IN THE MATTER OF A REFERENCE RE REGINA v. COFFIN

1955
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Criminal law—Murder—Circumstantial evidence—Recent possession of stolen goods—Hearsay evidence—Witness attended cinema as guard for jury—Mixed jury—Refreshing memory of witness—Canada Evidence Act, R.S.C. 1927, c. 59, s. 9—Criminal Code, ss. 923, 944, 1011, 1014(2).

The accused was found guilty of murder by a mixed jury. His conviction was unanimously affirmed by the Court of Appeal. His appeal from the dismissal by a judge of this Court of his application for leave to appeal was dismissed on the ground that this Court was without jurisdiction.

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

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Pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259, the Governor General in Council then referred the following question to this Court: "If the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any of the grounds alleged on the said application, what disposition of the appeal would now be made by the Court?"

Held: Kerwin C.J., Taschereau, Rand, Kellock and Fauteux JJ. would have dismissed the appeal. Locke and Cartwright JJ. would have allowed the appeal, quashed the conviction and directed a new trial.

Per Kerwin C.J. and Taschereau J.: The evidence was such that a legally instructed jury could reasonably find the accused guilty.

If the possession of recently stolen goods is not explained satisfactorily, they are presumed to have been acquired illegally. That possession may also indicate not only robbery, but a more serious crime related to robbery. There is no doubt that the jury did not accept the accused's explanations and that they could justly conclude that he was the thief. Thus they could see therein a motive for the murder and it was a circumstance which they could legally take into account.

The judge was not obliged to tell the jury that they were not entitled to convict of murder simply because they came to the conclusion that he was guilty of theft. The recent possession not only created the presumption, failing explanation, that he had stolen, but the jury had the right to conclude that it was a link in the chain of circumstances which indicated that he had committed the murder.

Any possible inaccuracies in the early part of the judge's direction in regard to the nature of the evidence, was subsequently remedied. The rule in the *Hodge's* case was entirely respected.

The evidence of the police officer that as the result of "precise information" he searched for a rifle at the accused's camp, was not hearsay evidence. The witness was not trying to prove the truth of his information but merely to establish the reason for his visit.

All necessary precautions to prevent irregularities were taken to the judge's satisfaction when he allowed the jury to go to the cinema. All the constables were under oath and it is not suggested that any indiscretions were committed. Moreover, the judge was exercising his discretion when he gave the permission after both parties had consented.

It is within the judge's discretion to grant a jury composed exclusively of persons who speak the accused's language, but if he refuses, he must grant a mixed jury. He must consider what will best serve the ends of justice. The interests of society must not be disregarded. The judge decided that the ends of justice would not be effectively served by granting the accused's request, for that would have eliminated eighty-five per cent of the population from taking part in the administration of justice.

Even if there had been any irregularities concerning the list of jurors, they would be covered by s. 1011 Cr. C.

There was nothing more logical, since a mixed jury was concerned, than to have the judge, counsel for the Crown and for the accused address the jury in French and in English.

Nothing in what counsel for the Crown said was such as to suggest that the jury bring in a verdict based on sentiments and prejudices and not exclusively on the evidence.

S. 9 of the *Canada Evidence Act* does not forbid refreshing the memory of a witness by means of a previous testimony which he has given. There was no attempt to discredit or contradict the witness Petrie. She admitted that her memory was better at the time of the preliminary inquiry. Moreover, this is a question for the judge's discretion.

Even if there had been some irregularities, s. 1014(*c*) Cr. C. would apply, as no substantial wrong or miscarriage of justice occurred. The evidence left the jury no alternative. It was entirely consistent with the guilt of the accused and inconsistent with any other rational conclusion.

Per Rand, Kellock and Fauteux JJ.: The court has a discretion, not open to review, to permit leading questions whenever it is considered necessary in the interests of justice. Moreover, a witness may refresh his memory by reference to his earlier depositions and s. 9 of the *Canada Evidence Act* applies only when it is attempted to discredit or contradict a party's own witness.

The contention that, because of the differences between the addresses of counsel in one language and the other, and between the two charges delivered by the trial judge, the accused was tried by two groups of jurymen, and further that s. 944 Cr. C. requires that the jury be addressed by one counsel only on each side, cannot succeed. The practice followed has been the invariable one in Quebec since 1892. Neither the differences in the addresses nor in the charges were of a nature to call for the interference of this Court.

The judge, in exercising his discretion under s. 923 Cr. C., was right in his view that the ends of justice would be better served with a mixed jury.

It cannot be said that the accused gave any reasonable explanation of how he came to be in possession of the things as to which he even attempted to make an explanation. There was, therefore, abundant evidence from which the jury could conclude, as they have done, that the possessor of the money and other items was the robber and murderer as well.

Per Locke J.: The evidence of the police officer that he acted on "precise information" in searching for a rifle in the vicinity of the accused's camp, was clearly hearsay evidence and, therefore, improperly admitted. That evidence, to which so much importance was attached by counsel for the Crown and by the trial judge when the matter was presented to the jury, was on a point material to the guilt or innocence of the accused. It cannot, therefore, properly be said that there has been no substantial wrong or miscarriage of justice and consequently, s. 592 Cr. C. has no application. (*Makin* v. *A.G. for New South Wales* [1894] A.C. 57 and *Allen* v. *The King* 44 S.C.R. 331 followed).

Per Locke and Cartwright JJ.: The evidence that the police officer had information that a rifle was concealed in a precisely indicated spot near the accused's camp, was inadmissible as being hearsay evidence. Proof that an accused has suppressed or endeavoured to suppress evidence is admissible, but, here, the foundation of the whole incident on which

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the jury were invited to find that he had suppressed evidence was this inadmissible hearsay evidence. It related to a vital matter and in view of the way it was stressed at the trial, counsel for the Crown cannot now be heard to belittle its importance.

The transcript of the evidence given at the preliminary inquiry by the witness Petrie was used not for the purpose of refreshing her memory but for the purpose of endeavouring to have her admit that she was mistaken or untruthful in giving her evidence at the trial. The cross-examination of this witness was unlawful and was attended by further error in that no warning was given to the jury that any evidence of what she had said at the preliminary inquiry was not evidence of the truth of the facts then stated but could be considered by them only for the purpose of testing the credibility of the testimony which she had given at the trial.

Although there is no evidence to suggest that any improper communication took place on the occasion of the visit to the cinema, this unfortunate incident falls within the principle stated in *Rex* v. *Masuda* 106 C.C.C. at 123 and 124. There is no escape from holding that the incident was fatal to the validity of the conviction.

The judge did not direct his mind to the question whether the ends of justice would be better served by empanelling a mixed jury. The reasons given for the exercise of his discretion under s. 923 Cr. C. were irrelevant. Whether the empanelling of a jury of the sort requested by the accused would be attended with difficulty or whether the language of the accused was or was not that spoken by the majority of the population of the district were irrelevant considerations. The record has failed to disclose any ground sufficient in law to warrant the accused being denied his right to a jury composed entirely of persons speaking his language. The error is not cured by s. 1011 Cr. C.

S. 1014(2) does not avail to support the conviction as it is impossible to affirm with certainty that if none of the above errors had occurred the jury would necessarily have convicted; furthermore, even if this could be affirmed, the error in law in admitting the hearsay evidence as to the rifle was so substantial a wrong that the sub-section can have no application, as the accused was deprived of his right to a trial by jury according to law. The errors pertaining to the episode of the cinema and to the empanelling of the mixed jury are also such as cannot be cured by the sub-section.

REFERENCE by His Excellency the Governor General in Council (P.C. 1552, dated October 14, 1955) to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1952, c. 259) of the question stated (*supra*).

A. E. M. Maloney, Q.C. and *F. de B. Gravel* for the accused.

N. Dorion, Q.C. and *P. Miquelon, Q.C.* for the Attorney General of Quebec.

G. Favreau, Q.C. and *A. J. MacLeod, Q.C.* for the Attorney General of Canada.

THE CHIEF JUSTICE:—For the reasons given by Mr. Justice Taschereau, my answer to the question referred to the Court is that I would have dismissed the appeal.

TASCHEREAU J.:—L'appelant a été traduit devant le tribunal de Percé, district judiciaire de la Gaspésie, pour répondre à l'accusation d'avoir, au début de juin 1953, assassiné Richard Lindsay de Holidaysburg, Pennsylvanie, U.S.A.

Le procès, présidé par l'honorable Juge Gérard Lacroix, s'est instruit devant un jury de langue française et de langue anglaise, et l'appelant a été trouvé coupable dans le cours du mois d'août 1954. Ce verdict a été confirmé unanimement par la Cour du Banc de la Reine de la province de Québec (1), et, s'autorisant alors des dispositions du Code Criminel, l'appelant s'est adressé à l'un des juges en chambre de cette Cour pour obtenir une permission spéciale d'appeler. Cette permission a été refusée par l'honorable Juge Abbott, mais les procureurs de l'appelant ont tout de même demandé à cette Cour de réviser ce jugement de M. le Juge Abbott et d'entendre son appel au mérite. La Cour en est venue unanimement à la conclusion qu'elle n'avait pas jurisdiction dans l'espèce, et a en conséquence refusé la demande.

L'appelant a ensuite fait parvenir une requête au Ministre de la Justice, demandant qu'un nouveau procès lui soit accordé. Le Gouverneur Général en Conseil, en vertu des dispositions de l'article 55 de la *Loi de la Cour Suprême du Canada,* a demandé l'opinion de cette Cour afin de savoir quel aurait été le jugment rendu, si celle-ci avait entendu l'appel à son mérite.

La preuve révèle que Eugene Hunter Lindsay, accompagné de son fils Richard, et d'un ami de ce dernier, Frederick Claar, tous trois de Holidaysburg, Pennsylvanie, quittèrent leur résidence le 5 juin 1953, pour se rendre faire la chasse à l'ours en Gaspésie. Le voyage qui s'effectuait en camionnette devait durer environ une dizaine de jours, et les chasseurs projetaient de revenir chez-eux vers le 15 juin.

Le 8 juin, à Gaspé, ils obtinrent tous trois leur permis de chasse et de circulation dans la forêt. A la même date, ils

(1) Q.R. [1955] Q.B. 620.

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achètent diverses épiceries chez les marchands locaux, et le soir, ils s'engagent dans la forêt de Gaspé. Un garde-feu du nom de Jerry Patterson raconte qu'au sud-ouest de Gaspé, sur une petite route qui longe le nord de la Rivière St-Jean, leur camionnette s'est enlisée dans la vase d'un ruisseau qu'ils avaient tenté de traverser, et qu'à cause de l'humidité le moteur avait cessé de fonctionner. Comme Patterson ne réussit pas à les remettre sur la route pour leur permettre de continuer leur voyage, il retourna seul à Gaspé, situé à quelque dix milles seulement, et leur envoya de l'aide, soit Thomas et Oscar Patterson et Wellie Eagle, qui arrivèrent à bord de leur camion le matin du 9 juin et les tirèrent du ruisseau. On remit le moteur en marche, et le midi du 9, on revit les trois chasseurs à Gaspé même. Evidemment, ils sont revenus sur leur chemin, et déclarent à un marchand local d'essence qu'ils désirent retourner aux camps 24, 25 et 26, situés à l'ouest de Gaspé, mais cette fois non pas en longeant le côté nord de la Rivière St-Jean, mais par une route différente.

Le lendemain, soit le 10, un garagiste revoit à Gaspé le plus jeune des trois chasseurs en compagnie de Coffin lui-même, dans un camion d'une demi-tonne et de marque Chevrolet, et portant une licence canadienne. Le jeune Lindsay, qui était accompagné de Coffin, informa le garagiste qu'ils sont venus tous trois en Gaspésie faire la chasse à l'ours, mais que contrairement à leurs habitudes ils n'ont pas eu cette fois recours aux services d'un guide. Quant à Coffin, alors qu'il est seul avec le témoin, il explique qu'il est revenu avec un individu au village pour faire réparer une pompe à gazoline défectueuse. Dans un bar où il achète une demi-douzaine de bouteilles de bière, il reconte qu'en se rendant prospecter dans la forêt, il a rencontré les trois chasseurs dont la camionnette était en panne. Coffin dit qu'il a décelé une défectuosité dans la pompe et qu'il a remené les américains à Gaspé à bord d'un truck, que Billy Baker lui aurait prêté. Le même jour, Coffin se rend chez un nommé Napoléon Gérard, un garagiste, accompagné du jeune Lindsay, et achète une pompe à gazoline au prix de $8.80. Coffin n'a demandé à personne de réparer la pompe défectueuse.

Evidemment, Coffin et les trois sont retournés immédiatement dans la forêt, dans le camion conduit par Coffin, et le 12, Coffin est revu à Gaspé dans le même camion, et un

témoin affirme avoir vu dépasser le canon d'une carabine. Quant aux voyageurs, on n'en a plus eu de nouvelles. La période de vacances qu'ils s'étaient fixée s'écoula, et les familles Lindsay et Claar n'en entendent plus parler.

La preuve révèle que tard dans la soirée du 12 juin, Coffin a quitté Gaspé dans le camion antérieurement emprunté de Baker, mais sans la permission de ce dernier pour ce nouveau voyage. Avant de partir cependant, il se procura un permis de conducteur, paya quelques dettes contractées depuis quelque temps, acheta à divers endroits plusieurs bouteilles de bière, paya l'un des vendeurs avec un billet américain de $20 et exhiba un canif à usage multiple, plus tard identifié comme étant la propriété du jeune Lindsay. Il se rendit chez sa soeur madame Stanley à qui il montra le même canif. Il se changea de vêtements et quitta sa soeur sans mentionner sa destination. Dans la nuit du 12 au 13 juin, vers 1:30 heure du matin, il arrêta chez un nommé Earle Turzo de York Centre, à qui il remit une somme de $10, empruntée cinq semaines auparavant, et se fit remettre un revolver qu'il avait donné en garantie. Il paya la traite au whisky à Turzo ainsi qu'à la mère de celui-ci. A 3:30 heures A.M., près de Percé, son camion tomba dans le fossé. Un nommé Elément lui aida à en sortir et se fit payer en billets américains.

A six heures du matin, le 13, Coffin est rendu à Percé. Il fait son plein d'essence et fait réparer ses freins. Le coût de la réparation s'élève à $8. Coffin remet au garagiste un billet américain de $20 et se fait remettre $10, laissant la différence comme pourboire. Il expliqua au garagiste qu'il lui fallait se rendre à Montréal, ayant reçu un appel téléphonique en rapport avec une prétendue compagnie américaine, et qu'il ne pouvait transmettre ses informations ni par téléphone ni par lettre.

