness of the trial that has been held.

There now remains the last question concerning the constitution of the jury. After eighteen Crown witnesses had given their evidence, "a trial within the trial" was held to determine the admissibility of certain statements made by the accused to Port Arthur Police Officers, in Port Arthur and Fort William. During these proceedings the petit jury was excluded, and the Chief Justice reserved his judgment on the admissibility of this evidence until the 19th of November. On that morning the petit jury was recalled and only eleven jurymen took their places in the box, one of them having been taken to hospital during the night. The Chief Justice then discharged the balance of the petit jury, the jury panel was brought back into the Court, and the cards of the petit jury placed back in the jury box. A new petit jury was empanelled and when sworn it comprised nine former petit jurors and three new members. It is submitted by the accused that this new jury was improperly constituted and that a mistrial and a miscarriage of justice occurred, when nine of these jurors who had been sworn and empanelled on November 17th, and who had heard evidence on November 17th and 18th and were discharged on November 19th, were permitted to be sworn and empanelled on the new jury on November 19th. The law on this point is quite clear. Section 929 of the Criminal Code states:—

> The twelve men, or in the Province of Alberta the six men, who in manner aforesaid are ultimately drawn and sworn shall be the jury to try the issues of the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box there to be kept with the other names remaining at that time undrawn and so *toties quoties* as long as any issue remains to be tried.

Section 945 of the Criminal Code provides:—

The trial shall proceed continuously subject to the power of the court to adjourn it.

2. The court may adjourn the trial from day to day, and if in its opinion the ends of justice so require, to any other day in the same sittings.

3. Upon every adjournment of a trial under this section, or under any other section, the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial.

4. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death.

5. In other cases, if no such direction is given, the jury shall be permitted to separate.

6. No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary. R.S., c. 146, s. 945.

I fail to see that the law as it then was, has not been strictly complied with in the present proceedings. In a murder case, the jury must be kept together as long as the trial lasts, and as it is stated "upon every adjournment", but when they are discharged, as they have been in the present case, the application of the law comes to an end. They cease to be the jury in *that case* and their functions are terminated, pursuant to section 929 already cited. The jurors after having been discharged were consequently free to act again in the new trial, and if the accused thought that one or many of them, on account of what they have heard or seen, "were not indifferent between the King and the accused", he could challenge him or them "for cause" pursuant to section 935 of the Criminal Code. It was also his right to challenge peremptorily twenty jurors, but as the record shows, he used only eighteen of these challenges. I agree with what has been said on this point by the Court of Appeal for Manitoba (1) and also with the judgment of the same Court rendered in 1925 in *Rex* v. *Luparello* (2) which has been followed.

The British Columbia case of *Rex* v. *Chong Sam Bow* (3) conflicts with the *Luparello* case (2) and it is overruled. It is useless to deal with the case of *Rex* v. *Wong O Sang* (4) because there, the procedure was governed by section 960 of the Criminal Code, which is not the case here.

On the whole, the appeal fails and should be dismissed.

(1) [1948] 2 W.W.R. 161.
(2) 25 C.C.C. 24.
(3) (1925) 1 W.W.R. 240.
(4) (1924) 3 W.W.R. 45.

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Rand J.

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

RAND J.: Two grounds are taken in this appeal and I will deal with that of the constitution of the jury first. The contention is this: that where, in a capital case, after part of the evidence has been offered, the jury, because of the illness of a juror, is discharged, the second panel must not include any member of the first. It is put on two considerations: one, that the purpose underlying section 945, which provides against the separation of the jury in certain circumstances, would be defeated; and the other that the effect on the minds of the jurors made by the evidence given must be taken to be of the same objectionable character as if they had heard the case in full, had disagreed and been discharged, in which case section 960 directing a "new" jury would in principle govern.

On the point there is a conflict of authority. In *Rex* v. *Chong Sam Bow* (1), the Appeal Court of British Columbia acted on the latter ground and following *Rex* v. *Wong Sang* (2), held the jury defective. In *Rex* v. *Luparello* (3), the contrary view was taken by the Court of Appeal of Manitoba, Richards, J. A. dissenting, which in the case before us was followed. The point seems to have been similarly dealt with in *Rex* v. *Gaffin* (4), by the Supreme Court of Nova Scotia.

