ROGER LIZOTTE .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1950

*Nov. 9, 10, 13.

*Dec. 18

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

Criminal law—Murder—Evidence—Defence of denial and of alibi—Charge of trial judge—Misdirection—Non-direction—Substantial wrong or miscarriage of justice—Accomplices—Corroboration—Evidence of previous offence—Interference with cross-examination of witness—Circumstantial evidence—Reasonable doubt—Jurisdiction—Whether this Court can review decision stating that there was no substantial wrong or miscarriage of justice—Criminal Code, ss. 259, 263, 1014(1) (2), 1023, 1025.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Cartwright JJ.

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Appellant was convicted of murder after a trial by jury. His defence was a denial that he had anything whatever to do with the matter. He testified that he was not at the time of the crime with the deceased and the three principal Crown witnesses as to all of whom it was open to the jury to take the view that they were accomplices. His conviction was affirmed by the Court of Appeal.

The Crown called evidence in rebuttal of statements made by a defence witness in the absence of the accused contradictory of the evidence given by such witness at the trial. The trial judge not only failed to explain to the jury that such contradictory statements were no evidence of the truth of the facts stated therein and must be considered solely as a test of the credibility of such witness, but gave the jury to understand that this rebuttal evidence had evidentiary value and might be regarded by them as corroborative of the evidence of the alleged accomplices. *Held:* that, particularly as the trial judge had failed to instruct the jury that before evidence can be considered as corroborative within the meaning of the rule requiring corroboration of the evidence of an accomplice it must tend to show not merely that the crime has been committed but that the accused committed it, such non-direction and misdirection were fatal to the validity of the conviction.

Crown counsel, in re-examination of a Crown witness, for the purpose of refreshing his memory, read to him from the transcript of his evidence at the preliminary hearing and elicited evidence that the accused had made a threat to such witness including a statement which would lead the jury to believe that on another occasion the accused had shot another person. *Held:* that, following the *King* v. *Laurin*, the deposition should not have been read to the jury. *Quaere:* Whether under the circumstances of the case it was permissible to refer to the deposition at all for the purpose of refreshing the memory of the witness. *Held further:* The trial judge should have, in this case, in the exercise of his discretion, excluded any evidence indicating that the accused had made such a statement, even though it might have been relevant to the issue of the guilt or innocence of the accused as being evidence of an attempt, on his part, to suppress evidence by means of a threat; it was wrong to admit such evidence which was highly prejudicial to the accused and in this case had substantially no probative value. (*Noor Mohamed* v. *The King; Maxwell* v. *Director of Public Prosecutions* and *Rex* v. *Shellaker referred to.*)

Held: The interference of the trial judge with the right of the defence to cross-examine one of the Crown witnesses (a right included in the right to make full answer and defence any improper interference with which will usually be a sufficient ground for quashing a conviction) did not produce any substantial wrong or miscarriage of justice in the particular circumstances of this case.

Held: The trial judge should have followed the usual practice of indicating to the jury the nature of the evidence in support of the alibi and telling them that, even if they were not satisfied that the alibi had been proved, if the evidence in support of it raised in their minds a reasonable doubt of the accused's guilt it was their duty to acquit him.

Held: The evidence as to the cause of the victim's death being largely circumstantial, the jury should have been directed that if and in so far as they based their verdict on circumstantial evidence, they must be satisfied not only that those circumstances were consistent with the accused having killed him but also that they were inconsistent with any other rational conclusion. (*Hodge's* case).

Held: Once this Court reaches the conclusion, on one or more of the points properly before it, that there has been error in law below, it is unfettered in deciding what order should be made by the views expressed in the Court of Appeal. Therefore, the argument, that the jurisdiction of this Court in criminal matters being limited to questions of law and the court appealed from having held that notwithstanding certain errors in law at the trial there was no substantial wrong or miscarriage of justice, such decision being on a question of fact or of mixed fact and law cannot be reviewed in this Court, is not entitled to prevail. (*Brooks* v. *The King; Stein* v. *The King; Bouliane* v. *The King; Schmidt* v. *The King* and *Chapdelaine* v. *The King* referred to).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the conviction of the appellant, before a judge and jury, upon a charge of murder.

Alexandre Chevalier K.C. for the appellant.

Noel Dorion K.C. and *Paul Miquelon K.C.* for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (1), pronounced on the 5th day of May, 1950, affirming the conviction of the appellant upon a charge of having "in the night of the 14th to the 15th of June, 1947, with other persons to be later identified killed and murdered Gérard Beaumont."

The appeal comes before us pursuant to an order of the Chief Justice of Canada pronounced on the 22nd day of May, 1950, granting the appellant leave to appeal to this court upon the following grounds.