Coffin se rend ensuite vers la Vallée de la Matapédia. Il s'arrête près de Chandler où il fait monter à bord de sa camionnette un nommé Diotte. Là, il s'arrête chez le coiffeur où il "paye la traite". Il donne $10 à Diotte pour acheter un paquet de cigarettes. Pendant ce temps, il se fait tailler la barbe, couper les cheveux, laver la tête, et verse la somme de $3 en paiement quand il ne devait que $1.50. Au cireur de chaussures qui lui demande $0.15, il lui fait cadeau de $1. Vers midi, le 13 juin, il arrive à

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St-Charles Caplan, verse dans un fossé. Un camionneur vient lui aider et Coffin tire d'un porte-feuilles bien garni, de couleur brune, un billet américain de $20 et ne demande que $10 de change. A Black Cape, il fait de nouveau son plein d'essence chez un nommé Campbell, et lui laisse un pourboire de $1. Il arrête ensuite, vers trois heures de l'après-midi, à Maria dans le comté de Bonaventure, où il s'endort au volant de son camion. Un nommé Audet vient le réveiller, invite Coffin à entrer chez-lui où Coffin prend un repas. Coffin lui donne $2 et $1 à l'un des enfants. Entre cinq et six heures, il part en direction de Québec. Le dimanche matin, il est rendu à St-André de Kamouraska chez un nommé Tardif où il déjeûne, et paye avec un billet de $20 de dénomination américaine. Comme on ne peut faire la monnaie, il laisse $5 refusant de recevoir la balance. Apparemment, il a aussi laissé $10 sous une chaise. Madame Tardif a constaté qu'en payant, il avait tiré de sa poche un gros paquet de billets. A Montmagny, il tombe de nouveau dans un fossé. Un nommé Chouinard de Rivière-du-Loup le tire de ce fossé, et Coffin lui laisse $5 sur un billet de $10. A St-Michel de Bellechasse où il couche, il repart le lendemain matin vers sept heures, et malgré qu'on lui demandait la somme de $2.50, il laisse à l'hôtelier $5. L'hôtelier remarque que le porte-feuilles est bien garni de papier-monnaie. Le dimanche 14, il arrive à Montréal chez sa "common law wife" Marion Petrie Coffin. Dans la camionnette de Baker qu'il conduisait toujours, Marion Petrie remarque des œufs contenus dans une boîte de biscuits soda et une bouteille de sirop "Old Type", précisément une boîte semblable à celle acquise par les chasseurs chez un épicier de Gaspé, et une bouteille portant la même marque que celle achetée au même endroit. Marion Petrie voit également une pompe à gazoline qui n'a jamais été utilisée, et qui est évidemment celle achetée à Gaspé pour les américains. Dans une valise placée également dans le camion et que les détectives retrouvent plus tard chez madame Stanley, sœur de Coffin, et qui est identifiée comme appartenant au jeune Claar, on y trouve des serviettes, deux paires de salopettes que la mère du jeune Claar reconnaît comme étant la propriété de son fils. Evidemment, ces objets avaient été apportés par le jeune Claar pour aller faire la chasse au camp 26, et sont demeurés

dans le camion de Coffin qui est allé le reconduire. Coffin apporta également à Montréal une paire de jumelles appartenant aussi à Claar.

Coffin séjourna à Montréal durant environ dix jours où il achète des épiceries, huit à dix bouteilles de bière quotidiennement, et dépense sans travailler. En quittant Montréal, il se rend à Val d'Or, rencontrer un nommé Hastie, courtier en valeurs minières, et celui-ci consent à se rendre en Gaspésie avec Coffin pour y examiner certains dépôts de cuivre. Le 20 juillet, le lendemain de son arrivée à Gaspé, Coffin informe Hastie qu'il lui est impossible de l'accompagner, car il lui faut aider les policiers dans leurs recherches commencées depuis quelque temps déjà.

Avant l'arrivée de Coffin, on avait retrouvé vers le 11 juillet la camionnette des chasseurs à un demi-mille du camp 21, et dans laquelle se trouvent une carabine et une paire de pantalons.

Le lendemain de la découverte de la camionnette, les recherches se poursuivent. Les camps sont visités et, le 15 juillet, d'importantes découvertes sont faites. Entre les camps 21 et 24 séparés d'une distance d'environ trois milles, on voit des traces de roues de camions, et du côté gauche de la route on découvre divers objets, et le lendemain on en découvre d'autres dissimulés dans les feuillages et d'autres reposant dans le lit de la rivière qui coule à environ cinquante pieds du chemin. Entre autres, on y trouve un poèle, un réservoir à essence, un coupe-vent de couleur bleue, un sac de couchage, qui appartenaient aux américains. On constate aussi la présence d'un kodak contenant un film qui n'a pas été entièrement exposé, et qui en est rendu à la cinquième pose sur un total de huit. Il était la propriété du jeune Claar. On retrouve également un étui à jumelles dans lequel on peut facilement introduire les jumelles que madame Lindsay a identifiées, et que l'on trouvera plus tard dans la forêt à proximité des ossements du jeune Lindsay; on trouve également l'étui à carabine qui a été retrouvé aux environs du camp 26, non loin des ossements du jeune Claar. Tous ces objets ont été retrouvés à au delà de trois milles où la camionnette abandonnée par les américains a été localisée. Le 15 juillet, une carabine et divers autres objets sont retrouvés. Dans le bois de cette carabine on y voit une impression laissée par un coup qui

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semble avoir été le résultat d'une balle d'une autre arme à feu. Le magasin de cette carabine était plein de cartouches, et le cran de sûreté était à la position "sure".

Près de cent pieds plus loin, de l'autre côté de la rivière qui est large de quinze à vingt pieds, on trouve un squelette humain complètement décomposé, et le Docteur Roussel ayant transporté ces restes à Montréal, conclut qu'il s'agit là des restes d'une personne de sexe masculin, mesurant environ cinq pieds sept pouces, âgée d'au delà de quarante ans et dont la mort remonte à au moins un mois depuis l'examen. On trouve également un porte-feuilles identifié comme appartenant à Lindsay père, avec certains documents qui lui appartiennent, mais il n'y a plus un seul sou des $650 qu'il avait apportés avec lui en billets américains. Il n'est certainement pas permis de douter qu'il s'agit là du cadavre de Lindsay père.

Les officiers de police ont continué leurs recherches afin de trouver les cadavres du jeune Claar et du jeune Lindsay, et ce n'est que le 23 juillet, aux environs du camp 26 qui se trouve à deux milles et demi du camp 24, où ont été trouvés les ossements de Lindsay père, que sont découverts les restes des deux autres américains. A proximité on y relève des pièces de vêtements, une paire de jumelles qui appartenait au jeune Lindsay, et madame Lindsay la mère a identifié d'autres vêtements trouvés sur les lieux comme appartenant à son fils. On a produit en outre à l'enquête un gilet blanc et une chemise de couleur verte à travers lesquels on aperçoit un trou entouré d'une tache noirâtre. Tout près, on voit dissimulée une veste de cuir à fermeture éclair, propriété du jeune Lindsay, et dont les poches sont retournées et vides. Il est en preuve que les taches qui entourent les perforations sont du sang humain et que les trous portent des traces de plomb. Leur site correspond au poumon et au coeur, et il est logique de conclure qu'il s'agit de perforation produite par un projectile d'arme à feu. Le Docteur Roussel témoigne que dans les deux cas il s'agit des cadavres de deux jeunes gens de moins de vingt-cinq ans dont la date de la mort remonte à la même période que la date de la mort de Lindsay père. Sur la chemise du jeune Claar on y aperçoit également des perforations au niveau du bassin et autour desquelles la présence de dépôts métalliques indique qu'elles sont attribuables à un projectile

d'arme à feu. Les mêmes constatations ont été faites au niveau de la poitrine, par conséquent au niveau d'organes vitaux.

Coffin n'est revenu en Gaspésie qu'après la découverte de la camionnette et des ossements de Lindsay père, et ce n'est que le 20 juillet que les détectives peuvent l'interroger. Ses réponses ne sont pas satisfaisantes. Ses explications des faits sont boiteuses, contradictoires et incomplètes, et le récit de ses allées et venues dénote une obstination persistante à vouloir voiler la vérité. Ainsi, il prétend n'être jamais allé au camp 21, et après s'être repris, il soutient qu'il n'est pas allé aux camps 25 et 26, les deux endroits où ont été trouvés les ossements, quand il est en preuve que ceci est faux.

Le matin du 10 après être revenu avec MacDonald du bois, et avec qui il est entendu qu'il doit retourner, il lui fausse compagnie, et repart seul dans la direction des chasseurs. Il explique qu'il préférait faire de la prospection seul. Mais au lieu d'aller faire de la prospection à la fourche sud de la Rivière St-Jean, il se rend au camp 21. Il est certain que quand il est retourné, il avait une carabine, car, elle est vue le soir du 12 par MacGregor. Sur ces points, il ne fournit pas d'explications. Comment s'est-il procuré tout cet argent américain, qu'il distribue à profusion? Où a-t-il pris les épiceries, cette valise, les vêtements, les jumelles, le canif, la pompe à gazoline, tous la propriété des chasseurs? Il n'explique pas qu'il ait emprunté une carabine d'un nommé John Eagle, qui n'a jamais été retournée, et qui n'a jamais été retrouvée. Il ne dit pas non plus la raison de son voyage à Montréal le soir du 12, ni pourquoi il est parti sans avertir personne.

Coffin prétend, évidemment pour détourner les soupçons, que deux autres américains sont allés à la chasse à l'ours avec les victimes. Personne cependant n'a eu connaissance de leur séjour à Gaspé ou ailleurs dans la région, à cette période. Aucun permis ne leur aurait été donné, et on ne retrouve aucune de leurs traces. Ce qui est vrai, c'est que deux autres américains sont venus à la chasse, en "jeep" de marque Willys, et sont entrés dans la forêt le 27 mai par York River, et qu'ils ont quitté Gaspé le 4 juin, c'est-à-dire plusieurs jours avant l'arrivée de Lindsay et de ses compagnons. De plus, ces chasseurs entendus comme témoins, ont juré n'être jamais allés aux camps 21, 24, 25 et 26.

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Au cours des recherches dans le bois avec les détectives, qu'il a consenti à accompagner, il feint de ne pas connaître les lieux. Au camp 24, accompagné des chercheurs, il demande au cours du repas, où est la source pour aller chercher l'eau, lui qui est né et a vécu dans ce pays, et qui le 8 au soir s'était rendu à ce même camp 24 avec MacDonald, et qui le matin du 9, sur le bord du ruisseau, avait allumé un feu. Il est en preuve que jamais il ne porte ses regards du côté gauche de la route, précisément aux endroits où les cadavres ont été trouvés, et où évidemment leur ont été enlevés tous les objets trouvés en la possession de Coffin.

Avec cette preuve, le jury légalement instruit, et maître des faits, pouvait raisonnablement trouver l'accusé coupable. C'est donc avec raison que devant cette Cour, le procureur de l'accusé a abandonné l'un de ses moyens d'appel, qui était à l'effet qu'il n'y avait pas de preuve suffisante pour justifier un verdict de culpabilité. La question de savoir si la "common law wife" de Coffin, Marion Petrie, était en vertu de l'article 4 de la Loi de la Preuve du Canada, un témoin compétent à témoigner contre l'accusé, a été abandonnée également, et n'a pas été soumise à la considération de cette Cour. Il en est de même d'un grief concernant la possession récente des objets volés, et se rapportant aux objets qui auraient été volés et n'appartenant pas à la victime, que Coffin est accusé d'avoir assassinée. On a aussi abandonné le point concernant une prétendue preuve illégale, se rapportant aux photographies des ossements des victimes, ainsi que celui relatif à la réplique, exercés par l'un des avocats de la Couronne.

Il reste donc à être déterminés par cette Cour, les points suivants, que je reproduis en anglais, la langue dans laquelle ils nous ont été soumis:—

1. Did the Learned Trial Judge err in respect to the instructions he gave to the jury with reference to the doctrine of recent possession in the following manner:—

(*a*) Should the jury have been permitted to apply the doctrine at all?

(*b*) Were the jury misdirected with reference to the burden resting on the Appellant to explain his possession of items allegedly stolen?

2. Did the Learned Trial Judge err in failing to instruct the jury that they were not entitled to convict the Appellant of murder simply because they came to the conclusion that he was guilty of the theft of the various articles proved to have been the property of the victim, Richard Lindsay, and his associates?

3. Did the Learned Trial Judge err by instructing the jury in a manner that would indicate the statements and declarations made by the Appellant to various witnesses were not to be regarded as circumstantial evidence and evidence therefore to which the rule in Hodge's case should be applied?

4. Did the Learned Trial Judge err in admitting evidence concerning a certain rifle, the property of one Jack Eagle?

5. Did the Learned Trial Judge err in permitting the jury to attend a moving picture theatre in the company of two police officers who were subsequently called as witnesses for the Crown?

6. Did the Learned Trial Judge err in refusing the application made on behalf of the Appellant to be tried by a jury composed entirely of English-speaking citizens?

7. Was the Appellant deprived of a trial according to law by reason of the failure of the Sheriff of the County in which the Appellant was tried to comply with the provisions of the Quebec Jury Act (1945, 9 George VI, Chap. 22)?

8. Was the Appellant deprived of a trial according to law by reason of the improper mixture of the English and French language?

9. Was the Appellant deprived of a trial according to law by reason of the fact that Crown Counsel in their addresses to the jury used inflammatory language?

10. That Marion Petrie, being a Crown Witness, was submitted to a cross-examination by the Crown counsel, although she was not declared hostile.

Au soutien de son premier point, le procureur de l'accusé prétend que le jury n'aurait pas dû appliquer la doctrine de la possession récente, pour établir que l'accusé était l'auteur des vols commis, et que le juge a donné des instructions erronées concernant le fardeau qui repose sur l'accusé, d'expliquer la possession des objets volés.

La doctrine et la jurisprudence enseignent que si une personne est en possession d'objets volés peu de temps après la commission du crime, elle doit expliquer cette possession, et si elle ne réussit pas à le faire de façon satisfaisante, elle est présumée les avoir acquis illégalement. De plus, c'est aussi la doctrine et la jurisprudence que la possession d'effets récemment volés, peut indiquer non seulement le crime de vol, mais aussi un crime plus grave relié au vol. (*Rex* v. *Langmead* (1); Wills pages 61 et 62; *Regina* v. *Exall* (2)).

Dans le présent cas, je n'ai pas de doute que le jury n'a pas accepté les explications données par l'accusé aux policiers, et que le jury pouvait justement conclure que Coffin était l'auteur du vol. En concluant ainsi, le jury

(1) (1864) 9 Cox C.C. 464 at 468. (2) (1866) 4 F. & F. 922.

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pouvait y voir un motif du crime de meurtre, et c'était une circonstance dont il pouvait légalement tenir compte. Je ne vois rien dans la charge du juge qui soit de nature à vicier le procès sur ce point.

Je crois également le second point non fondé. Je suis d'opinion que le juge ne devait pas dire au jury ce qu'on lui reproche d'avoir omis. Le fait pour Coffin d'avoir en sa possession des effets récemment volés, faisait naître non seulement la présomption, faute d'explication, qu'il les avait volés, mais le jury avait le droit de conclure que c'était un lien dans une chaîne de circonstances, qui indiquait qu'il avait commis le meurtre. Dans *Regina* v. *Exall* (supra page 924) Pollock C.B. dit:—

> And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.