It is indisputable that at common law in such circumstances the remaining members of the jury were competent to serve on the second jury: *Rex* v. *Edwards* (5), in which before all of the judges except Lawrence, J., (1812), the rule was assumed: and for the same point only, *Rex* v. *Lawrence* (6). The analogy of a disagreement, whatever may be the true interpretation of section 960, therefore disappears. The one, if not the primary, object of section 945 is to keep the jurors free from being tampered with, but obviously that ends when they have ceased to be jurors. No doubt it may be desirable also that their minds be clear of all matter except what is laid before them in court; but the remaining members of the array summoned are free to read and listen at large; and to concede the

(1) (1925) 1 W.W.R. 240.
(2) (1924) 3 W.W.R. 45.
(3) (1915) 25 M.R. 233.
(4) (1904) 8 C.C.C. 194
(5) Russel & Ryans Crown Cases 224.
(6) (1909) 25 T.L.R. 374.

competency of the latter to the second panel and to deny it to the remaining members of the first would be wholly illogical. And where, as here, the discharge and the reconstitution of the jury took place within a period of fifteen minutes, any substance in the point vanishes.

The next ground is of some difficulty. I agree with the dissenting judgments of Adamson, J.A. and Dysart, J.A. (1) that the Chief Justice at trial should have heard Mr. McMurray. There seems to have been an initial misconception both of the nature of the action of appointing counsel for an accused and of the right of the accused thereafter in relation to him. To speak through counsel is the privilege of the client, and such an appointment is made in circumstances in which for various reasons the accused, assuming him to be of sufficient understanding, though he desires the benefit of counsel, is not in a position to obtain it; and in the interest of justice counsel should and will be assigned for his assistance. The desire of the accused if not expressly indicated can ordinarily be presumed, but if there is any doubt about it, the court should inquire: *Reg.* v. *Yscuado* (2), where Erle J. said at page 387: "I do not think I have any authority to assign counsel to a prisoner without his consent. I should be very glad if I could do so but by allowing counsel to appear without any communication with the prisoner and without his sanction, I might be authorizing a defence which the prisoner himself would never have made and yet for which he must be responsible." And certainly there is no statutory rule that defence by counsel is a necessary part of the machinery of trial. In fact the contrary appears from what is contemplated by section 944(2) of the Criminal Code where it uses the language ". . . or the accused, if he is not defended by counsel, shall be allowed."

Here, the accused, before Major, J., was represented by counsel who had already conducted on his behalf the preliminary inquiry. There was nothing so far to indicate any obstacle to his defence in the ordinary way. But immediately on the withdrawal of Mr. Walsh—because of the refusal of his motion to traverse the trial to the next sittings —Major, J., without reference to the accused, intimated his duty and intention, should Mr. Walsh persist in his

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withdrawal, to appoint counsel. Surely in that situation nothing could be clearer than that the wishes of the accused should have been consulted.

Then, when the arraignment was moved, Mr. Walsh's partner, Mr. McMurray, K.C. rose, stating that "he was appearing for the accused, having been retained by the family." The Chief Justice answered that he could not hear him because counsel had already been appointed by the court. That I cannot but think was both unfortunate and erroneous. The appearance of Mr. McMurray was an unmistakable intimation that for some purpose at least he had been retained by the accused and that so far Mr. Ross, K.C., who had been appointed "senior" counsel had not been accepted as sole counsel. If Mr. McMurray under his retainer, which I accept as having been made with the consent and approval of the accused, had intended to proceed for all purposes of the defence, I should have had great difficulty in finding that the refusal to hear him had not vitiated all the subsequent proceedings. It is argued that we must infer a general retainer to defend and that we cannot for any purpose go behind the language "I appear for the accused"; but with such a plea as that the latter was deprived of his right to make full defence, we must deal with the realities of what took place and not merely with the formality of the external circumstances: we are therefore entitled to inquire into the extent of the retainer, and into the intention of Mr. McMurray.

We have the undisputed statement of Mr. Kay that Mr. McMurray stated to him immediately before he rose that he was making a motion to traverse the trial, and that if he were not successful, Mr. Walsh would not act with Mr. Ross. Mr. Kay states further, and again without challenge, that nothing indicated in the slightest degree that Mr. McMurray would himself in any circumstances have gone on with the defence; and Mr. Walsh very frankly in the course of his able argument placed himself on the bare formal fact of the refusal to hear Mr. McMurray, regardless of the nature of the motion Mr. McMurray intended to make or of his intention in case of an adverse decision or of the extent or purpose of his retainer. Mr. McMurray's appearance, therefore, appears to have been in fact, as the Chief Justice says he understood it, to make the motion

for postponement and that only. But even if the facts do not compel us so to interpret his intervention, there can be no doubt whatever that his participation in the proceedings would have ended with the motion, if it had been refused. If this were not so, we would have the assurance of another intention on Mr. McMurray's part.