(1) the illegal admission of rebuttal evidence presented by the Crown for the alleged sole purpose of attacking the credibility of a defence witness by the name of Hamel which rebuttal evidence consisted in proof

(1) Q.R. [1950] K.B. 484.

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of a previous contradictory statement made by the witness Hamel in the presence of the witnesses heard in rebuttal but in the absence of the Petitioner Lizotte and the failure of the trial Judge to explain to the jury that the said rebuttal evidence purported to be exclusively a test of the credibility of the said witness Hamel;

(2) the illegal admission of a proof of character of the Petitioner by the illegal introduction in the evidence before the jury in the re-examination of one Maurice Légaré of the previous testimony of the said Légaré at the time of the preliminary inquiry which previous testimony included an alleged statement in the presence of Légaré that the Petitioner had previously shot somebody and would be able to shoot another person;

(3) the illegal refusal by the trial Judge to permit the defence to establish in cross-examination of Mrs. René Boivin that the said Mrs. Boivin was greatly antagonistic and entertained a spirit of revenge against the Petitioner on account of previous testimonies by the Petitioner against the husband of the said Mrs. René Boivin in some previous cases before the Courts;

(4) the error of the trial judge in his instructions to the jury in failing to direct the jury relatively to the proof of alibi and to the question of the benefit of the doubt in connection with this defence;

(5) the failure of the trial judge to instruct the jury that the Crown must prove not only the death of the victim but also that the death was caused by the accused considering that there was in the record no scientific or other proof of the cause of the death of Gérard Beaumont nor of the time of the said death;

(6) the failure of the trial judge to instruct the jury concerning circumstantial evidence that such evidence must be not only compatible with the guilt of the accused but incompatible with his innocence.

On the afternoon of the 14th of June, 1947, Gérard Beaumont left his home at St-Gérard Majella intending to

go by motor-bus to the City of Quebec. He was apparently in good health and sober and was said to have with him approximately forty dollars (although it is questionable whether this last mentioned fact was proved by any admissible evidence).

On the 22nd of June, 1947, the body of Beaumont was observed floating in the St. Charles River. A police officer brought the body to shore by the use of a rope with a brick attached. An inquest was held but there was no autopsy. The body was already in a state of decomposition. It was said by some of the witnesses that there were marks on the forehead of the victim. A verdict of death from drowning was returned.

The accused was arrested on the 26th of November, 1948. At the trial three witnesses Maurice Légaré, Vallières and Demers gave evidence which, while containing a number of contradictions and differences in matters of detail some of which were of importance and some comparatively trifling, was in substantial agreement as to the broad outlines of the case on which the Crown relied. Their account of what occurred may be briefly summarized as follows.

At about eleven o'clock on the night of June 14, Légaré, Vallières and Demers were together at or near a bus terminal in Quebec and were intending to return to the place where they were working at Rivière aux Pins in a taxicab driven by the accused. Before leaving they were in conversation with the deceased who said that he was going to return by motor-bus. The witness, Demers, says that Lizotte said to the deceased "No, you are coming with us" and that some of them pushed him into the car. Before leaving the city they stopped and Légaré purchased some bottles of beer. They continued on their way and drank some of the beer in the car. Légaré and the deceased, who had had some of the beer, began to quarrel in the back seat. Légaré said to the chauffeur "arrête, on va régler cette affaire-là drette icitte." The chauffeur stopped the car. Légaré and Beaumont got out of the car. After getting out of the car, Légaré struck Beaumont twice on the head with a beer bottle and Vallières struck him once. Beaumont fell to the ground. At this point Lizotte is said

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to have taken hold of Beaumont by the hair, to have struck him in the face with his fist and to have kicked him in the face. Thereafter they put Beaumont back into the rear of the car on the floor and drove off. They stopped for gasoline at the garage of Jean Paul Hamel at St. Gérard Majella as to which a little more must be said later. They then drove away towards Quebec on the Forty Arpents road. At a lonely spot on the road they stopped, took Beaumont out of the car, removed most of his clothes, took the money from his pockets and divided it amongst the accused, Légaré and Vallières. They put Beaumont back in the car and then drove on and stopped at a point near le Remous des Hirondelles on the St. Charles River. At that point Lizotte is said by Vallières and Légaré to have taken Beaumont out of the car and dragged him away in the direction of the river. According to Demers, Lizotte, Vallières and Légaré went away together dragging Beaumont. Demers says that at this point Lizotte threatened him, seizing his neck-tie and saying:—"Ti-blond, tu vas m'aider ou tu vas mourir, la même chose, toi aussi." Demers says that he refused to help saying he would as soon die. Demers says that when Lizotte, Vallières and Légaré returned to the car he asked what they had done with Beaumont and Lizotte, Vallières and Légaré said "Il recommence à revenir, il reprend sa connaissance, que le diable l'emporte, il s'en ira tout seul."