Il est certain que le juge en adressant le jury leur a dit que la Couronne avait offert deux sortes de preuve, soit la preuve circonstancielle, et la preuve de conversations ou paroles dites par l'accusé. Après avoir défini la preuve circonstancielle, et avoir énoncé aux jurés les principes de la cause de *Hodge,* il ajouta:—

> Il est évident que sur l'ensemble de ces faits, l'on ne trouvera aucune preuve directe nulle part et c'est précisément là que l'on vous demande d'extraire des circonstances, la ou les conclusions que, dans votre estimation, vous devez voir comme résultant de ces faits.

Je suis fermement convaincu que s'il a pu y avoir quelques incorrections au début de ses remarques, sur ce point, le juge y a complètement remédié par les dernières paroles que je viens de citer. Les règles contenues dans la cause de *Hodge* ont en conséquence été totalement respectées.

J'ai signalé déjà que Coffin avait emprunté une carabine d'un nommé John Eagle, qui n'a jamais été remise à ce dernier, et qui n'a jamais été retrouvée. Quand l'accusé est revenu du bois dans la soirée du 12 juin, on a remarqué dans son camion la présence d'une carabine. On sait aussi qu'il n'en avait pas le 8, quand il est allé dans le bois avec MacDonald pour prospecter, et qu'il n'en avait pas non plus le 10, quand il est retourné seul dans la forêt. Il me semble nécessaire que la Couronne fît des efforts pour

trouver cette arme. En revenant le 12, Coffin n'a pas laissé la carabine chez son père où il vivait, et il ne l'avait pas avec lui quand il est parti pour Montréal le soir du 12. La théorie de la Couronne est que le soir du 9, tel que prouvé par MacDonald qui l'accompagnait, Coffin est allé à son camp situé à l'ouest de Gaspé, pour y chercher la carabine, et qu'il l'avait retournée au même endroit après la commission du crime. Cette théorie est d'autant plus vraisemblable, qu'un jour, alors qu'il était détenu au mois d'août à la prison de Gaspé, Coffin eut une entrevue avec son frère, et dans la même nuit, un camion s'est rendu au camp de Coffin, dont le conducteur n'a pas demandé d'ouvrir la barrière qui conduit dans la forêt. Au contraire, cette barrière a été contournée, et des traces fraîches sur la route indiquaient le passage récent d'un camion que l'on croit être d'une capacité d'une tonne, comme celui du frère de Coffin. Ces traces indiquent que le camion s'est rendu au camp et en est revenu en contournant toujours la barrière.

Au mois d'août, le sergent Doyon s'est rendu au camp de Coffin, y a constaté les mêmes traces, et au cours de son témoignage, il a dit qu'ayant reçu une "information précise", il s'était rendu faire des recherches au camp de Coffin, essayant de trouver quelque preuve qui lui aiderait à retrouver cette carabine. On prétend que cette preuve est illégale vu qu'il s'agirait de ouï-dire. Je ne puis admettre cette prétention. A mon sens, il ne s'agit nullement de ouï-dire, car quand Doyon a dit qu'il avait agi après avoir reçu une "information précise", il n'entendait pas prouver la véracité de son information, mais bien établir la raison de sa visite au camp. Comme le dit Roscoe Nisi prius, page 53:—

> When hearsay is introduced not as a medium of proof in order to establish a distinct fact, but as being in itself part of the transaction in question and explanatory of it, it is admissible, words and declaration are admissible.

A la page 55, il ajoute:—

> It has been justly remarked by recent text writers that many of the above cases are not strictly instances of hearsay (i.e. second hand evidence) though commonly so classed. The res gesta in each case is original evidence and the accompanying declaration being part of it is also original.

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Phipson (hearsay) page 223:—

In some cases a verbal act may be admissible as original evidence although its particulars may be excluded as hearsay. Thus, though the fact that the prosecutor made a communication to the Police, in consequence of which they took certain steps, is allowed to be proved, yet what was actually said is excluded as hearsay, is a very dangerous form.

Dans la cause de *Rex* v. *Wilkins* (1), M. le Juge Erle dit:—

Half the transactions of life are done by means of words. There is a distinction, which it appears to me is not sufficiently attended to, between mere statements made by and to witnesses, that are not receivable in evidence, and directions given and acts done by words, which are evidence. The witness, in this case, may say that he made inquiries, and in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them.

Les détectives agissent souvent comme conséquence d'informations qu'ils reçoivent, et le fait de dire qu'ils ont été "informés" ne constitue nullement une preuve illégale. Ce n'est pas un moyen de preuve de nature à établir un fait particulier.

Un autre grief de l'accusé, est que le juge a erré en permettant aux jurés, durant le procès, d'assister au cinéma, accompagnés de plusieurs officiers de police, qui furent subséquemment appelés comme témoins de la Couronne. Je suis satisfait que toutes les précautions nécessaires ont été prises, à la satisfaction du juge pour que rien d'irrégulier ne s'est passé. Tous les constables ont été assermentés, et il n'est pas suggéré qu'aucune indiscrétion n'ait été commise. D'ailleurs, cette permission d'assister au cinéma a été donnée par le juge lui-même, exerçant sa discrétion, après qu'il eût obtenu le consentement de l'avocat de la Couronne et de celui de l'accusé.

En ce qui concerne le 6ème grief, il est nécessaire en premier lieu de citer l'article du *Code Criminel,* qui détermine les droits d'un accusé à un jury mixte, ou composé entièrement de personnes parlant la langue française ou anglaise. Cet article se lit ainsi:—

923. Dans ceux des districts de la province de Québec où le shérif est tenu par la loi de dresser une liste de petits jurés composée moitié de personnes parlant la langue anglaise, et moitié de personnes parlant la langue française, il doit, dans son rapport, mentionner séparément les jurés qu'il désigne comme parlant la langue anglaise, et ceux qu'il désigne comme parlant la langue française, respectivement; et les noms des jurés ainsi assignés sont appelés alternativement d'après ces listes.

(1) (1849) 4 Cox C.C. 92.

2. Dans tout district, le prisonnier peut, lorsqu'il est mis en jugement, demander par motion, d'être jugé par un jury entièrement composé de jurés parlant la langue anglaise, ou entièrement composé de jurés parlant la langue française.

3. Sur présentation de cette motion, *le juge peut ordonner* au shérif d'assigner un nombre suffisant de jurés parlant la langue anglaise ou la langue française, *à moins qu'à sa discrétion il n'apparaisse que les fins de la justice sont mieux servies par la composition d'un jury mixte.*

Je suis fermement d'opinion qu'il n'y a pas eu d'erreur de la part du juge en ordonnant un jury mixte. Quand un accusé demande la composition d'un jury exclusivement composé de personnes parlant sa langue, comme la chose a été faite dans le cas présent, *il est à la discrétion du juge* d'accéder à cette demande, mais s'il la refuse, il doit accorder un jury mixte. Le droit de l'accusé à douze jurés de sa langue, n'est pas un droit absolu, et le juge devra prendre en considération ce qui doit le mieux servir les fins de la justice. Malgré que dans un procès criminel, l'intérêt de l'accusé soit primordial, l'intérêt de la société ne doit pas être méconnu. (*Alexander* v. *Regem* (1); *Mount* v. *Regem* (2); *Bureau* v. *Regem* (3); *Duval* v. *Regem* (4)). Dans la présente cause, exerçant sa discrétion le juge a décidé que les fins de la justice ne seraient pas utilement servies, en accordant la demande de l'accusé, car il aurait ainsi éliminé 85% de la population française, à la participation de l'administration de la justice. Il n'appartient pas à cette Cour d'intervenir dans l'exercice de cette discrétion.

Je disposerai brièvement du grief N° 7, où l'on prétend que les dispositions de la loi (1945, 9 Geo. VI, c. 22) concernant la liste des jurés n'ont pas été suivies. Ainsi, et c'est le grief qu'on invoque, les jurés doivent être choisis dans un *rayon* de 40 milles de la municipalité (art. 1) et ils l'ont été, non pas dans un *rayon de 40 milles,* mais bien jusqu'à une distance de 40 milles, mesurés sur la route.

Même s'il y avait là une irrégularité, elle serait couverte par l'article 1011 C. Cr. qui dit:—

1011. Nulle omission dans l'observation des prescriptions contenues dans une loi à l'égard de la compétence, du choix, du ballotage ou de la répartition des jurés, ou dans la préparation du registre des jurés, le choix des listes des jurys, l'appel du corps des jurés d'après ces listes, ou la convocation de jurys spéciaux, ne constitue un motif suffisant pour infirmer un verdict, ni n'est admise comme erreur dans un appel à interjeter d'un jugement rendu dans une cause criminelle.

(1) Q.R. (1930) 49 K.B. 215.
(2) Q.R. (1931) 51 K.B. 482.
(3) Q.R. (1931) 52 K.B. 15.
(4) Q.R. (1938) 64 K.B. 270.

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Je trouve que cette objection ne repose sur aucun fondement sérieux.

Le grief N° 8 ne me semble pas plus sérieux. On reproche au juge, aux avocats de la Couronne, comme d'ailleurs pas ricochet aux avocats de la défense d'avoir adressé le jury en français et en anglais. Y avait-il rien de plus logique d'agir de la sorte quand il s'agit d'un jury mixte? D'ailleurs, il semble qu'on peut facilement disposer de cette objection en référant à la cause de *Veuillette* v. *Le Roi* (1), et particulièrement aux raisons de M. le Juge Brodeur à la page 424:—

> Ce serait, suivant moi, un droit bien illusoire si, malgré le droit qu'aurait un anglais, par exemple, de choisir un jury mixte, il était permis à la couronne de faire entendre les témoins en langue française et de ne pas traduire leurs témoignages en anglais de manière à ce que la teneur de ces témoignages fût comprise par les jurés de langue anglaise. Cela constituerait un grave déni de justice.
>
> Il en serait de même pour le résumé (charge) du juge. Ce dernier devrait voir à ce que son allocution soit comprise de tout le jury.
>
> Il est vrai que la loi est silencieuse sur la manière dont une cause devra être conduite devant un jury mixte. Mais je ne veux pas de meilleure interprétation de la loi que cette pratique, constamment suivie depuis plus de cent cinquante ans, que dans le cas de jury mixte les dépositions de témoins sont traduites dans les deux langues et le résumé du juge est également fait ou traduit en anglais et en français.

Et M. le Juge Mignault s'exprime de la même façon aux pages 430 et 431.

Je ne crois pas nécessaire de discuter le 9ème grief, car je ne trouve pas que les procureurs de la Couronne, s'ils ont parlé avec énergie, ont employé un langage enflammé. Rien dans ce qu'ils ont dit était de nature à suggérer aux jurés de rendre un verdict non pas exclusivement basé sur la preuve, mais aussi sur les sentiments et les préjugés.

Il reste donc le dernier motif d'appel qui est à l'effet que Marion Petrie, appelée comme témoin de la Couronne, aurait été transquestionnée par le procureur de la Couronne, sans avoir été déclarée hostile. L'objection est basée sur l'article 9 de la *loi de la Preuve du Canada.* Il se lit ainsi:—

> 9. La partie qui produit un témoin n'a pas la faculté d'attaquer sa crédibilité par une preuve générale de mauvais réputation, mais si le témoin est, de l'avis de la cour, défavorable à la partie en cause, cette partie dernière peut le réfuter par d'autres témoignages, ou, avec la permission de la cour, peut prouver que le témoin a en d'autres occasions fait une déclaration incompatible avec sa présente déposition; mais avant de

(1) (1919) 58 Can. S.C.R. 414.

pouvoir établir cette dernière preuve, les circonstances dans lesquelles a été faite la prétendue déclaration doivent être exposées au témoin de manière à désigner suffisamment l'occasion en particulier, et il doit lui être demandé s'il a fait ou non cette déclaration.

On voit donc, que ce que défend cet article est de discréditer ou contredire son propre témoin, mais nullement de rafraîchir la mémoire d'un témoin, au moyen de témoignages antérieurs qu'il a rendus. Quand l'avocat de la Couronne a questionné madame Petrie sur la bouteille de sirop d'érable, la pompe à gazoline, la présence des deux autres américains, retournés aux Etats-Unis avant l'arrivée de Lindsay et de ses compagnons, comme ses réponses ne concordaient pas entièrement avec celles données à l'enquête préliminaire, elle a lu elle-même ses réponses pour se rafraîchir la mémoire. Elle admet que sa mémoire était meilleure au temps de l'enquête préliminaire une année auparavant. Je ne vois aucune tentative de discréditer le témoin ou de la contredire. Il s'agissait seulement de savoir quelle était la véritable version, et le témoin a accepté celle de l'enquête préliminaire. C'est là d'ailleurs une question de discrétion pour le juge, qui décide suivant les circonstances et l'attitude du témoin.

Je suis donc d'opinion que j'aurais rejeté cet appel, si la Cour avait eu jurisdiction pour l'entendre. Il y a dans toute la preuve qui a été faite un faisceau de circonstances telles que même si j'avais trouvé dans les griefs soulevés par le procureur de l'accusé, non pas des erreurs fondamentales, auxquelles on ne peut remédier, mais quelques irrégularités affectant le procès, je n'aurais pas hésité à appliquer l'article 1014(*c*) du *Code Criminel*, car il ne s'est produit aucun tort réel, ni déni de justice. *Allen* v. *The King* (1). Les circonstances établies, ne laissaient aucune alternative au jury. Elles sont entièrement compatibles avec la culpabilité de l'accusé, et incompatibles avec toute autre conclusion rationnelle.

Ma réponse, en conséquence, à la question posée par Son Excellence la Gouverneur Général en Conseil est que j'aurais rejeté l'appel.

RAND J.:—For the reasons given by my brother Kellock, my answer to the question referred to the Court is that I would have dismissed the appeal.

(1) (1911) 44 Can. S.C.R. 331.

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KELLOCK J.:—The appellant first contends that while the jury were properly charged as to the treatment of circumstantial evidence, the learned trial judge removed from the ambit of such evidence all statements made by the accused himself to the various witnesses.

Initially that is so but the learned trial judge had previously told the jury that, with respect to both direct and circumstantial evidence, the Crown must establish beyond a reasonable doubt that it was the accused who had committed the crime for which he was indicted, and immediately following the direction objected to, proceeded to particularize the evidence of "the circumstances" and included therein not only what had been stated by the various witnesses as to the conduct of the appellant but also the statements made by him. Not only so, but he told the jury that "considering the whole of these facts, no direct proof can be found anywhere" and charged them that if they were not convinced by the evidence "beyond a reasonable doubt that the accused has committed the offence for which he stands indicted, this doubt must work in his favour and it is your duty to discharge him." In these circumstances, all basis for any objection on the above ground, in my opinion, disappears.

The appellant further contends that the examination on behalf of the Crown of the witness Petrie, with respect to whom the learned judge had refused an application to declare her a hostile witness, amounted to cross-examination and was for that reason inadmissible, and, in particular, that the use made by counsel for the Crown of her previous depositions was illegal.