We know likewise, beyond any doubt, that a motion for traverse would in fact have been refused. It had been denied by Major, J. at the opening of the sittings: immediately after the abortive trial and when the circumstances were most favourable, on the application of Mr. Ross, it had been rejected by the Chief Justice; and we have both the statement of the latter made immediately afterwards, that "this case is going on", and in his report, that he should have refused the motion had it been made by Mr. McMurray.

Now, in these circumstances, what appears externally as an error of cardinal importance, is seen to be in reality of an entirely different character; and it must be taken as beyond doubt that upon the conclusion of the motion, the accused would have been in precisely the same position as when Mr. Walsh withdrew. No suggestion has been made either that other counsel would have been engaged or that the accused, aged twenty-one years, would have defended himself; and although the ruling of the Chief Justice was no doubt a coercive circumstance on the mind of the accused, yet in fact it played no part in denying him the assistance of counsel of his choice. The contention is that the trial in fact was what it was because of the refusal to hear Mr. McMurray. The circumstances show conclusively that that was not so; the circumstances of the trial would have been precisely the same had the motion been heard; and the effective cause of the trial as it was carried out was the voluntary withdrawal of counsel chosen by the accused. There was no suggestion either of any failure or inability in confidential co-operation between the accused and Mr. Ross, an experienced counsel, and no intimation of any sort before the Chief Justice at any time during the trial that he was unwanted.

As against this error, there are in the case unchallengeable facts so convincing and conclusive that it would seem a mockery of the practical administration of justice to require

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their repetition in a new trial. Notwithstanding that, however, had the actualities not been as indubitably they were, the vital importance of administering the criminal law not only according to the procedure laid down by law, but so that it would not only be *but appear to be* in accordance with our basic conceptions of justice, would have compelled me to conclude that that repetition must be made. But the facts, properly understood, satisfy that fundamental obligation.

I should add that no point is made connected with any ground on which the withdrawal of Mr. Walsh was based. In fact all grounds mentioned in the Notice of Appeal—and there were twenty-nine of them—other than those against the charge dealing with accident, drunkenness and provocation and as to intent, and those with which I have dealt, were abandoned in the court below. The appeal must therefore be dismissed.

LOCKE J.:—The facts in connection with the withdrawal of Mr. Walsh, the appointment of Mr. Ross, K.C. and of the appearance of Mr. McMurray, K.C. before the Chief Justice at the opening of the Assizes, have been stated in the dissenting judgments in the Court of Appeal. There are, in my opinion, some additional facts to be considered in deciding the issues raised on this appeal.

The appellant, a convict serving a sentence for robbery in the Stony Mountain Penitentiary, was taken in charge by the Police authorities on the charge of murdering the boy George Robert Smith on August 8, 1947, and within a few days thereafter retained Mr. Walsh to defend him. Mr. Walsh was thus engaged on the matter for something more than two months before the accused was brought before Major, J. on October 21st, and during that time had represented the accused at the lengthy preliminary hearing during the course of which the confession was admitted in evidence, and was thoroughly familiar with the matter and had had ample time to make whatever preparations were necessary for the defence. When the case was spoken to before Major, J. at the opening of the Fall Assizes on October 21st, counsel for the prisoner asked that it be traversed to the next Assizes on the ground that widespread publicity had been given by the Winnipeg newspapers to