It is said that the accused then drove Demers, Vallières and Légaré back to Rivière aux Pins arriving there about five o'clock in the morning of Sunday, June 15, 1947.

It should be emphasized that the above is but a brief outline of the main points of the narrative contained in the evidence of Demers, Vallières and Légaré which occupied some hundreds of pages in the transcript and contains numerous points of disagreement.

Evidence was given that the accused did not return the taxi to the garage of his employer, Madame Boivin, until the morning of Tuesday, June 17, that the seat-covers had then been removed and that he told Madame Boivin that he had removed them because they were dirty.

The theory of the Crown appears to be that Beaumont died either as a result of the blows or kicks given to him by the accused or as a result of being thrown into the river by the accused, while still alive.

The defence is a denial that the accused had anything whatever to do with the matter. The accused gave evidence. He denied that he was with the deceased, Légaré, Vallières or Demers on the night in question. Evidence was given by his wife and sister-in-law that during the month of June, 1947, which his wife claims to remember particularly well as she was expecting shortly to give birth to a child, the accused never came into the house at night later than midnight except on one occasion when he came in about 1.30 a.m.

The first ground of appeal arises out of the following circumstances. The Crown witnesses, Demers, Vallières and Légaré stated, as mentioned above, that after Beaumont had been assaulted and put back in the car, the accused remarked that he was running short of gasoline and drove to the gas station of Jean Paul Hamel at St-Gérard Majella, arriving there about 2 o'clock in the morning, that they had to wait for some little time but that Hamel finally came down and supplied them with some gasoline and that they then drove away.

Hamel, called as a witness for the defence, testified that he had not served Lizotte or any of the other witnesses with gasoline on the night in question and he went on to state that he could not have done so as he did not have any gasoline during the month of June. The defence called one Georges Marchand an employee of the Imperial Oil Company who said that that company had supplied Hamel with gasoline in the years 1946 and 1947 but had not supplied him with any between the month of November, 1946 and the 28th of June, 1947. In rebuttal the Crown called one Joseph Légaré who testified that he had supplied Hamel with a total of ten barrels of gasoline containing 45 gallons each during the months of May, June and July, 1947. During Hamel's cross-examination he was asked whether he had had conversations with three persons, Eugene Rivard, Lucien Falardeau and Germaine Beaumont (Dame Lucien Falardeau). Hamel was asked

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whether Rivard had come to his store during the night of the 15th to the 16th of June, 1947, apparently to get gasoline. Hamel said that Rivard had come but he thought that it was on the previous night, and that he had not come out nor had he served Rivard with gasoline. He was asked whether he had had a conversation with Rivard a few days later and had said to him, referring to his visit just mentioned: "Pourquoi ne vous êtes-vous pas nommé des fois qu'il vient des jeunes qui sont chauds, qui font du train", ou encore "généralement des jeunes qui viennent la nuit, qui font du train la nuit, j'aime pas ça et si vous vous étiez nommé je vous aurais servi?" Hamel admitted having had a conversation with Rivard but denied having used the words mentioned. Rivard was called in rebuttal and deposed to the words which Hamel had used. These words were identical in meaning with those which had been put to Hamel. Hamel was asked in cross-examination whether on or about the 22nd of June, 1947, he had had a conversation with Lucien Falardeau, a brother-in-law of Beaumont. The question was then put to him: "Quelques jours après la disparition de celui qui serait son beau-frère aujourd'hui et que vous lui aviez dit ceci: 'Que vous trouviez ça effrayant la disparition de Gérard et que dans la nuit du samedi, samedi en question, 14 au 15 juin, vous lui aviez dit qu'il était venu en taxi, vous aviez cru entendre sa voix, la voix de Gérard?' " Hamel denied having made any such statement. In rebuttal Lucien Falardeau deposed that Hamel had said to him speaking of the deceased: "Bien, il m'a dit qu'il était allé un char, le samedi qu'il était disparu, pour avoir du gaz. Il m'a dit 'J'ai cru que Gérard était dans le char'." Hamel was asked in cross-examination in regard to Madame Falardeau: "Vous rappelez-vous d'avoir rencontré madame Falardeau, soeur de Gérard Beaumont, quelques jours après la disparition de son frère ou après qu'on eut repêché le cadavre de son frère et lui avoir dit à peu près ceci, et je cite: 'Je sais qu'il est venu un taxi pour avoir du gaz, ils ont cogné pas mal longtemps, j'ai vu que c'était des gars pour avoir du gaz, j'ai descendu et je leur en ai donné. J'ai jeté un coup d'oeil dans la machine puis j'ai cru que c'était Gérard qui était étendu dans le fond de la machine, à terre,

puis il y avait du sang dans la machine, oui ou non avez-vous dit ça à madame Falardeau?" Hamel denied having made such a statement. Madame Falardeau was called in rebuttal but just after the question had been put to her as to what statement, if any, Hamel had made to her, she was apparently taken ill in the witness box and the matter was not further pursued.