In the course of her examination as to articles which Coffin had brought to Montreal, the witness stated that she had seen a certain maple syrup bottle while giving evidence at the preliminary hearing a year before. She went on to say that it was "like" the one produced at the trial but smaller "as far as I can remember". Crown counsel agreed that "we are talking about evidence that had been given over a year ago" and asked the witness if she would care to refresh her memory, to which she responded that she "wouldn't mind". After having read her depositions to herself, she stated what she had said at the earlier hearing and agreed that her earlier memory was to be preferred.

Similarly, on a question as to her having seen a gas pump with Coffin, the witness at first said she had seen only the box in which it was contained. But on refreshing her memory by reference to her depositions, she said her memory had been better on the former occasion and that she had seen the pump.

Evidence had already been given at the trial of a statement made to the police by Coffin that when he had last seen the Lindsay party, two other Americans, driving a yellowish-coloured jeep, were with them. Evidence had also been given that two Americans driving a vehicle of the above description had been in the Gaspé area some days earlier but had recrossed the border to the United States on June 5, the day the Lindsay party had left Pennsylvania. This was the only evidence of the presence in the district at any time of any similar American party.

On this subject the witness Petrie deposed that Coffin had, a few days after his arrival, told her the same story he had told the police but not on the night of his arrival, when he had told her the other things. She also said, in answer to a question to that effect, that she had not made such a statement on any previous occasion, including an occasion when she had given a statement to the police. She was then asked as to her memory of the facts at the time of the preliminary inquiry. Having answered that it was "a little better than they are now", she looked at her depositions and testified that she had previously said that Coffin had told her only of the Lindsay party. She said that her memory when she had thus testified was "not too bad I guess". In my opinion, in this answer the witness was adopting as the fact what she had said at the preliminary inquiry and her evidence is to be taken accordingly.

It is quite true that the initial answers made by the witness as to these three matters were not "accepted" by counsel for the Crown but while, as a general rule, a party may not either in direct or re-examination put leading questions, the court has a discretion, not open to review, to relax it whenever it is considered necessary in the interests of justice, as the learned judge appears to have considered was the situation in the case at bar; *ex parte Bottomley* (1); *Lawder* v. *Lawder* (2). Moreover, the authorities

(1) [1909] 2 K.B. 14 at 21-23. (2) (1855) 5 Ir. C.L.R. 27 at 38.

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make it clear that a witness may be allowed to refresh his memory by reference to his earlier depositions and that it is only where the object of the examination is to discredit or contradict a party's own witness that s. 9 of the *Canada Evidence Act* applies. In the present case it is evident that the object was to show that the mention by the appellant to the police of having left the Lindsay party in the company of two other persons was an afterthought which had not occurred to him when he gave his earlier account to the witness Petrie. Counsel did not wish, therefore, to discredit Petrie but to obtain from her the evidence she had given in her depositions if, on bringing the depositions to her attention, her memory would permit her to adopt them.

In *Reg.* v. *Williams* (1), a witness for the prosecution, having replied in the negative to a question put to him, was permitted by Vaughan Williams J., to have his depositions put into his hands, and, after having looked at them, to answer the question. Similarly, in *Melhuish* v. *Collier* (2), a witness for the plaintiff was asked by the plaintiff's counsel as to whether or not she had not made a certain answer in previous proceedings before the magistrate. The question being objected to on the ground that it went to discredit the party's own witness, the learned trial judge ruled that the question was a proper one. Upon a rule *nisi* for a new trial, the rule was discharged. At p. 496, Coleridge J., said:

> A witness from flurry or forgetfulness may omit facts and on being reminded may carry his recollection back so as to be able to give his evidence fully and correctly, and a question for that purpose may properly be put.

As to the difference between a question directed to refreshing memory and contradicting one's own witness, the learned judge continued:

> But as to the first point it is objected that the object of the question put here was to contradict and not to remind a witness and that therefore it could not be put. It is certainly very difficult to draw the line of distinction in practice and I am not now disposed to do it. In the present case I do not think the question objected to went further than was proper

See also *The King* v. *Laurin* (3), distinguishing *R.* v. *Duckworth* (4).

(1) (1853) 6 Cox C.C. 343.
(2) (1850) 19 L.J. Q.B. 493.
(3) (1902) 6 C.C.C. 135.
(4) (1916) 37 O.L.R. 197.

In the case at bar the learned trial judge, having come to the conclusion that the witness was not hostile in the legal sense and having therefore refused to permit her to be cross-examined, was, nevertheless, entitled, in his discretion, to permit leading questions to be put, and, similarly, was right in allowing the memory of the witness to be refreshed by reference to her previous statements. As in each case the witness adopted what she had previously said, no such situation arose as in *Duckworth's* case, *ubi cit,* or *Rex* v. *Darlyn* (1), where the earlier statements were not adopted.

The very fact that the learned judge did not regard the witness as hostile, i.e., as not giving her evidence fairly and with a desire to tell the truth because of a hostile animus toward the prosecution, would seem to indicate the propriety of his permitting the examination to proceed and the attention of the witness to be called to her statements when her memory as to the matters to which she deposed was, as she herself said, much better than at the time of the trial, a year later.

A further objection made is that two of the guards attending the jury at a moving picture theatre during an adjournment of the trial, subsequently gave evidence for the Crown. The evidence given was of a statement made by the appellant to his father during the coroner's inquest that "They are not men enough to break me." Only one of the witnesses could depose as to what was said. The other did not understand English and could testify only that Coffin had spoken to his father on the occasion in question.

The jury had been permitted to attend the theatre by the learned trial judge upon the consent of counsel for the accused as well as the Crown. The guards were provincial police and all took the usual oath as to communication with the jury. It is not suggested that there was any breach of this oath on the part of the witness nor any of the other members of the guard. It would appear from the *procès-verbal* that the selection of the guard and the administering of the oath was left by all concerned to the clerk of the court, and that the inclusion of the two constables was a pure oversight by him. In these circumstances, I see no reason for assuming that either constable

(1) (1946) 88 C.C.C. 269.

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was guilty of any impropriety in communicating, in breach of his oath, with the jury on the subject of his prospective evidence, any more than it would be assumed that any constable in attendance at a trial, during the course of which he is required to guard a jury during an adjournment, had discussed with them anything he had heard at the trial or from any other source. We have been referred to reported cases involving facts in which the courts there concerned considered a new trial called for but I cannot agree that the present circumstances call for such a result.

The appellant further calls attention to the fact that the trial took place before a mixed jury, the evidence being translated from one language into the other; that the learned trial judge charged the jury in both languages, and that one counsel for the prosecution as well as one for the defence addressed the jury in one language while his associate in each case addressed the jury in the other. It is contended that because of differences between the addresses in one language and the other and between the charges delivered by the learned judge, the result is that the appellant was really tried by two groups of jurymen composed of six men each. It is also contended that s. 944 of the *Criminal Code* requires that the jury be addressed by one counsel only on each side.

When it is remembered (as we were told by Crown counsel without contradiction) that the practice followed with respect to translation, the charge and the addresses has been the invariable practice in the Province of Quebec since 1892 at least, when the *Code* was first enacted, and that during all of that time s. 944 has been in its present form, the contention, in so far as it is based on that section, cannot, in my opinion, succeed.

In *Veuillette* v. *The King* (1), the appellant, being tried on an indictment for murder, stated through counsel that the language of the defence was French. The jury impanelled was a mixed jury, each of the French-speaking members stating to the court on his selection that he understood and spoke both languages. The proceedings were carried on throughout in English and the summing up was in English only. It was held by this court that even assuming there was any error in law in so proceeding, no

(1) (1919) 58 Can. S.C.R. 414.

substantial wrong or miscarriage of justice had been thereby occasioned to the appellant. In the course of his judgment, Mignault J. said at p. 430:

> Revenant maintenant à la disposition de la loi 27-28 Vict. ch. 41, il est clair que cette disposition serait illusoire si, dans un procès instruit devant un jury mixte, les témoignages n'étaient pas traduits du français en anglais, et réciproquement, et si l'adresse du juge présidant le procès n'était pas faite, *du moins quant à ses parties essentielles,* dans ces deux langues. Telle a toujours été la pratique en la province de Québec, . . .

At p. 431, the same learned judge said:

> Je suis bien d'avis qu'il a été fait quelque chose de non conforme à la loi pendant le procès, c'est-à-dire que l'accusé avait droit à ce que le procès fût instruit dans les deux langues, et à ce que l'adresse du juge au jury fût faite ou traduite, *au moins dans ses parties essentielles,* dans les deux langues, . . .

In my opinion, neither the differences to which we were referred as between the address on behalf of the prosecution in the one language and the other, nor the charges, were of a nature to call for the interference of this Court in the grant of a new trial.

It is next contended that the trial judge erred in refusing the appellant's application under s. 923 of the *Code* to be tried by an exclusively English-speaking jury. The foundation for this contention is certain evidence given by the sheriff that in preparing "the list of jurors", only the names of those who resided within a distance of forty miles *by road* from the court-house were included. The appellant relies upon the interpretation section of the *Jury Act,* 9 Geo. VI (Quebec), c. 22, s. 1, para. (*a*), which defines "municipality" as any municipality situated wholly or in part within a *radius* of forty miles, and he says that "it would appear from the evidence of the Sheriff that had this method of selection been used, a larger number of jurors of English tongue could then have been obtained."

The appellant therefore submits that

> when it was brought to the attention of the trial judge that the Jurors had not been selected in the manner prescribed by the *Jurors' Act,* that it was the duty of the trial judge to order the sheriff to summons a sufficient panel of jurors speaking the English language under the provisions of s. 923, ss. (3) and that *in the circumstances* there was no proper exercise by the trial judge of his discretion in the instant case, and the appellant was thus deprived of a trial according to law.

The italics are mine.

While the definition of "municipality" is as above, the statute provides, by s. 6 and following, for the preparation

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of a permanent jury list in each judicial district by a "special officer", from extracts furnished to him by the secretary-treasurer of each municipality. Upon the completion of this list, the special officer is required, by s. 23, to submit it for approval to a judge of the Superior Court, which approval "shall render the list valid and incontestable" and upon its deposit in the office of the sheriff, s. 18 provides that it shall be the "only" list in force in the judicial district.

It is from the list thus prepared that the sheriff is required to prepare the panel of jurors for any particular sittings but the sheriff has nothing to do with the preparation of "the list" itself. That duty falls upon the special officer and the Superior Court judge. The contention of the appellant under this head is therefore founded upon a complete misconception of the statute. Moreover, it is provided by s. 1011 of the *Criminal Code* that

> No omission to observe the directions contained in any Act as respect . . . the selecting of jury lists, the drafting of panels from the jury lists . . . shall be a ground for impeaching any verdict or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

On this reference we are, as is the appellant, restricted to a consideration of "the grounds alleged" upon the application for leave. If, however, anything is open under this head of objection which is not disposed of by what I have already said, I am of opinion that there was, in the circumstances of this case, no error on the part of the learned judge in exercising his discretion under s. 923 of the *Code* against the motion. The learned judge took the view that, even if a full panel of English-speaking jurors could be obtained from the list, which appeared extremely unlikely, "the ends of justice" would be better served by a trial with a mixed jury, as to do otherwise would exclude eighty to eighty-five per cent of the population of the district who were French-speaking from all participation in the administration of justice so far as that trial was concerned.

The ground of objection concisely put is that "the ends of justice" could only be "better served" by what the accused conceived to be in his interests. In my opinion, the section is not to be so construed. It is to be noted that the statute does not say "the interests of the accused" but the "ends of justice." In my opinion, the interests of the

accused are gathered up in the larger interests of the administration of justice. I do not think, therefore, that in the exercise of his discretion under the section for the purposes of this trial, the learned judge took into consideration any matter which can be said to be outside the scope of what was proper in the due administration of justice.

It is next contended that certain comment by counsel for the Crown while addressing the jury in French with respect to the statement by the appellant to his father already referred to, was inflammatory. Having considered that comment, however, I am unable to say that it was not one which might not fairly be made.

The appellant also contends that the address of Crown counsel was inflammatory in its reference to the responsibility resting upon the jury in a case which had undoubtedly received international attention, as indeed the appellant in his factum expressly states. Having read the portion of the address referred to, the impression made upon my mind is best expressed in the language of Duff J., as he then was, in *Kelly* v. *The King* (1), as follows:

> . . . although some of the observations of the learned Crown counsel were no doubt excessively heightened, it is impossible to think that in the circumstances of this case the accused could suffer in consequence of them. Such expressions could not deepen the effect of a bare recital of the facts in the story which the officers of the Crown had to put before the jury.

It is also contended that evidence relating to a rifle borrowed by the appellant from one Eagle, was irrelevant and inadmissible and of so prejudicial a nature as to call for a new trial.

In May, 1953, the appellant had borrowed from Eagle a .32-40 rifle and Eagle also gave him eighteen or twenty cartridges for it. Eagle subsequently gave the police other cartridges of this kind. He further said that early in June, Coffin had told him he had the rifle at his home at York Centre. Eagle, who was quite obviously an unwilling witness for the Crown, further testified that he had had a conversation with Coffin in August following but that the subject of the rifle was not mentioned.

An expert witness called by the Crown testified that in the case of the bullet holes found in the clothing of

(1) (1916) 54 Can. S.C.R. 220 at 260.

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Lindsay Jr., and the bullet mark on the stock of the rifle of Lindsay Sr., there was no deposit of potassium nitrate, which deposit, according to the expert evidence, is found in the case of all calibres of rifle excepting the .32-40. It was also proved that the cartridges Eagle had given to the police, when fired in the type of rifle he had loaned to Coffin, did not leave such a deposit either. None of the four rifles possessed by the Lindsay party were of this calibre.

While, according to the evidence of MacDonald, the appellant did not have a rifle with him on June 8th or 9th, and while the appellant stated to the police that he had not had a rifle with him in the bush between June 10th and 12th, the witness MacGregor saw the muzzle of a rifle in the back of the truck which Coffin was driving immediately upon his coming out of the bush on the evening of the 12th.

Coffin had a camp of his own some ten miles from Gaspé on a bush road which led nowhere beyond that point but faded out into the bush. Access to this road was protected by a gatekeeper, as in the case of the other roads in the neighborhood leading into the forest area. The gatekeeper testified that on June 9 Coffin had passed the gate going toward his camp. This could only have been after his return from the bush that day.

Coffin told the police that he had left for the bush very early on the morning of the 10th. This according to MacDonald, was in breach of Coffin's agreement with MacDonald of the day before to go back into the bush with him at 6.00 a.m. on the 10th. It was also shown that while Coffin had left his home around midnight on June 12 without telling anyone of his plans, he had, by 3.00 a.m., progressed only about thirteen miles on the way to Montreal. He had, therefore, plenty of opportunity to visit his camp in the interim, had he so desired, and to place the rifle there if he did not wish to leave it at his home in York Centre. On arrival in Montreal in the early morning of June 15, he did not have a rifle.