the fact that the prisoner had made a confession and to a statement made by the Chief of Police of Winnipeg that the bullet which had killed the boy had been fired from a revolver found in the possession of the accused, that counsel expected that the evidence of the ballistic expert called at the preliminary by the Crown would be refuted by an expert on behalf of the defence, and that he would require two or three months to prepare the defence. Mr. Walsh then stated that unless the trial Judge adjourned the case until the following January he would withdraw from the defence. The learned Judge's decision on the motion for a traverse was given on the following morning whereupon Mr. Walsh announced that he must withdraw from the defence and when the trial Judge questioned his right to do so insisted that he had the right to withdraw and proceeded to do so. I think it must be assumed that Mr. Walsh who had been paid a retainer by the accused and apparently undertaken to defend him withdrew with the consent of his client. In England the employment of a barrister is a purely honourary one in the sense that it confers on him no legal right to remuneration for his services but in Manitoba, by virtue of section 72 of *The Law Society Act*, R.S.M. 1940, cap. 111, a barrister may sue for his fees on the footing that an enforceable contract exists between him and his client. On October 22nd when Mr. Walsh announced his withdrawal, Major, J. stated that if the accused did not appoint counsel within a day or two the Court would appoint someone and it was on the day following, when a sister of the accused stated in Court that they did not want any other counsel than Mr. Walsh, that he informed the accused that he had appointed Mr. Ross, K.C. to act as counsel for him and on the following morning Mr. Ross appeared and on behalf of the accused asked that the arraignment be deferred until the 17th of November, the day fixed by the presiding Judge for the commencement of the trial. While the sister of the accused had said on October 23rd in the presence of the prisoner that they did not want to have any other counsel but Mr. Walsh, when the trial opened twenty-four days later Mr. Ross appeared and stated that the defence was prepared to proceed. In the interval since his appointment Mr. Ross had on the prisoner's behalf asked that he be examined by

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a psychiatrist to determine whether he was sane and this had been done. Either on the evening of November 16th or the following morning before Court Mr. McMurray informed Mr. Ross that he proposed to make an application at the opening of the trial, and on that morning he also spoke to counsel for the Crown in Court informing him that he had been retained by the family of the accused and wished to make another application for a traverse of the case to the next Assizes. According to Mr. Kay's statement he thereupon asked Mr. McMurray if in the event of the application being refused he intended to have his partner, Mr. Walsh, act with Mr. Ross as second counsel: the answer was in the negative and Mr. Kay understood that neither Mr. McMurray nor Mr. Walsh intended to take any part in the proceedings if the application was refused. Nothing was said by the prisoner or by Mr. McMurray on his behalf to the effect that he did not desire the services of Mr. Ross, of which he had already availed himself, and during the ensuing trial which lasted seven days Mr. Ross actively conducted the defence, apparently with the prisoner's approval and consent.

The Notice of Appeal to the Court of Appeal for Manitoba (1) stated twenty-six grounds of objection, these including a contention that a miscarriage of justice occurred "when counsel was appointed on my behalf that I did not wish and whose services I did not desire and whose appointment I did not sanction", and further that "I insisted that a witness should be brought to my trial from Verdun, Que. but my desires were constantly overridden by the said counsel appointed by the Court." It was open to the accused under section 27(3) of *The Court of Appeal Act*, R.S.M. 1940, cap. 40, to have obtained the leave of the Court of Appeal to prove by affidavit or otherwise the truth of the contention that he had not in fact accepted the services of Mr. Ross, or to support his complaint as to the witness, but nothing of this nature was done and the complaint against the manner in which the defence had been conducted was abandoned in that Court (1).

It is of course fundamental that a person accused of a crime is entitled to make full answer and defence either personally or by counsel of his choice and that an accused

(1) [1948] 2 W.W.R. 161.

may decline the services of counsel nominated by the Court. While Mr. Justice Major had announced his intention of appointing counsel, I have no doubt that the accused was made aware by Mr. Walsh, in whose presence the announcement had been made on October 22nd, that this meant that the services of a counsel nominated and paid by the Crown would be made available to him and that he might reject the services of anyone so nominated. If he was not then so advised I would assume that this information was given to him by his family after they consulted Mr. McMurray, K.C. No doubt had the appellant informed Mr. Ross that he did not desire his services the latter would have withdrawn at once. Had the appellant so informed Mr. Ross I would assume that the experienced counsel who represented him before the Court of Appeal (1) would have obtained leave to prove that fact by affidavit before that Court (1) and the fact that this was not done indicates to me that nothing of the kind occurred. Apart from the fact that, as shown by the trial judge's report, Mr. Ross acted for the appellant in arranging that he be examined as to his sanity, to assume that he stated to the Court that the defence was prepared to proceed when the trial opened in the Assizes without having thoroughly discussed the matter with the accused and made all proper preparations for the defence, would be to draw an inference which I consider to be directly contrary to the fact. While the prisoner when asked by the clerk whether he was ready for his trial said that he was not, it was for his counsel, so long as he retained his services, to say whether the defence was ready. The prisoner had apparently been a consenting party to the withdrawal of Mr. Walsh some twenty-four days earlier after the application to traverse the case to the next Assizes had been refused and the answer made by him was apparently merely another attempt on his part to obtain a further adjournment. Apart from the fact that Mr. Ross stated that the defence was ready to proceed, an examination of the evidence makes it apparent that ample time for preparation had been given. The prisoner had signed a confession in which he admitted having accosted the boy on the street at night, pointing a gun at him, forcing him into a back lane and shooting the