What is here complained of is not the admission of the evidence of Rivard and Lucien Falardeau as to the statements contradictory of his evidence in chief which Hamel is alleged to have made to them or of the evidence of the witness Jos. Légaré as to his having supplied gasoline to Hamel but the complete failure of the learned trial judge to explain to the jury that the contradictory statements were no evidence of the truth of the facts stated therein but must be considered solely as a test of the credibility of the witness Hamel. It is said that, far from giving the jury any such direction, the learned judge gave them to understand that this rebuttal evidence had evidentiary value and could be regarded by the jury as corroboration of the evidence of Légaré and Vallières, whose evidence was clearly that of accomplices, and of the evidence of Demers as to which the learned trial judge, in my opinion properly, told the jury that they might or might not regard it as being that of an accomplice.

At the conclusion of the argument, in the absence of the jury, upon the trial judge ruling that the rebuttal evidence tendered was admissible, counsel for the accused said: "Alors, je croirais qu'il faudrait que vous expliquiez aux jurés qu'il s'agit de la crédibilité d'Hamel," and the learned trial judge replied "Absolument." and after a short further discussion counsel for the accused said, "Je fais application pour que, dans votre charge, vous l'expliquiez bien."

In charging the jury the learned trial judge dealt fully with the danger of convicting an accused upon the uncorroborated evidence of an accomplice or accomplices. His charge in this regard is not a subject of complaint before us but the directions given in regard to the rebuttal evidence must be considered in the light of what had been said on the matter of corroboration and it is important to

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note that there was a complete failure to instruct the jury that before evidence can be considered as corroborative within the rule it must be evidence which tends to implicate the accused, or, as it is often put, it must be evidence which tends to show not merely that the crime charged has been committed but that the accused committed it.

The effect of this rebuttal evidence was dealt with by the learned trial judge in the following passages in his charge to the jury:

Il y a aussi le fait du voyage du retour et de ce qui s'est passé à Québec, vous vous demanderez s'il n'y a pas certains faits que ces trois témoins rapportent qui ne sont pas corroborés par des témoins étrangers. Vous vous demanderez ensuite ce qui s'est passé chez Hamel dans la nuit, et là, vous aurez à examiner si ce témoin dit la vérité, et si vous en venez à la conclusion que réellement il y a eu arrêt chez Hamel, vous aurez là une corroboration d'une partie importante des témoignages de Légaré, Vallières et Demers.

* * *

C'est un incident assez important, c'est un fait matériel, que s'il était prouvé, et c'est à vous à décider s'il est prouvé, servirait à corroborer pour partie la version des trois témoins de la Couronne.

* * *

Si vous en venez à la conclusion que Hamel n'a pas dit vrai, vous avez là une corroboration du témoignage des trois témoins de la Couronne, pour ce fait qui se serait passé entre le prétendu assaut et entre le temps ou à Québec où le corps aurait été jeté à l'eau. Car lorsqu'on aurait pris de la gazoline chez Hamel, la victime dans ce temps-là aurait été assaillie et aurait été dans le fond de la voiture.

In my view there was both non-direction and misdirection as to the purpose and effect of the rebuttal evidence.

In dealing with the second ground of appeal mentioned above, it is first necessary to state briefly what occurred at the trial. Towards the end of the examination in chief, by counsel for the Crown, the witness, Maurice Légaré was asked the following questions and made the following answers.

Q. Maintenant, monsieur Légaré, après que ça a été fait, avez-vous recontré Roger Lizotte dans la suite?
R. Oui.
Q. Combien de temps après et où l'avez-vous rencontré?
R. Quinze jours, trois semaines après.
Q. A quel endroit?
R. Chez Omer Daigle.
Q. A-t-il été question de cette affaire-là?
R. Oui.
Q. Qu'est-ce qui s'est dit à ce propos-là?
R. Je m'en rappelle pas.

Q. Vous en a-t-il parlé, lui?
R. Je sais qu'il m'a dit de fermer ma gueule.
Q. A-t-il ajouté d'autre chose?
R. Il dit: si tu fermes pas ta gueule, il y a de quoi qui est dangereux.
Q. Y a-t-il eu d'autre chose de dit?
R. Je m'en rappelle pas.