On the 27th of August the appellant, while in custody, was visited by a brother who parted from the appellant in tears. The following morning the police went to Coffin's camp and made a search for the rifle, without result. They, however, found tracks in the soft earth of a vehicle which had preceded them, which they were able to follow to the

camp, where the vehicle had turned about and gone back. The night of August 27-28 had been a very wet night and the marks of the truck were clearly visible in the soft ground. The gatekeeper and his wife deposed that late on the evening of the 27th or the early morning of the 28th, sounds of a vehicle rushing past the barrier had been heard. The driver did not stop to have either his entrance or exit cleared, as was required. The tracks of the vehicle around the barrier were clearly visible. When the police arrived at the camp, they made a search for the missing rifle but found nothing. Had there been no other evidence with regard to the rifle it might be that the evidence of the visit of the police, as well as that of the nocturnal visitor who preceded them, should be considered too remote to be properly admissible. But there was other evidence.

Eagle testified that when he "lost" the rifle loaned to Coffin he bought another in its place in October, 1953. It is a legitimate inference from this evidence, and one the jury were entitled to draw, that Mr. Eagle had learned, from some source, that his rifle was irrevocably gone when he spent his money on a new one. It is also a fair inference that when the rifle was not mentioned between them when Eagle was talking to Coffin on the occasion of the August interview, the realization of his "loss" must have come to him subsequently. When it is realized that no person would have any business at Coffin's camp except the appellant himself or someone under his direction or with his permission, it is also a fair inference that the object of the police officers and that of the nocturnal visitor of August 27-28, was the same, namely, the rifle. All of the above evidence is part of a whole, which, in my opinion, was admissible, its weight, of course, being a matter for the jury. Moreover, all of this evidence was merely incidental to the main fact deposed to by the witness MacGregor that the latter had seen a rifle in Coffin's truck immediately upon his coming out of the bush on the evening of June 12, as well as to the fact that the rifle loaned to Coffin by Eagle was not accounted for.

In *Blake* v. *Albion* (1), Cockburn C.J., said at p. 109:

> . . . with a few exceptions on the ground of public policy . . . all which can throw light on the disputed transaction is admitted—not of course matters of mere prejudice nor anything open to real, moral or sensible objection, but all things which can fairly throw light on the case.

(1) (1878) L.R. 4 C.P.D. 94.

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In my opinion, however, that portion of the evidence of the police officers that it was because of having obtained "precise" information that they had gone to the appellant's camp to make the search, was not proper. For reasons to be given, however, I am satisfied that, in the circumstances of this case, neither the admission of this statement nor the reference to it in the judge's charge produced any substantial wrong or miscarriage of justice.

It is next said for the appellant that the learned judge did not instruct the jury in accordance with the principle in *Schama's* case (1), with reference to such account as Coffin gave of his possession of the property of the deceased hunters. In so far as the early part of his charge is concerned, I think there is room for objection. However, the learned judge went on to point out to the jury that the appellant had given no explanation at all to account for his possession of some of the articles and, after putting before them such explanation as the appellant did make with regard to others, he asked the jury to consider whether the explanation given was "likely". Also, after asking the jury to consider which of the respective contentions of counsel for the Crown and the appellant as to the appellant's conduct they considered "the most logical, the most plausible, the most likely and the most reasonable, according to the facts" which had been proved, the learned judge again returned to the appellant's possession of articles belonging to the deceased, of American money and his story of having been paid by Lindsay Sr., as well as his failure to make any explanation at all as to certain articles, and, placing before the jury the theory of the prosecution and the defence, concluded:

> Gentlemen, you have two theories which are opposed to one another. Is one more likely than the other? Does the theory of the Crown rest on a body of evidence which points beyond any reasonable doubts towards Coffin and towards his guilt as to the crime he stands indicted? Does the theory of the Defence spring reasonably from *the same facts,* and may it cause you to believe in the incompatibility of the proven circumstances with the guilt of Coffin and their compatibility with his innocence?

In re *R.* v. *Garth* (2), Lord Goddard C.J., in reference to the decision in Abramovitch, said, at p. 101, that "a much more accurate direction to the jury is: 'if the prisoner's account raises a doubt in your minds, then you

(1) (1914) 11 Cr. App. R. 45. (2) (1949) 33 Cr. App. R. 100.

ought not to say that the case has been proved to your satisfaction.' " See also *Richler* v. *The King* (1), per Sir Lyman Duff C.J. In my opinion, the charge of the learned judge, on this subject, when read as a whole is not open to the objection which the appellant takes. If it could be said to fall short of what is required, I would, in any event, be of opinion that, in the circumstances of this case, no substantial wrong or miscarriage of justice occurred because of it.

The appellant further contends that the learned trial judge erred in failing to direct the jury that they were not entitled to convict of murder "simply because they came to the conclusion that he was guilty of theft" of the various articles. In his factum the appellant says:

> While the jury might well have seen fit to conclude that the appellant had stolen the items found in his possession from the abandoned truck of the victims there was nothing in the evidence to compel them to conclude that he had killed the deceased tourists and had stolen from their persons.

In this connection it is necessary to refer to the evidence at some length.

The deceased, with his father, Eugene Lindsay, and another youth, Frederick Claar, left their homes in Pennsylvania on June 5, 1953, intending to return by the 15th of that month. As they did not return, a search was instituted and ultimately the remains of all three were found. Little more than bones remained as the bodies had been eaten by bears and other wild animals. According to the expert evidence, the death of each had occurred not later than June 17.

The country where the remains were found is a forest area adjoining a bush road which, some distance to the east of the locality in question, has two branches which commence at what is called the "Mine Road", which runs from Gaspé to Murdockville. The westerly end of this bush road again meets the Mine Road approximately six miles to the east of Murdockville. This country is, so far as the evidence shows, completely uninhabited, and resorted to only by prospectors and hunters.

Approximately midway between the point where the two branches join and the point where its westerly terminus meets the Mine Road, there are four hunting camps used

(1) [1939] S.C.R. 101 at 103.

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spasmodically by hunting parties, the camps being numbered, from east to west, 21, 24, 25 and 26. They are approximately three miles apart. Access to the bush road is obtained only through barriers for which a pass must be presented to the attendants in charge.

On July 10, the truck of the deceased was found abandoned on the bush road at a point about three miles east of camp 21. On July 23, the remains of Lindsay Jr., were found in a heavily wooded area at a distance of approximately 175 feet from Camp 26. With them were found a sweater and two shirts, each perforated by a bullet hole in what would have been the vicinity of the heart had the clothing been worn at the time of the death. Undoubtedly they had been so worn as the bullet holes were in the same place in each garment. There was also found nearby a watch, a silver ring, and a cigarette lighter, all belonging to the deceased, as well as his rifle, the muzzle being buried in the earth, suggesting that as he fell the rifle had been pushed into the ground. The left pocket of the trousers of the deceased had been turned inside out and his wallet was missing. It was proved that he had had a wallet made of brown leather.

In a locality of the same character approximately 200 feet away, the remains of Claar were also found the same day. Nearby there were some of his clothing, boots, a camera, as well as his rifle. Beneath a large stump, under which it had been stuffed, a leather windbreaker belonging to Claar was also found, as was also his wallet which had been rifled. Holes in the bones of the lumbar region of Claar were similar to the bullet holes found in the clothing of Lindsay Jr., but the experts were not able to swear positively that they were bullet holes.

The remains of Lindsay Sr. had previously been found on July 15, at a distance of approximately one hundred and fifty feet from Camp 24, near the bank of a small stream. On July 27, his wallet was discovered in the bed of this stream. The zipper had been pulled open and most of the documents it contained were partly pulled out, but the wallet was empty of money. When the deceased had left his home on the 5th of June, he had with him at least $650. On the butt of his rifle, which was found approximately fifty feet from his remains, there was evidence of blood and

human hair, and there was more hair on the ground. In addition, there was a mark on the butt suggesting it had been caused by being grazed by a bullet.

In the vicinity of Camp 24 also, there were first discovered a sleeping bag containing some bread, a camera case and a couple of jackets. The sleeping bag had been tightly rolled up and tucked under some trees in the bush away from the road. This discovery led to a further examination in the vicinity with the result that, spread over an area of approximately one hundred feet in the bush, other articles were found, including a camp stove, the legs of which were in the branches of the trees, while the stove itself was down below in the bushes. All these articles were proved to have belonged to one or other of the deceased. It was apparent to the searchers from the places in which they were found that these latter articles had been thrown away. In addition to the three rifles mentioned, another was found in the abandoned truck, from which nothing else appeared to have been taken. None of the rifles had been recently fired. The Lindsay party had taken with them four rifles only.

It is reasonably apparent from the articles not taken, and the jury could so conclude, that the motive for the killing was robbery and that it was money which the robber chiefly wanted.

Coffin, with one MacDonald, had been in the area in question on the 8th and 9th of June, had spent the night at Camp 24 and had gone as far as a mile and a half west of Camp 26 before returning to Gaspé on the afternoon of June 9, arranging to meet MacDonald next morning at Coffin's home at six o'clock for the purpose of returning to the area for prospecting purposes. Coffin did not, as already mentioned, keep this appointment. Instead, according to his own story, very early on the morning of June 10, he set out for Camp 21 alone in the truck which he had borrowed from one Baker and which he and MacDonald had used on the two preceding days. He told the police that he had come upon the three Americans about three miles east of Camp 21 and had had breakfast with them.

According to Coffin, Lindsay Sr., had requested him to go to Gaspé with Lindsay Jr., to have the gas pump of the Lindsay truck, which Coffin said was not working, repaired. He did so and the presence of the two in Gaspé that day was independently proved. On arrival at Gaspé, Coffin said

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they found it impossible to repair the pump and young Lindsay purchased a new one. They then returned, reaching the others about four or five o'clock that afternoon. At this time, according to Coffin's story to the police, there were the two other Americans there with a yellowish plywood jeep. Coffin said he was introduced but did not remember their names.

Coffin stated that Lindsay Sr. took out his wallet and paid him $40 in American currency, a $20 bill and two $10 bills. Coffin stated that after having a meal with the Americans, he left for Camp 21 and that he prospected in the vicinity until June 12, when he set out on the return trip to Gaspé. On reaching the place where he had left the five Americans on the evening of the 10th, he said the Lindsay truck was there but no person. After waiting some time, he went on, reaching the home of MacGregor, a neighbour, in the early evening. Subsequently and about midnight, he left for Montreal, where he remained until on or about July 14.

On arrival in Montreal, Coffin had in his possession a knife having a number of attachments, the property of Lindsay Jr., as well as a pair of binoculars, the property of Claar's father, which the latter had lent his son for the purposes of the trip. These binoculars had a value of $65. Coffin had also the gas pump and a valise of Claar Jr., which contained a shirt, two pairs of shorts, two pairs of socks, a pair of blue jeans and two towels. According to the witness Petrie, Coffin told her that the knife and the binoculars had been given to him as souvenirs by some Americans he had helped in the Gaspé bush. He made no explanation to her or to anyone else with respect to the valise or any of its contents nor as to the pump. When Coffin returned to Gaspé he had the valise and the knife with him. The valise was unpacked by his sister, Mrs. Stanley, who found in it the two towels and the pair of jeans. He made the same statement to her with regard to the knife as he had made to Petrie but said nothing about any of the other articles.

As already pointed out, the appellant concedes that there was sufficient evidence of the theft of the various articles but not of any connection between the theft and the killing.

With respect to Coffin's account of his possession of the knife and the binoculars, it is to be kept in mind that he made no attempt to explain to anyone his possession of the other articles. That Coffin would be paid $40 for going back to Gaspé with Lindsay Jr. on June 9 would, taken by itself, seem likely to cause some raising of eyebrows among the jury, but when that story is coupled with the further statement that Coffin had, in addition, been "given" binoculars of a value of $65, a gift which no one but Claar Sr., who was in Pennsylvania could make, and the knife, which was of a special character and which had been a special gift to young Lindsay, the limits of credulity are surely overpassed. It cannot, therefore, be said, in my opinion, that the appellant gave any reasonable explanation of how he came to be in the possession of the things as to which he even attempted to make an explanation; *R.* v. *Curnock* (1).

Moreover, if the jury did not believe the story that Coffin had been "paid" $40 by Lindsay Sr., it was established out of his own mouth that he was in possession on June 10 of part, at least, of money belonging to Lindsay Sr.

In my opinion, therefore, there was abundant evidence from which the jury could conclude that the possessor of the money and the other items was the robber and the murderer as well. I think they have done so.

In *Regina* v. *Exall* (2), Pollock C.B., said at 924:

> The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account,* a jury are justified in coming to the conclusion that he committed the robbery.
>
> And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.
>
> The law is, that if recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to *account* for the possession, that is, to give an explanation of it, which is not unreasonable or improbable.

In a note to the above case at p. 850 of vol. 176 of the English Reports, the editor refers to the case of *R.* v. *Muller* at p. 385 of the same volume, where the murder in question had occurred in a railway carriage on a Saturday

(1) (1914) 10 Cr. App. R. 207. (2) (1866) 4 F. & F. 922.

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evening and on the following Monday the prisoner was found in possession of the watch of the murdered man which he said he had bought off a pedlar at the London docks. The question arose as to whether, supposing the jury were not satisfied of the accused's guilt upon the evidence apart from the recent possession of the hat and watch, such possession would be sufficient proof of the prisoner's guilt of the murder. The note reads:

> That it would have been sufficient, if no explantion at all had been offered, would be conceded. For the absence of explanation would have amounted to an admission.

In the case at bar the evidence which I have thus far discussed, does not stand alone.

Very shortly after Coffin came out of the bush on the evening of June 12, he went to see the witness Boyle and paid him an "old debt" of $5.25. The same evening, also, he went to the hotel of the witness White where he purchased a case of ale, in payment for which he tendered a $20 American bill, and on being told that he owed White $5 "from last year", he paid that. Change was given to him in Canadian money.

At 1.30 a.m. on June 13, before he had left York Centre for Montreal, he also visited one Tuzo and paid him $10 which the latter had loaned him approximately five weeks earlier.

About 3 a.m. on the same morning, Coffin got into the ditch at a place called Seal Cove about twelve miles on the road to Montreal from Gaspé and was helped out by the witness Element, who was paid by Coffin $2 in American bills.

At about 6.30 a.m. the same day, the witness Despard testified that he had filled the tank of Coffin's truck at Percé and repaired the brake at a cost of $8, for which Coffin tendered him a $20 American bill, asking for only $10 in change, thereby tipping him $2.

Later, at a place called Chandler, Coffin received a haircut, a shave and a hair wash at the barber shop of the witness Poirier at a cost of $1.50. In addition to paying this, he left a tip of $1.50, and paid $1 for a shoeshine. He also paid for the haircut of another customer in the shop and left as well a tip of $1.75.

Later the same morning, Coffin got into the ditch again near a place called St-Charles de Caplan, out of which he was assisted by the witness J. P. Poirier, to whom he tendered another $20 American bill. Poirier testified that Coffin took the money out of a *brown* wallet which was filled with bills to a depth of approximately half an inch.

At noon the same day, at Black Cape, Gaspé, the appellant incurred a small garage bill and left the proprietor a tip of $1. About 8.30 a.m. on June 14, he went to the home of the witness Tardif at St-André de Kamouraska where he purchased toast and coffee and seven bottles of beer, for which he paid $5. After he had left, a $10 Canadian bill was found under the chair which he had occupied.