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child when he attempted to escape. The signed statement, however, attributed the discharge of the gun to accident, claiming that the accused had slipped on some clay in the lane when the boy attempted to get away from him and pulled the trigger by mistake. Medical evidence given at the trial showed that in addition to the fatal wound caused by the bullet which passed through his body the boy had been struck a heavy blow on the head fracturing his skull, the evidence indicating that this blow had been struck after the bullet wound had been inflicted. The confession had been made voluntarily by the accused and had been admitted in evidence at the preliminary hearing and it must have been apparent to counsel for the accused that it would be admitted at the trial. It is to be noted that while one of the grounds of appeal was that evidence had been improperly admitted at the trial the point was not considered worthy of argument in the Court of Appeal (1) and, when counsel for the Crown stated at the commencement of his argument in that Court (1) that he understood this ground of appeal had been abandoned, there was no dissent by counsel for the accused. In addition to this evidence a statement made by the accused to his brother and sister while he was in custody in the Winnipeg Police Station, to the effect that he had confessed and had done so voluntarily, which had been overheard, was given in evidence both at the preliminary and at the trial. While in view of the evidence afforded by the confession and this statement it would appear the evidence was unnecessary, the Crown called a ballistic expert, both at the preliminary hearing and at the trial, who gave evidence that the bullet found in the ground near the boy's body had been fired from a revolver found in the possession of the prisoner when he was arrested in Port Arthur on the charge of robbery. It is apparent that even if there were a ballistic expert who would have given evidence contradicting this Crown witness it would have been pointless to call him. The sanity of the prisoner had been enquired into at the instance of Mr. Ross and he had been found sane. The crime had been committed at night and there were no eye witnesses. In these circumstances it cannot, I think, be seriously contended that twenty-four days was

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not ample time for counsel to prepare the defence. In my opinion there can be no well founded criticism of the course followed by Mr. Justice Major in making the services of Mr. Ross available to the prisoner and in directing that the trial proceed twenty-four days after that date, or by Chief Justice Williams in accepting the answer of Mr. Ross on November 17th that the defence was ready and directing that the trial proceed.

When Mr. McMurray appeared at the opening of the trial he stated that he was appearing "on behalf of the accused, retained by his family" and asked to be permitted to state the nature of the application he proposed to make. In the report made by the Chief Justice to the Court of Appeal (1) he states that he did not understand that Mr. McMurray was seeking to defend the prisoner and that he took from this statement that counsel was appearing for the clients who had retained him and not for the accused. I think it was unfortunate, assuming as I do that Mr. McMurray had been retained to make the application by the accused, that he did not make this clear to the learned trial Judge. Counsel may speak on behalf of a prisoner only if authorized by him to do so but the retainer would be none the less that of the prisoner if it had been made on his behalf by some member of his family on his direction, which presumably was the case here. Had the question been asked whether Mr. McMurray was authorized by the prisoner the position would have been made perfectly clear and the only matter then to be decided would be whether, in view of the fact that an application to traverse the case had been made and dismissed by Major, J., the Chief Justice would entertain another motion to be made apparently without filing any material to support it. If Mr. McMurray had said that he proposed to undertake the defence of the accused and either dispense with the services of Mr. Ross or to act with him, he would no doubt have been heard. It has been made quite clear that the only application which he proposed to make was that the case be traversed to the next Assizes and that he did not intend to take any part in the defence if the motion was refused and we are informed by the judge's report that any such motion would have been refused. In my opinion, if

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it was error on the part of the learned Chief Justice in declining to permit Mr. McMurray to make this motion, it has been shown affirmatively by the Crown that no substantial wrong or miscarriage of justice has actually occurred and the provisions of section 1014(2) of the Criminal Code should be applied.

A further ground of appeal urged on behalf of the appellant is that the jury was not properly constituted. As to this I agree with my brother Rand.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the Appellant: *McMurray, Greschuk, Walsh, Micay, Molloy, Denaburg & McDonald.*

Solicitor for the respondent: *Hon. J. O. McLenaghen.*