The examination in chief concluded shortly after this and was followed by a lengthy cross-examination in which the witness was asked nothing whatever in regard to this particular incident. At the conclusion of the cross-examination counsel for the Crown re-examined the witness on certain matters which had arisen in the course of the cross-examination, and when he had reached the end of this re-examination asked the court's permission to examine on a matter which did not arise out of the cross-examination. Counsel indicated that he wished to refer the witness to certain statements made by him at the preliminary enquiry for the purpose of refreshing his memory. Counsel for the defence objected on the ground that the evidence proposed to be given would be inadmissible as constituting evidence of the bad character of the accused. After some argument, the learned trial judge decided to permit the re-examination. His grounds for so doing are stated in the following words:

Il n'est pas question d'un fait; il est question d'un aveu, d'une déclaration de l'accusé. C'est différent entre prouver un fait et une déclaration. Il y a une grosse différence. Je vais permettre la question, mais seulement M. Dorion, complétez, s'il y a lieu, la déclaration d'aveu que vous entendez établir, jusqu'à preuve du contraire.

The jury was brought back into the court room and the transcript continues as follows:

Q. Monsieur Légaré, pour revenir à ces propos qu'aurait tenus Lizotte chez Daigle, auxquels vous avez référé hier dans votre examen en chef, vous rappelez-vous qu'il en a été question également à l'enquête préliminaire devant l'Honorable Juge Pettigrew, alors que je vous interrogeais?

R. Oui, monsier.

Q. Vous rappelez-vous que je vous ai posé la question, à la page 115 . . .

LA COUR: Avant, demandez lui ce qu'il a déclaré.

Me NOEL DORION, c.r.

Q. Quelle est la déclaration que vous avez faite à l'enquête préliminique j'ai ici à la page 115 de l'enquête préliminaire.

R. Je ne me rappelle pas.

Q. Si vous ne vous en souvenez pas, je vais vous lire la déclaration que j'ai ici à la page 115 de l'enquête préliminaire.

Q. Qu'est-ce que Lizotte a dit? racontez çà à la Cour?

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R. Il a dit: "Si tu fermes pas ta gueule, je vais faire comme j'ai déjà fait à un autre." avez-vous dit cela à l'enquête préliminaire?

R. Oui, monsieur.

Q. Et ce que vous avez dit à l'enquête préliminaire, était-ce exact?

R. Oui, monsieur.

Q. Alors, est-ce qu'il a dit cela, oui ou non?

R. Oui, monsieur.

LA COUR:

Q. Vous vous en rappelez maintenant?

Oui, monsieur.

Me NOEL DORION, c.r.

Q. Qu'est-ce qu'il a dit qu'il ferait? Je vous posais la question—et vous avez répondu: d'après l'enquête préliminaire: "il a dit: 'J'en ai déjà tiré un, je suis capable d'en tirer un autre'; vous rappelez-vous avoir dit cela à l'enquête préliminaire?

R. Oui, monsieur.

Q. Ce que vous avez dit à l'enquête préliminaire était-il exact là-dessus?

R. Oui, monsieur.

Q. Alors, est-ce vrai qu'il vous a dit celà à cette occasion-là?

R. Oui.

It appears to me that the evidence quoted above offends the well settled rule stated in the following words in the judgment of the Judicial Committee in *Noor Mohamed* v. *The King* (1).

In *Makin* v. *Attorney General for New South Wales* (1894) A.C. 57, 65, Lord Herschell L.C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country." (*Maxwell* v. *The Director of Public Prosecutions* (2)).

The rule just stated, is subject to the qualification also stated in Makin's case that the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury. It is urged that the evidence in question was legally admissible and was relevant to the issue of the guilt or innocence of the accused as being evidence of an attempt, on his part, to suppress evidence by means of a

(1) [1949] A.C. 182 at 190. (2) [1935] A.C. 309, 317, 320.

threat. The Crown relies upon such statements as the following: "The presence or absence of facts showing (the accused's) consciousness of having done the act may also be proved—e.g.,—the fabrication or suppression of evidence." Phipson on Evidence, 8th Edition at page 127. There is a similar statement in Wigmore on Evidence, 3rd Edition, vol. 2, section 278. The principle on which such evidence is admitted is stated by Phillimore J. in *Rex* v. *Watt* (1). It may be taken, I think, to be the general rule that evidence may be given against a party in either a civil or criminal case to show that he attempted to suppress evidence. It is true that in the English cases cited in support of the rule proceedings were actually pending at the time of the alleged suppression but there seems to be no reason, in principle, for refusing to apply the rule to cases of attempts to suppress evidence before any proceedings have been commenced. It is argued by the Crown that had the witness Légaré given the evidence objected to when he was first asked about his conversation with the accused it would have been admissible under the principle just stated. It might be sufficient for the disposition of this argument to point out that this did not happen and that we are not concerned to discuss a situation which did not, in fact, arise; but, since, in my view, there should be a new trial, I think it desirable to state that, in my opinion, this is eminently a case in which the learned judge presiding at the trial should, in the exercise of his discretion, exclude any evidence indicating that Lizotte had made a statement which would lead the jury to believe that on another occasion he had shot another person. The rule which I think should guide the trial judge in regard to this matter is referred to in the judgment of Isaacs C.J. giving the unanimous judgment of the Court of Criminal Appeal, the other members of which were Channell, Bray, Avory and Lush, JJ., in *Rex* v. *Shellaker* (2). At page 418, the learned Chief Justice refers to the class of cases "in which, though in strictness the evidence is admissible, the judge may be of opinion that it is of so little real value and yet indirectly so prejudicial to the prisoner, or that it