Prior to leaving York Centre for Montreal, the only money which Coffin was known to have had was $20 which he had received from MacDonald on the evening of the 9th of June to enable him to buy gas and other supplies for their return trip into the bush. This is apart from the $40 in American funds which he alleged he had received from Lindsay Sr. Coffin's last known employment was in May but how long he had worked or how much money he had was not shown.

The character of the above expenditures was such as to call as much for explanation as the recent possession of stolen goods; *Wills on Circumstantial Evidence,* 7th ed., p. 105.

On Coffin's return from Montreal on July 20, when the remains of Lindsay Sr. had been found but the search for the others was proceeding, he was asked by the police to assist. He went with them the next day and it was then that he gave the account of his movements between June 10 and 12 to which I have already referred.

Coffin told the police, also, that on his visit from June 10 to 12 inclusive, he had not gone beyond Camp 21 but on July 21, when the search party were having lunch at Camp 24, cold water was asked for and Coffin went out to get it. He had, however, gone only five or ten feet beyond the door when he turned and asked "Where is the brook?", and did not go farther. The brook was within sixty feet of the shanty and readily visible. Upon Coffin saying this, one of the other men of the party, one Adams, said to him

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that he knew the country as well as Adams did himself. To this Coffin made no answer. Moreover, MacDonald testified that he and Coffin had eaten a meal within ten feet of that brook on June 9. It will be remembered that it was in the bed of this brook that the rifled wallet of Lindsay Sr. was later found on July 27. When the search party reached Camp 24, Coffin said he remembered having "come up to" Camp 24 with MacDonald. According to the latter, he and Coffin had gone beyond Camp 26 about a mile and a half on June 9.

Members of the search party testified that Coffin participated on a small scale in the search, during which he kept away from the sides of the road where the various articles thrown into the bush had been found.

As was said by Cockburn C.J., in *Moriarty* v. *Ry. Co.* (1):

> . . . it is evidence against a prisoner that he has said one thing at one time and another at another, as shewing that the recourse to falsehood leads fairly to an inference of guilt.

This is clearly applicable to the case at bar, which, in my opinion, is completely covered by the principle stated by Lord Tenterden C.J., in *R.* v. *Burdett* (2):

> No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; *can human reason do otherwise than adopt* the conclusion to which the proof tends?

This being so, the circumstances, in my opinion, are such as to call for the exercise of the jurisdiction conferred by s. 1014(2) of the *Criminal Code,* notwithstanding error in the proceedings as already mentioned.

The effect of the sub-section has been variously expressed but the underlying principle was thus stated by Viscount Simon in *Harris* v. *Director of Public Prosecutions* (3):

> If it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted . . ., the proviso should be applied. This is the test laid down by this House in *Stirland* v. *Director of Public Prosecutions,* 1914 A.C., 315 at 321.

Similar language had previously been used by Anglin J., as he then was, in delivering the judgment of the majority

(1) (1870) L.R. 5 Q.B. 314 at 319. (2) (1820) 4 B. & Ald. 95 at 161.
(3) [1952] A.C. 694 at 712.

in *Kelly* v. *The King* (1), where the decisions of the Privy Council in *Makin* v. *Attorney General of New South Wales* (2) and *Ibrahim* v. *The King* (3), were referred to. It may be observed that in the latter case, Lord Sumner, at p. 616, called attention to the former, as follows:

> Even in Makin's case, however, reservation was made of cases "where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the Jury," *and this reservation is not to be taken as exhaustive.*

Again, in *Stein* v. *The King* (4), Anglin C.J.C., after referring to *Makin's* case, *Ibrahim's* case, *Allen* v. *The King* (5) and *Gouin* v. *The King* (6), said:

> It may be that sometimes objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and on that ground, in refusing to set aside the verdict.

In that case the court considered the section inapplicable as the trial judge had erred in a most vital matter. In my opinion, the error in the case at bar was confined to matter of a comparatively minor character. Even where there has occurred misdirection in a material matter, the section is applicable if the court is satisfied that the jury, properly directed, must have reach the same conclusion: *Boulianne* v. *The King* (7).

In the case at bar, the evidence being as above reviewed with no explanation attempted by the appellant as to some of the articles in his possession and no explanation as to the others that could reasonably be true, no reasonable jury could, in my opinion, have done "otherwise than adopt the conclusion to which the proof tend(ed)."

Accordingly, if the application made by Wilbert Coffin for leave to appeal had been granted on any of the grounds alleged on the said application, I would have dismissed the appeal.

LOCKE J.:—The facts, so far as it is necessary to consider them, are stated in the reasons for judgment to be delivered by my brother Cartwright which I have had the advantage of reading.

(1) (1916) Can. S.C.R. 220 at 260.
(2) [1894] A.C. 57.
(3) [1914] A.C. 599.
(4) [1928] S.C.R. 553 at 558.
(5) (1911) 44 Can. S.C.R. 331.
(6) [1926] S.C.R. 539.
(7) [1931] S.C.R. 621 at 622.

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As to the fourth ground of appeal, that portion of the evidence of Sergeant Doyon as to the "precise information" on which he acted in searching for the rifle in the vicinity of Coffin's camp was clearly hearsay. During the course of the argument of counsel for the Crown, he was asked if he could suggest any meaning which could be given to the language employed, other than that some one (unnamed) had given the witness information that the rifle was to be found there. He was unable to do so. I also find myself unable to attribute any other meaning to the words. The answer made by Constable Synnett that:—

> We proceeded to the place where Sergeant Doyon had got his information from—where the indicated spot was supposed to be, and we got there at the indicated place, and the rifle was not there.

amounted to repeating the inadmissible evidence of Doyon.

The fact that the learned trial judge and both of the counsel who presented the case of the Crown to the jury accentuated its importance in determining the issue of the guilt or innocence of the accused appears to me to be decisive of the question as to the material nature of the evidence.

In *Allen* v. *The King* (1), this Court considered an appeal, by a person convicted of murder in British Columbia, upon a reserved case, the basis for the appeal being that evidence had been improperly admitted at the trial. At the time *Allen's Case* was considered, s. 1019 of the *Criminal Code* (c. 146, R.S.C. 1906), dealing with appeals in criminal cases to a court of appeal, read:—

> No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

It was contended for the Crown that this section should be applied in disposing of the appeal. Sir Charles Fitzpatrick C.J., with whom Duff J. (as he then was) agreed, said in reference to this (p. 339):—

> It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where

(1) (1911) 44 Can. S.C.R. 331.

the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitæ*. To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury.

Having said this, the Chief Justice said that the law on the point had been laid down by the Judicial Committee of the Privy Council in 1893 in *Makin* v. *Attorney General for New South Wales* (1), and quoted the following extract from the judgment of Lord Chancellor Herschell:—

It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction transfers from the jury to the court the determination of the question whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that, in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and the construction which their Lordships are invited to put upon the enactment would gravely affect the much-cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly affected the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the court might, under such circumstances, be justified, or even consider themselves bound to let the judgment and sentence stand. These are startling consequences. . . .

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them. In their Lordships' opinion, substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence.

The language above quoted was followed by the following, which was the concluding paragraph of the Lord Chancellor's judgment:—

Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is

(1) [1894] A.C. 57 at 69 and 70.

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impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.

While this was not quoted by the Chief Justice, it was clearly adopted by him in the passage from his judgment above recited.

Anglin J., saying that to accept the construction of s. 1019 urged on behalf of the Crown would be, in effect, to substitute the court for the jury in determining the question whether the evidence which was admissible established the guilt of the accused, quoted that passage from the judgment of the Lord Chancellor in which it was said that in their Lordship's opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence and there were substituted for it the verdict of the court founded merely upon the perusal of the evidence. While both the Chief Justice and Anglin J. noted that the enactment considered in *Makin's Case* differed from the language of s. 1019 in that it read:—

> Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

both clearly were of the opinion that there was no real distinction between the statutory provisions.

S. 592(1)(*b*)(iii) of the new *Code* which applies to the disposition of the present matter by virtue of s. 746 provides that the court may dismiss the appeal, notwithstanding that it is of the opinion that, on any question of law, the appeal might be decided in favour of the appellant if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred." The meaning of the language quoted is indistinguishable from that of the section 1019 considered in *Allen's Case*. In my opinion, we are bound by the decision of the Judicial Committee in *Makin's Case* and by that of the majority of this Court in *Allen's Case*. It cannot, in my opinion, be said that the evidence in question, to which so much importance was attached by the learned trial judge and by Crown counsel when the matter was presented to the jury, was evidence of the nature referred to in the concluding passage of the Lord Chancellor's judgment above referred to. Once it is determined that the evidence improperly admitted is on a point

material to the guilt or innocence of the accused, it cannot properly be said that there has been no substantial wrong or miscarriage of justice and the section has, in my opinion, no application.

The decision of this Court in *Schmidt* v. *The King* (1), was not in a case in which there had been an improper admission of evidence of this character and was not intended to be at variance with *Allen's Case,* in my opinion.

On all of the other questions discussed by my brother Cartwright I agree with his conclusions and with his reasons for those conclusions.

If leave to appeal had been granted on those grounds advanced on the application for leave to appeal, dealt with by my brother Cartwright and by me, it would have been my opinion that the appeal should be allowed, the conviction quashed and a new trial directed.

CARTWRIGHT J.:—On August 5, 1954, following his trial at Percé in the Province of Quebec before Lacroix J. and a jury, Wilbert Coffin was convicted of having, between June 1, 1953 and July 23, 1953, murdered Richard Lindsay. He appealed to the Court of Queen's Bench (Appeal Side) (2), and his appeal was dismissed without dissent. He then applied to a Judge of this Court for leave to appeal to this Court upon a number of questions of law; this application having been dismissed, he appealed to the Court from such dismissal; and the Court, being of opinion that it was without jurisdiction, dismissed the appeal.

His Excellency the Governor General in Council has referred the following question to the Court:—

> If the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any of the grounds alleged on the said application, what disposition of the appeal would now be made by the Court?

We have had the assistance of full and able arguments by counsel for the Attorney General of Quebec and for Coffin.

The grounds alleged on the application for leave to appeal to this Court which were argued before us are as follows:—

> 1. Did the Learned Trial Judge err in respect to the instructions he gave to the jury with reference to the doctrine of recent possession in the following manner:—
>
> (*a*) Should the jury have been permitted to apply the doctrine at all?

(1) [1945] S.C.R. 438.

(2) Q.R. [1955] Q.B. 620.

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(b) Were the jury misdirected with reference to the burden resting on the Appellant to explain his possession of items allegedly stolen?

2. Did the Learned Trial Judge err in failing to instruct the jury that they were not entitled to convict the Appellant of murder simply because they came to the conclusion that he was guilty of the theft of the various articles proved to have been the property of the victim, Richard Lindsay, and his associates?

3. Did the Learned Trial Judge err by instructing the jury in a manner that would indicate the statements and declarations made by the Appellant to various witnesses were not to be regarded as circumstantial evidence and evidence therefore to which the rule in Hodge's case should be applied?

4. Did the Learned Trial Judge err in admitting evidence concerning a certain rifle, the property of one Jack Eagle?

5. Did the Learned Trial Judge err in admitting the evidence of one Marion Petrie Coffin, common law wife of the Appellant?

6. Did the Learned Trial Judge err in permitting the jury to attend a moving picture theatre in the company of two police officers who were subsequently called as witnesses for the Crown?

7. Did the Learned Trial Judge err in refusing the application made on behalf of the Appellant to be tried by a jury composed entirely of English-speaking citizens?

8. Was the Appellant deprived of a trial according to law by reason of the failure of the Sheriff of the County in which the Appellant was tried to comply with the provisions of the Quebec Jury Act (1945, 9 George VI, Chap. 22)?

9. Was the Appellant deprived of a trial according to law by reason of the improper mixture of the English and French languages?

10. Was the Appellant deprived of a trial according to law by reason of the fact that Crown Counsel in their addresses to the jury used inflammatory language?

The evidence indicated that Richard Lindsay, aged 17 years, his father, Eugene Lindsay and a friend Frederick Claar left their home in Pennsylvania on June 5, 1953, in a truck to go on a hunting trip in the District of Gaspé from which they never returned. Their remains were discovered by search parties in July 1953, those of Eugene Lindsay on July 15 about 150 feet from a camp known as Camp 24 and those of Richard Lindsay and Claar, about two hundred feet apart, in a heavily wooded area in the vicinity of a camp known as Camp 26 which is distant about two and a half miles from Camp 24. Camp 24 is about 60 miles from Gaspé. The medical evidence was that their deaths had occurred not later than June 17.

As is pointed out by Hyde J. the Crown's case against Coffin was based on circumstantial evidence. The main circumstances claimed to be established were:—

(*a*) that Richard Lindsay was shot;

(*b*) that property belonging to him and his two deceased companions was stolen;

(*c*) that Coffin had an opportunity to commit the crime;

(*d*) that a weapon (Eagle's rifle), which could have been used to shoot Richard Lindsay, was loaned to Coffin prior to the date of the crime and was never returned to its owner;

(*e*) that when Coffin came out of the bush on June 12 the muzzle of a rifle was seen in his truck;

(*f*) that the motive of the murder was theft;

(*g*) that Coffin had possession of articles which were the property of the three deceased;

(*h*) that as to some of these he gave no explanation and as to others no reasonable explanation of having them in his possession;

(*i*) that when he left home Eugene Lindsay had about $650 in cash but that when his wallet was found there was no money in it;

(*j*) that after June 12 Coffin had possession of a substantial amount of money although prior to that date he was shewn to owe some small debts;

(*k*) that Coffin made contradictory statements as to his actions during the period when the murder was committed;

(*l*) that Coffin's conduct during the search for the remains of some of the deceased, in which he took part, was suspicious;

(*m*) that Coffin, after being arrested, arranged to have Eagle's rifle made away with.

Coffin did not testify and no witnesses were called for the defence. Statements which he had made to police officers and to Marion Petrie Coffin, who was described as his common law wife, were proved as part of the Crown's case. Some parts of these statements, if true, were exculpatory; they contained no admission of guilt. This brief

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summary, while far from complete, is, I think, sufficient to indicate the evidentiary background against which the questions of law raised for decision must be considered.

Ground 4.

I propose to deal first with ground 4 above. There was evidence that in May 1953 the witness Eagle had loaned his Marlin .32-40 calibre rifle to Coffin; that up to the time of the trial the rifle had not been returned to him; and that the holes in the clothing of Richard Lindsay, indicating that he had been shot, could have been made by a bullet of the calibre of Eagle's rifle. It was part of the theory of the Crown that Coffin had shot Richard Lindsay with Eagle's rifle. The evidence objected to was introduced in an endeavour to establish that at some time after the murder and probably before leaving for Montreal on June 13 Coffin had hidden this rifle near his camp; that on August 27 he had told his brother Donald Coffin where he had hidden it and that in the night of August 27 Donald Coffin had gone in a truck to Wilbert Coffin's camp, got the rifle and made away with it.