(1) (1905) 20 Cox C.C. 852. (2) [1914] 1 K.B. 414.

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is so remote, that it ought not to be given." In *Noor Mohamed* v. *The King* (*supra*) the matter is put as follows at page 192.

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

I refer also to the same case at page 195.

> . . . Their Lordships think that a passage from the judgment of Kennedy J. in the well known case of *Rex* v. *Bond,* (1906) 2 K.B. 389, 398, may well be quoted in this connection: "If, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions." Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in Maxwell's case (1935) A.C. 309, 320, when he said "It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions.

My reason for thinking that this evidence should have been excluded, no matter when tendered, is that the statement, while calculated to create a prejudice against the accused the extent of which could scarcely be overestimated, has in the particular circumstances of this case substantially no probative value. Evidence of a threat made by the accused for the purpose of suppressing evidence, given by some independent witness, might, in a greater or less degree, go to strengthen the jury's belief in Légaré's story or to lessen their belief in that of the accused, but when the alleged incident comes only out of the mouth of Légaré who had already deposed to all the

facts on which the Crown relied as establishing the guilt of the appellant, its probative value seems to me to be very slight.

No permission to cross-examine Légaré was obtained nor was he declared an adverse witness so that his statement made at the preliminary hearing might be proved pursuant to the provisions of section 9 of the Canada Evidence Act; and there is nothing in the record to suggest that either of these courses could properly have been followed. The sole ground on which counsel for the Crown sought permission to show the deposition to the witness was for the purpose of refreshing his memory and it is on that ground that it was argued before us that the course followed was not unlawful.

At the trial while counsel for the defence objected throughout to the re-examination of Légaré on this subject-matter he did not expressly raise the objection that under the circumstances of this particular case Légaré ought not to be allowed to refer to the transcript of his evidence at the preliminary hearing for the purpose of refreshing his memory on the grounds that such evidence had been given more than seventeen months after the alleged conversation and that Légaré had repeatedly stated in the course of his cross-examination that statements made by him at the preliminary hearing were inaccurate. I do not think that the question whether such objection if made should have been maintained is before us on this appeal. Had it been otherwise it might have been necessary to consider whether the view expressed in Phipson on Evidence, 8th Edition at page 461 and in Halsbury's Laws of England, 2nd Edition, Volume 13, pages 753 et seq., section 829, or that in Wigmore on Evidence, 3rd Edition at pages 100 et seq., sections 758 to 765, is to be preferred and whether if the former view is accepted the principles which guide the court in determining whether a witness may look at a writing to refresh his memory differ in the case of a deposition from those applicable in the case of other writings. Assuming, but not deciding, that the circumstances of this case were such that the witness might have been permitted to refer to his deposition for the purpose of refreshing his memory, I agree with Barclay J.

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that the whole incident was illegal. I think it was rightly held in *The King* v. *Laurin* (1), that the deposition must not be read to the jury as was done in the case at bar. I think that the evidence in question was wrongly admitted and that it cannot be said that it did not cause the gravest prejudice to the accused.

As to the third ground of appeal, the court indicated to Counsel for the Crown that it did not require him to address any argument in regard to this ground. It was, I think, made clear at the time that the reason for so doing was that in the particular circumstances of this case it was the opinion of the court that the interference by the learned trial judge with the cross-examination could not be said to have produced any substantial wrong or miscarriage of justice. The purpose of the cross-examination of Madame Boivin which was stopped was to elicit an admission that she entertained ill feelings towards the accused because of evidence which he had given against her husband in criminal proceedings in which her husband had been convicted. The facts which the defence sought to establish were brought out in the cross-examination of the witness Boivin in the witness box. I am in agreement with Bertrand J. (2) where he says in his judgment:

> C'était le droit de la défense de pouvoir transquestionner le témoin sur ces raisons, et le juge aurait dû permettre ces questions.

The ruling of the court on this point was not intended to cast any doubt on the well established rule that the right to make full answer and defence includes the right to cross-examine the Crown witnesses with freedom and that any improper interference by the trial judge with this right will usually be a sufficient ground for quashing a conviction.

As to the fourth ground of appeal, the learned trial judge made only passing reference to the evidence given in support of the defence of an alibi. I do not find it necessary to consider whether, in view of the repeated and eminently proper direction given by the learned trial judge to the jury that they must consider all the evidence whether given by the Crown or the defence and if having done so they entertained a reasonable doubt as to the guilt of the accused they should acquit him, it could be

(1) 6 Can. Cr. Cas. 135. (2) Q.R. [1950] K.B. 484.

said that there was error in the charge in this regard; but I do respectfully venture to suggest that in this case it would have been well to follow the usual practice of indicating to the jury the nature of the evidence put forward in support of the alibi and telling them that, even if they are not satisfied that the alibi has been proved, if the evidence in support of it raises in their minds a reasonable doubt of the appellant's guilt it is their duty to acquit him.

It is obvious that where an accused is not charged until some seventeen months after the alleged commission of an offence, although he be in fact innocent, it will only be in the rarest of cases that he is able to establish an alibi beyond peradventure. While the evidence of the witness Savard tendered in support of the alibi appeared to relate not to the week-end of the 15th of June, 1947, but rather to the following week-end, the evidence of the accused's wife, if believed, showed that he could not have committed the crime and it was supported by the evidence of the accused's sister-in-law.

The fifth and sixth grounds of appeal may well be considered together. It is argued on behalf of the appellant that the learned trial judge failed to instruct the jury that before they could convict the accused of the murder of Beaumont they must find on the evidence that it was proved beyond a reasonable doubt not only that the victim was killed but that he was killed by the accused. In my respectful opinion the learned trial judge failed to charge the jury adequately on this point.

On the theory of the Crown as set out in the factum of counsel for the respondent, the death of Beaumont was caused by Lizotte by striking and kicking the victim in the face or by throwing him into the river when he was still alive. If there was evidence on which the jury could properly find beyond a reasonable doubt that the victim's death must have been caused by one or other of these means, it would not be necessary that such evidence should be of what is commonly referred to as a scientific nature but it was essential to the verdict that there should be such evidence.

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In a case, such as this, where the defence is that the accused had nothing to do with the matter whatever, it is obvious that the defense will be unable to furnish any explanation as to how the victim met his death and the onus rests upon the Crown to bring home to the accused, beyond a reasonable doubt, the killing of the victim by him. This being so, and the evidence upon which the jury might have come to the conclusion that the accused killed Beaumont being largely circumstantial, it was, in my opinion essential that they should be directed that if and in so far as they based their verdict on circumstantial evidence, they must, in the words of Alderson B. in *Hodge's* case (1), be satisfied not only that those circumstances were consistent with his having committed the act but also that such circumstances were inconsistent with any other rational conclusion than that it was the prisoner who in fact killed Beaumont.

In the factum of the respondent it is submitted that it matters not whether Beaumont was actually killed by the accused, by Légaré or by Vallières or by the combined actions of the three of them. This submission is based on the ground that each was responsible for the acts of the others by reason of the provisions of section 69, subsection 2 of the *Criminal Code*. The addresses of counsel to the jury do not appear in the record before us but I find nothing in the charge of the learned trial judge to the jury to indicate that the theory of the Crown depended upon invoking the terms of section 69(2). In my opinion the evidence falls short of disclosing the formation by the accused, Vallières and Légaré of a common intention to prosecute any unlawful purpose and to assist each other therein, which preceded the alleged striking of the victim with a beer bottle by Légaré and Vallières. Certainly there was no adequate instruction to the jury as to the necessity of their being satisfied beyond a reasonable doubt that the accused, Légaré and Vallières had formed a common intention to prosecute an unlawful purpose and to assist each other therein and that the killing of Beaumont was or ought to have been known to be a probable consequence of the prosecution of such common purpose before they

(1) 2 Lewin C.C. 227 at 228.

could properly convict Lizotte, if, in their view, the evidence was consistent with the view that the victim was killed by Légaré and Vallières.

Our jurisdiction is limited to dealing with the points of law upon which leave to appeal has been granted and these points do not include a submission that there was no evidence upon which a jury could have found that Lizotte, in fact, killed Beaumont, and I, therefore, do not consider whether such an argument could have been supported. I am, however, of opinion that a verdict of guilty cannot be supported in the absence of a clear direction to the jury that they could not find the accused guilty unless they were satisfied beyond a reasonable doubt that it was he who actually killed Beaumont. If, for example, the jury were of the opinion that, consistently with the evidence, the death of Beaumont may have been caused by the blows on the head with bottles said to have been struck by Légaré and Vallières and were not satisfied beyond a reasonable doubt that his death was caused by blows struck by the accused or that the accused took part in throwing him into the river while still alive they could not find him guilty of murder; I cannot find that they were properly instructed in this regard.