Coffin's camp is in wooded country about 14 miles from Gaspé. On the forest road leading to this camp there is a barrier at which persons going into the bush to hunt are required to obtain a permit. Coffin had been taken into custody on August 10. On August 27 he was allowed to have a private interview with his brother Donald at Police Headquarters in Gaspé. Donald came out from this interview in tears. In the early morning of August 28 the sound of a motor vehicle was heard rushing past the barrier on the road leading to Coffin's camp. Later on the morning of August 28 Sergeant Doyon and Police Constable Synnett went to Coffin's camp; they saw marks on the road of the tires of a truck. It was said that Donald Coffin had a truck but there was no evidence as to whether the marks of its tires were similar to those seen on the road. Doyon and Synnett made a search in the vicinity of Coffin's camp but found no rifle.

The evidence objected to is found in the following passages in the evidence in chief of Sergeant Doyon and Police Constable Synnett.

Sergeant Doyon—

Q Maintenant, il y a un monsieur Eagle qui a été entendu au sujet d'une carabine qu'il avait prêtée à Coffin. Voulez-vous dire à la Cour et à messieurs les jurés si vous avez fait quelques recherches au sujet de cette carabine?

R Oui, j'avais eu une information précise, et j'ai fait certaines recherches aux alentours du camp de Coffin à la grande fourche, et plus précisément . . .

Q A quelle date?

R En date du 28 août.

Q Etait-ce quelle partie de la journée?

R A bonne heure le matin.

Q Et avec qui avez-vous fait ces recherches?

R Avec l'agent Synnett de la Police de la Route.

Q Alors, où vous êtes-vous rendus?

R De Gaspé, nous nous sommes rendus jusqu'au petit camp de Coffin à l'endroit appelé Grande Fourche.

Q Et quelle partie avez-vous visitée ou fouillée?

R Plus précisément, à environ quarante à cinquante pieds au nord du petit camp de Coffin.

Q Qu'est-ce que vous avez fait, là?

R J'ai fait des recherches avec Synnett dans cette partie de la forêt, principalement près de petits sapins.

Q Et puis, combien de temps avez-vous cherché comme ça?

R A partir de sept heures et demie du matin aller jusqu'à onze heures de l'avant-midi, je crois.

Q Et avez-vous trouvé quelque chose?

R Non monsieur.

Q Pour aller au camp de Coffin et à l'endroit où vous avez fait des recherches sur l'information précise que vous aviez obtenue, est-ce qu'il faut passer par une barrière?

R Oui, il y a une barrière à environ un demi-mille de la route nationale, qui conduit de Percé à Gaspé.

Police Constable Synnett—

Q. Now, Mr. Synnett, had you the occasion to accompany Mr. Doyon in order to make any searches in the vicinity of a camp belonging to Coffin?

A. Yes, we went there on the day of the last Coroner's inquest, or the day following the last Coroner's inquest.

Q. Do you remember what date it was?

A. On the 28th day of August.

Q. Now, will you tell us in what circumstances you made that trip, and what you noticed at that occasion?

A. We were going to look for a rifle.

Q. Do you know to whom belonged that rifle?

A. Yes, I did, at the time.

Q. Who?

A. John Jack Eagle.

Q. Will you go on?

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A. We proceeded to the place where Sergeant Doyon had got his information from—where the indicated spot was supposed to be, and we got there at the indicated place, and the rifle was not there.

Q. How long did you spend for your search?

A. About an hour.

In my view all those parts of these passages which shewed that Doyon had information that Eagle's rifle was concealed in a precisely indicated spot in the neighbourhood of Coffin's camp were inadmissible as being hearsay evidence. Their meaning is not doubtful; and the jury could only understand them as a statement that someone, unnamed and not called as a witness, had told Doyon that Eagle's rifle was concealed near to some small fir trees 40 or 50 feet to the north of Coffin's cabin and had given Doyon precise information as to its hiding-place. On this illegal foundation there was erected and placed before the jury the theory that Coffin had told his brother Donald where the rifle was and had prevailed on him to get it and make away with it and that Donald was the driver of the vehicle heard to rush past the barrier in the early morning of August 28. Without evidence that Eagle's rifle was in fact hidden near Coffin's camp prior to the night of August 27/28 the whole incident was of negligible probative value and connected with the accused so remotely, if at all, as to be inadmissible because irrelevant; but with evidence that the rifle was so concealed counsel for the Crown was in a position to ask and did ask the jury to infer a conspiracy between Coffin and his brother to destroy what was, in the Crown's theory, the murder weapon. Evidence that an accused has suppressed or endeavoured to suppress evidence is admissible circumstantial evidence against him, but here the foundation of the whole incident on which the jury were invited to find that he had suppressed evidence was the inadmissible hearsay evidence dealt with above.

In my view, the admission of this hearsay evidence was a grave error in law. I do not think that counsel for the Crown can be heard to say that the evidence was unimportant for it was forcibly put to the jury, in the address of counsel, as a circumstance pointing to Coffin's guilt and throwing upon the defence the onus of calling Donald Coffin as a witness which they had not done.

When he came to charge the jury the learned trial judge did so first in English and then in French. His charge in English concluded at 12.15 p.m. and the Court adjourned; on resuming at 2.15 p.m. the learned judge addressed the jury in English as follows:—

Gentlemen, before I address you in French, I want to make certain corrections. There is an incident in the evidence which I had noted and I intended to draw your attention to, and I unfortunately overlooked it this morning.

I told you that on the occasion of that trip in the bush, MacDonald had declared that he had not seen any rifle in the equipment, and that on the 12th of June MacGregor at Murray Patterson's place, had testified to the fact that he had seen a rifle in the pick-up which was driven by Coffin.

Now, maybe something could be said to complete that part of the evidence, because there is the testimony of Doyon who later went to Coffin's camp, following what he declared to be a precise information, the nature of which has not been established, though; and he says that he had not found any rifle at that place.

And you have then the conversation which on the previous day Coffin would have had with his brother at Gaspe, and during that night the gate keeper's wife, on the road leading to Coffin's camp, would have heard the noise of an automobile, and the following morning, they saw tracks that didn't cross on the highway through the gate, but went around.

You will give to these facts the interpretation that should be given in the light of your judgment and the evidence.

The learned trial judge dealt with the incident in substantially similar terms when he charged them in French. We find therefore that inadmissible testimony which had been vigorously stressed by Crown counsel was again brought to the attention of the jury by the learned trial judge with an instruction that they should consider it.

In my view the following words of Anglin C.J.C., giving the unanimous judgment of the Court in *Stein* v. *The King* (1), are applicable to the case at bar:—

It is impossible to say that in the case now before us there has been no miscarriage of justice. It may be that sometimes objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and, on that ground, in refusing to set aside the verdict. But it is impossible so to regard this case, where, in a most vital matter, the learned judge did not merely fail to warn the jury to disregard the objectionable matter contained in the statements which had been admitted in evidence, but actually stressed it.

It is my view that this hearsay evidence in the case at bar related to a vital matter and, as I have already mentioned,

(1) [1928] S.C.R. 553 at 557.

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I do not think that, in view of the way in which they stressed it to the jury, counsel for the Crown can now be heard to belittle its importance. *Allegans contraria non est audiendus.*

Ground 5.

I will deal next with ground No. 5. In the memorandum filed on the application for leave to appeal, this ground was extended to read as follows:—

> It is respectively submitted that the crucial testimony given by Marion Petrie was inadmissible for two reasons:—
>
> (*a*) Her testimony was privileged by virtue of the provisions of section 4 of the Canada Evidence Act; and
>
> (*b*) She was submitted to a severe cross examination by Crown Counsel notwithstanding the fact that the Trial Judge had refused the application of Crown Counsel to have her declared a hostile witness.

Before us, Mr. Maloney did not argue ground (*a*), on which the authorities seem to be conclusive, but pressed ground (*b*).

The witness Marion Petrie Coffin was called by the Crown; she was shown to have lived with Coffin for some years as his wife. According to her evidence he arrived at her residence in Montreal at about 2.00 a.m. on June 15 and remained for some days. Some of her evidence assisted the Crown's case, for example she deposed that Coffin had possession of articles which other witnesses testified had belonged to the deceased. Her evidence in chief reads, in part, as follows:—

> . . . When we were talking, he told me about when he went in the woods, he met three Americans, they had their truck that was broke down, and he took one of the fellows down to Gaspe to get a gas line or something fixed; he brought the fellow back, they gave him a pair of binoculars and a knife as a souvenir. He didn't mention anything about any money.
>
> Q. Did he say he had left the three Americans in the bush?
>
> A. Yes, when he came back, he left the other fellow with the other two.
>
> Q. You mean the one . . .
>
> A. The one that he had taken down to Gaspe, he brought back.
>
> Q. That he had left him in the bush with the other two?
>
> A. With the other two.
>
> Q. Is that all he said?
>
> A. Oh, when I asked him if they got the truck fixed, he said there was another two chaps there the last time he seen them.
>
> Q. Did he say who those fellows were?

A. He just said he left them with another two friends, he didn't say who, and I didn't bother to ask him.
Q. He gave you no more details on that?
A. No, I was not interested.

* * *

Q. So, when did Coffin mention for the first time that there were two others but the three Americans that we are interested in?
A. Well, it was a few days after he had arrived, I had asked him, it was just something that was going through my head, and I asked him if they got the truck fixed. When I asked him if they got the truck fixed, he said: "The last time I seen them, there was two chaps with them."

It is obvious from the record that Crown counsel did not accept as truthful the witness' statement, that Coffin had told her that when he last saw them he had left the Lindsays and Claar in company with two other Americans; and counsel proceeded, against the repeated objections of defence counsel and in spite of the definite refusal of the learned trial judge to declare Miss Petrie an adverse witness, to conduct a cross-examination, in the course of which he referred her to a statement she was alleged to have made to a police officer and to the evidence she had given at the preliminary inquiry. The examination of this witness by Crown counsel concludes as follows:—

Q. Do you recall having been heard as a witness at the preliminary inquiry?
A. Yes sir.
Q. And that was about a year ago?
A. Yes sir.
Q. Was your memory fresh over the facts we are concerned about, at the time?
A. A little better than they are now.
Q. Now, would you like to refresh your memory?
A. .....
Q. What did your memory tell you at the time?

Mr. Raymond Maher,

For the Defence:

OBJECTED to the way of putting the question.

Mr. Paul Miquelon, Q.C.

For the Prosecution:

Q. What did your memory tell you at the time?
A. He just said three; he mentioned the three when he went out with them.

OBJECTION BY Mr. Francois Gravel,

For the Defence:

Mr. Paul Miquelon, Q.C.

For the Prosecution:

Q. How did your memory serve you at the time?
A. Not too bad, I guess.

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Q. Well, what did it say?
A. He just said "three", he mentioned the three when he went out with them.
Q. To what question did you give that answer at the time?
A. Did he talk about one American hunter or a second group or a party.
Q. And, to that question, the answer was the one you just gave us?
A. He just said three.
Q. And that answer was?
A. He just said three, he mentioned the three when he went out with them.

It was argued before us that, whether or not counsel was entitled to cross-examine his own witness, he was entitled to have her refresh her memory by reading inaudibly to herself the evidence which she had given at the preliminary inquiry. In *Lizotte* v. *The King* (1), the question whether a witness may refresh his memory by referring to the transcript of his evidence at the preliminary hearing was left open after attention had been called to the views expressed by eminent writers and I do not find it necessary to decide that question in this case, as it seems clear from reading the record that the transcript of the preliminary hearing was used not for the purpose of refreshing the memory of the witness, who had already without assistance testified as to her conversations with Coffin, but for the purpose of endeavouring to have her admit, (i) that at the preliminary inquiry she had not referred to any statement by Coffin that he had left the three deceased with two other Americans, and (ii) that she must have been mistaken or untruthful in her evidence at the trial in saying that Coffin had made such statement to her.

When all of the evidence of this witness is read it does not appear to me that there was any unexplained difference between her evidence at the preliminary inquiry and that which she gave at the trial; but the jury may well have taken a different view as they were invited to do by Crown counsel as appears from the following passages in his address:—

> Now, I am not here to judge Coffin's personal life, nor his wife's personal life, but on the other hand you know that that person who goes around as Mrs. Coffin is not Mrs. Coffin, they live as man and wife, I could not expect, and neither could you expect her to come here and tell us the whole story. I could not expect that, and she wouldn't be his wife, common wife or otherwise, and even if she did deny that Coffin confessed everything to her, but there is one other important point, after

(1) [1951] S.C.R. 115 at 129.

many contradictions, she admits—and keep that in mind—she admits that Coffin never mentioned two other American and she, at the last part of her testimony, she came back to what she had said at the preliminary inquiry when she told us her memory served her much better, that he only mentioned three Americans, and remember that later on, when we get Coffin back in Gaspe, because if there is one person in the world to whom he should have confided during that night, it was Mrs. Coffin, not his mother but his common-law wife.

* * *

Did Coffin try to point those two Americans as possible culprits? I know he did, we brought them here to tell us their story. Do you think that story is true when you have heard the story of Marion Petrie to whom he never mentioned, according to her own testimony—and you can believe that woman when she comes up and says anything that would hurt Coffin—I don't say she should be believed as easily when she says something in favour of Coffin, but when she states something against Coffin, it is because she has to say it and can't get out of it.

In my view the cross-examination of this witness by Crown counsel was unlawful, and was attended by a further error in that no warning was given to the jury that any evidence of what the witness had said at the preliminary inquiry was not evidence of the truth of the facts then stated but could be considered by them only for the purpose of testing the credibility of the testimony which she had given before them at the trial. Similar errors were treated as grounds for quashing a conviction in *Rex* v. *Duckworth* (1) and in *Rex* v. *Darlyn* (2).

Ground 6.

I will deal next with ground No. 6. It appears that during the course of the trial the jury asked permission to attend a moving picture theatre. The learned trial judge consulted counsel and a consent in the following terms was signed by Coffin and his counsel:—

Nous soussignés consentons que les jurés se rendent au cinéma à Chandler ce 27e jour de juillet 1954, sous les conditions suivantes:

1. Que six gendarmes aient la charge des jurés, sous la direction du sergent Cassista;

2. Que la représentation ne représente aucun procès quelconque;

3. Que les jurés et les gendarmes soient tenus complètement à part du public dans le théâtre et à la sortie.

Six constables were sworn to escort the jury to and from the moving picture theatre at Chandler, the journey being made in automobiles. The record does not disclose the oath administered to the constables. There is nothing in the

(1) (1916) 37 O.L.R. 197. (2) (1946) 88 C.C.C. 269.

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record to suggest that during the course of this excursion any of the jury had communication with any member of the public or that there was an improper conversation between the constables and the members of the jury; but a few days later two of these constables were called and examined as Crown witnesses. One of them, Poirier, did not give evidence of any importance, but the other, Pépin, gave evidence of a conversation between Coffin and his father which took place after Coffin had been in custody for about 17 days. As to this Pépin said:—

> A. Well, all I heard was this: Mr. Coffin, Wilbert's father, said: "are they treating you well?" He says: "Yes, I am well." He says: "don't worry Dad, I'll be home soon," and before he left, the accused: "they are not man enough to break me."

In the Court of Queen's Bench, Hyde J. after quoting the above answer continues:—

> This is certainly not one of the essential links in the chain of circumstances. I do not regard it as necessarily incriminating but certainly, looked at in a certain light, it could be prejudicial to the Appellant.

At the trial however it had been stressed by Crown counsel in the following terms:—

> Et je terminerai par ce dernier mot qui a été également l'un des derniers de la preuve, celui-là qu'il a prononcé lui-même devant les hommes de police à l'adresse de son père: "They are not man enough to break me." Ils ne sont pas assez hommes pour me casser ou me briser.
>
> Messieurs, est-ce là le langage d'un innocent? Est-ce là le langage d'une personne qui n'a rien à se reprocher? Est-ce là le langage d'une personne qui ne fuit pas la justice? Est-ce là le langage d'une conscience qui véritablement est en paix?
>
> Je vous pose la question, et je crois que ces derniers mots sont lourds de signification. Il ne crie pas: "Je suis innocent, mon père," il ne crie pas: "Je n'ai rien fait de tel, mon père." Non: "Non, ne vous inquiétez pas, ils ne sont pas assez hommes pour me casser ou pour me briser." En d'autres termes: Non, la vérité, ils ne la connaîtront jamais, la vérité, je l'ai enfouie avec mon crime dans les profondeurs des bois où j'ai abattu ces trois Américains; la vérité n'éclairera pas, et si la vérité n'éclate pas, la justice sera muette.
>
> Eh bien non, messieurs les jurés, j'ai confiance que la justice ne sera pas muette, et que vous allez donner l'exemple d'abord à votre district, . . .

and in his charge the learned trial judge invited the jury to consider whether or not Coffin's statement to his father indicated a guilty mind. I mention this not to suggest that either the learned judge or counsel for the Crown made improper use of this piece of evidence but to shew the importance assigned to it in the conduct of the Crown's case at the trial. While, as mentioned above, there is no

evidence to suggest that any improper communication in fact took place between this officer and any member of the jury, this unfortunate incident appears to me to fall within the principle stated by Sloan C.J. in *Rex* v. *Masuda* (1), as follows:—

> Stripped to its bare essentials, there can be no escape from the fact that three Crown Witnesses dined with the jury during a murder trial. It seems to me that to countenance such a situation as is thus presented, violates two essentials of justice. The one is that the jury must be kept completely free from any opportunity of communication during the trial, except under the most exceptional circumstances calling for a direction from the Court; and, secondly, that nothing must occur during the trial of a case from which a suspicion may arise that any taint attaches to the proper and meticulous fairness which must always surround the administration of public justice, more especially when a man is on trial for his life.
>
> * * *
>
> Moreover, if Crown witnesses are permitted to join the jury in an atmosphere of sociability during the adjournment of a murder trial, the confidence of the public in our present system of trial by jury would be shaken. The Courts are the custodians of that confidence and it must be upheld and not weakened. Thus it appears to us that the opportunity for communication, while a factor for consideration, is not the whole test to be applied in the circumstances. The test, in our opinion, is that enunciated by Lord Hewart, C.J. in *R.* v. *Sussex Justices,* (1923) 93 L.J.K.B. p. 129 at p. 131 wherein he said: "Nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice", and "it is . . . of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done."

I agree with everything that was said by the learned Chief Justice in the passages quoted; and I am unable to find any such essential difference between the circumstances under which the jury were in company with the Crown witness in the case before us and those in the case with which the learned Chief Justice was dealing as would justify our refusing to apply the principle which he enunciated. In my view, unless we are prepared to overrule the judgment in *Rex* v. *Masuda,* there is no escape from holding that the incident on which this ground of appeal is founded was fatal to the validity of the conviction.

Ground 7.

I will deal next with ground No. 7. It appears from the *Procès-verbal* that Coffin's trial commenced at Percé on July 15, 1954, and that on May 29, 1954 a notice had been

(1) (1953) 106 C.C.C. 122 at 123 and 124.

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served on the Attorney General of Quebec and the Clerk of the Queen's Bench, Criminal Assize Division, Percé, on behalf of Coffin, indicating that he could not speak or understand the French language and that he would ask at his trial for a jury of his own tongue. On his arraignment on July 15, 1954 the defence moved that Coffin be tried by a jury composed entirely of jurors speaking the English language. On this motion Crown counsel called as a witness the Sheriff of the district of Gaspé who deposed that of the jurors on the list of those qualified for the district about twelve to fifteen per cent were English-speaking and the remainder were French-speaking. The learned trial judge reserved judgment on the motion and gave judgment the following day rejecting the motion and ordering that the trial proceed before a mixed jury. The reasons for this decision are set out in full in Volume I of the record at pages 25 to 30 inclusive. As I read these reasons the decision of the learned judge was based upon the following considerations: (i) that the persons whose names appeared upon the list of jurors who were English-speaking was twelve to fifteen per cent of the total, the remainder being French-speaking; (ii) that because of exemptions granted by the Court and the anticipated challenges, either for cause or peremptory, it appeared almost impossible to obtain a jury composed entirely of persons speaking the language of the accused; (iii) in the words of the learned judge:—

> CONSIDERING that it does not seem to be in the spirit of the law that to exercise its discretion, in the sense of paragraph 3, Section 923, the Tribunal must eliminate eighty-five to eighty-eight per cent of the qualified talesmen in one district;

Section 923 of the *Criminal Code,* in force at the date of the trial, reads as follows:—

> 923. In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed, one-half of persons speaking the English language, and one-half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists.
>
> 2. In any district, the prisoner may upon arraignment move that he be tried by a jury entirely composed of jurors speaking the English language, or entirely composed of jurors speaking the French language.

3. Upon such motion the judge may order the sheriff to summon a sufficient panel of jurors speaking the English or the French language, unless in his discretion it appears that the ends of justice are better served by impanelling a mixed jury.

This section was considered by this Court in *Piperno* v. *The Queen* (1). After re-reading the judgment of the majority in that case, delivered by my brother Fauteux, and all the authorities to which reference is made therein, it is my view that the proper construction of s. 923 as applied to the facts of the case before us is as follows. Coffin having moved that he be tried by a jury entirely composed of jurors speaking the English language, and it being conceded that English is his mother tongue and that he does not speak the French language, was *prima facie* entitled to be so tried and could be required to stand his trial before a mixed jury only if it appeared to the learned judge presiding at the trial in his discretion that the ends of justice would be better served by empanelling a mixed jury. Provided the learned judge exercised his discretion on relevant grounds and in accordance with the law an appellate court would not interfere with his decision; but, with respect, it appears to me that he did not direct his mind to the question whether the ends of justice in the case before him would be better served by empanelling a mixed jury; that the three reasons, set out above, which he assigns for exercising his discretion in the way he did, and particularly the last mentioned of these reasons, were irrelevant considerations; and that, in the result, Coffin was deprived of a right of which he could only be lawfully deprived by the learned judge exercising his discretion on relevant and legal grounds.

On a proper construction of s. 923 of the *Criminal Code* the question which the learned judge was required to put to himself was whether in the case which he was about to try the ends of justice would be better served by empanelling a mixed jury rather than one composed entirely of jurors speaking the language of the accused, and not whether the empanelling of a jury of the sort last mentioned would be attended with difficulty or whether the language of the accused was or was not that spoken by the majority of the residents of the district in which he was on

(1) [1953] 2 S.C.R. 292.

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trial for his life. I respectfully agree with the following passage in the judgment of Langlais J. in *Rex* v. *Twyndham and McGurk* (1):

> If I refer to s. 923 of the Criminal Code, subsection (2), I read: "In any district, the prisoner may upon arraignment move that he be tried by a jury entirely composed of jurors speaking the English language, or entirely composed of jurors speaking the French language."
>
> Therefore the prisoner when English or French has a right to move for a jury of his own tongue. It is his privilege and unless there are special grounds not to grant him such a motion he has an absolute right to it.
>
> Is there a restriction and what is it?
>
> We find it in subsection (3) of the same section which reads as follows: "Upon such motion the judge may order the sheriff to summon a sufficient panel of jurors speaking the English or the French language, unless in his discretion it appears that the ends of justice are better served by impanelling a mixed jury."
>
> That subsection gives a discretion to the presiding Judge.
>
> Then it is quite clear that the general rule favours granting the motion unless there are special reasons to refuse it.

In *Piperno* v. *The Queen* (*supra*) at page 295 my brother Fauteux said:—

> Ce qui est sanctionné par la loi, c'est une faculté donnée à un prévenu, dans la province de Québec, de demander à être jugé par des jurés familiers avec la langue qu'il parle lui-même—pourvu que ce soit le français ou l'anglais—et le droit d'obtenir alors au moins un jury mixte si, dans la discrétion du Juge, il apparaît que les fins de la Justice soient ainsi mieux servies qu'en faisant droit à sa demande.

There was no need in that case to consider the nature of the grounds on which the exercise of the discretion given to the trial judge by s. 923 (3) can lawfully be based. An examination of the record in the case before us has failed to disclose any ground which appears to me to be sufficient in law to warrant the accused being denied a jury composed entirely of persons speaking his language.

This error does not appear to be cured by the provisions of s. 1011 of the *Criminal Code*. It was, in my respectful view, an error in law on the part of the learned trial judge in deciding how the case should be tried. If the provisions of s. 1011 were an answer in this case they would equally have been an answer to the objection to which effect was given in *Alexander* v. *Regem* (2), which was one of the decisions approved in *Piperno* v. *The Queen*. Had this ground alone been raised it would, in my opinion, require

(1) (1943) 79 C.C.C. 395 at 395 and 396.

(2) Q.R. (1930) 49 K.B. 215.

the setting aside of the verdict; and consequently I do not find it necessary to consider the related grounds numbers 8 and 9.

Ground 3.

I will deal next with ground No. 3. What is here complained of is not that the learned trial judge failed to direct the jury in the manner required by the rule in *Hodge's* case but rather that, having properly instructed them as to how they should approach a case resting solely on circumstantial evidence, he mistakenly gave them to understand that the case against Coffin did not consist solely of circumstantial evidence, as, in fact, it clearly did. The passages which are chiefly objected to are as follows:—

> In the present case, the evidence which has been adduced by the Crown is of two distinctive kinds.
>
> There is: 1) The circumstantial evidence which I have explained; and 2) The declarations which would have been made by the accused.
>
> * * *
>
> We can say, I believe, that the evidence offered by the Crown can be divided in two kinds:
>
> 1. Circumstantial evidence.
>
> 2. Evidence of conversation or words spoken by the accused.

It is argued by counsel for the Attorney General that any harm done by these passages was remedied later in the charge and particular reference is made to the following passage:—

> It is evident that considering the whole of these facts, no direct proof can be found anywhere and it is precisely there where you are asked to extract from the circumstances the conclusions which, in your estimation, you must take as the result of these facts.

It should be borne in mind, as was pointed out by Middleton J.A. in *Rex* v. *Comba* (1) and by some members of this Court in *Boucher* v. *The Queen* (2), that the rule in *Hodge's* case is quite distinct from the rule requiring a direction on the question of reasonable doubt; and if, on reading the charge as a whole, I came to the conclusion that the jury were left in doubt as to whether the rule in *Hodge's* case did not apply to all the evidence in the case before us I would have regarded this as serious error. When the charge is read as a whole I incline to the view that the jury were not misled in the way suggested; but, as on several other grounds I have concluded that there should be a new

(1) (1938) 70 C.C.C. 205 at 207. (2) [1955] S.C.R. 16 at 30.

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trial, I do not pursue this further. For the same reason I find it unnecessary to deal with grounds numbers 1, 2 and 10 and I express no opinion in regard to them.

Mr. Miquelon, while maintaining that there had been no error in law at the trial, argued, alternatively, that, even if we should be of opinion that any of the errors alleged by Coffin's counsel were made out, the legally admissible evidence was overwhelming and that, had such errors not occurred, the jury must inevitably have reached the same verdict; and that the Court should apply the provisions of s. 1014 (2) of the Criminal Code and dismiss the appeal. That the Crown's case was a very strong one cannot be denied but I find myself unable to affirm with certainty that if none of the matters which I regard as errors had occurred the jury must necessarily have convicted. Reading the written record we cannot say to what extent each witness weighed with the jury or how much importance they attached to one or another of the items of evidence; and, to borrow the words of Viscount Sankey in *Maxwell* v. *Director of Public Prosecutions* (1), it may well be that the hearsay evidence as to Eagle's rifle or the effect which the jury were invited to give to the unlawful cross-examination of Marion Petrie Coffin may have been the last ounce which turned the scale against the accused. But the matter does not rest here. Section 1014 (2) reads as follows:—

> The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

This sub-section has often been considered by this Court and its meaning is stated in the following passage in the judgment of Kerwin J., as he then was, in *Schmidt* v. *The King* (2):

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

(1) [1935] A.C. 309 at 323. (2) [1945] S.C.R. 438 at 440.

in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

It will be observed that, once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred. The satisfaction of this onus is a condition precedent to the right of the Appellate Court to apply the terms of the sub-section at all. The Court is not bound to apply the sub-section merely because this onus is discharged. Even if the onus referred to could be regarded as having been satisfied by the Crown in the case before us it would nonetheless be my opinion that the error in law which I have dealt with under ground 4 above was so substantial a wrong that the verdict could not be saved by the application of s. 1014 (2). To hold otherwise would, I think, be contrary to the principles enunciated in *Makin* v. *Attorney General for New South Wales* (1), *Allen* v. *The King* (2), *Northey* v. *The King* (3) and the judgment of my brother Locke in *Boucher* v. *The Queen* (4).

In *Makin's* case at page 70 Lord Herschell L.C. said in dealing with a provision similar to s. 1014 (2):—

> Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.
>
> In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

This passage is I think applicable to the case before us.

What I have said as to s. 1014 (2) has been related primarily to the grounds other than grounds numbers 6 and 7. As to ground 6 the passages which I have quoted from the reasons of Sloan C.J. seem to me to show that the conviction must be set aside on this ground even if the Court should be of the view that there was in fact neither substantial wrong nor miscarriage of justice because one

(1) [1894] A.C. 57.
(2) (1911) 44 Can. S.C.R. 331.
(3) [1948] S.C.R. 135.
(4) [1955] S.C.R. 16 at 28.

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of the main grounds of the decision of Sloan C.J. rests on the importance of justice being not merely done in fact but being plainly seen to be done.

As to ground 7, I think that the error which occurred is such that by its very nature it cannot be cured by the application of s. 1014 (2).

In the result, if leave to appeal had been granted on those grounds advanced on the application for leave to appeal with which I have dealt above, it would have been my opinion that the appeal should be allowed, the conviction quashed and a new trial directed.

FAUTEUX J.:—For the reasons given by my brother Kellock, my answer to the question referred to the Court is that I would have dismissed the appeal.

Solicitor for the accused: *F. de B. Gravel.*

Solicitors for the Attorney General of Quebec: *N. Dorion, P. Miquelon.*

Solicitor for the Attorney General of Canada: *F. P. Varcoe.*