The importance of what I respectfully consider to be non-direction in regard to the effect to be given by the jury to circumstantial evidence arises chiefly in regard to the matter of the actual cause of death. *Hodge's* case was a case where all the evidence against the accused was circumstantial. It is argued that the direction there prescribed is not necessary in a case where there is direct evidence against the accused as well as circumstantial evidence. However that may be, it is my opinion that where the proof of any essential ingredient of the offence charged depends upon circumstantial evidence it is necessary that the direction be given.

One further argument requires consideration. At the conclusion of his able argument Mr. Dorion submitted that the jurisdiction of this court in criminal matters being limited to questions of law and the court appealed from having held that notwithstanding certain errors in law at the trial there was no substantial wrong or miscarriage

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of justice and that the appeal should be dismissed under the provisions of section 1014(2) of the *Criminal Code*, such decision cannot be reviewed in this court. It is argued that in reaching the decision to apply section 1014(2) the Court of Appeal must of necessity have examined and weighed the evidence and that consequently such decision is one of fact or of mixed fact and law and, therefore, not subject to review in this court. It is urged that the appeal must be dismissed even if this court should be of opinion that any or all of the points of law argued before us are well taken.

I do not think that this argument is entitled to prevail. In the case at bar it might perhaps be disposed of by pointing out that in my opinion there were serious errors in matters of law at the trial which the Court of Appeal did not regard as being errors at all; but even had the Court of Appeal found the existence of all the errors in law which in my view did occur and nonetheless dismissed the appeal pursuant to section 1014(2), I do not think that this court would be without jurisdiction.

Counsel were not able to refer us to any reported case in which the argument put forward by Mr. Dorion appears to have been considered. Its importance is obvious. If given effect it would have the result that in any case in which a Court of Appeal dismisses an appeal because in its view, in spite of error in law at the trial, no substantial wrong or miscarriage of justice has actually occurred this court could not entertain, or at all events could not allow, an appeal from such judgment no matter how grave, in the view of this court, was the error complained of.

The solution of this question depends, in the first instance, on the wording of the relevant sections of the *Criminal Code*. It will be observed that the jurisdiction of this court is conferred by a form of wording different from that which confers jurisdiction on the Court of Appeal. As has already been mentioned, the jurisdiction of this court is confined to considering questions of law while the Court of Appeal has jurisdiction to deal not only with questions of law but with questions of mixed law and

fact and with questions of fact alone. Under section 1014(1) the Court of Appeal shall allow the appeal if it is of opinion:

(a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law; or

(c) that on any ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal. Then follows subsection 2, reading 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.

The jurisdiction of this court is limited to hearing and determining appeals on:

(i) any question of law on which there has been dissent in the Court of Appeal.

(1023), or

(ii) any question of law, if leave to appeal, is granted by a judge of this court.

(1025).

In my view it is the duty of this court, in the first instance, to examine the point or points of law properly brought before it either under (i) or (ii) above or, as may sometimes happen, under both (i) and (ii). If the court comes to the conclusion that there has been no error in law it follows that the appeal will be dismissed. If, on the other hand, this court is of opinion that there has been error in law in regard to any one or more of the points properly before it, then I think, there devolves upon it the duty, in disposing of the appeal, to "make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires." (section 1024).

In my opinion once this court reaches the conclusion, on one or more of the points properly before it, that there has been error in law below it is unfettered in deciding what order should be made by the views expressed in the Court of Appeal. This would be my view if the point were devoid of authority. It is I think supported by the practice followed for many years. While numerous cases

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might be cited it seems to me to be sufficient to refer to: *Brooks* v. *The King* (1) and *Stein* v. *The King* (2). In *Brooks* v. *The King* this court allowed the appeal and directed a new trial on the ground that the learned trial judge had misdirected the jury as to the consideration which they should give to certain evidence given by the defence. In the Court of Appeal for Ontario (3), Masten J.A. dissented, taking the view that because of this particular misdirection the conviction should be quashed. The judgment of the majority of the Court of Appeal (3) was delivered by Grant J.A. After discussing the misdirection complained of that learned judge continued:

> We are of opinion that upon this ground no substantial wrong or miscarriage of justice can have occurred.

This court (1), after holding that there was misdirection, continued:

> . . . That it may seem probable to an appellate court perusing the record that the jury would have reached that conclusion, does not warrant affirming the conviction. That would, in effect, be to substitute the verdict of the court for that of a jury properly instructed, to which the appellant was entitled. Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty. *Gouin* v. *The King* (1926) S.C.R. 539, at p. 543; *Allen* v. *The King* (1911) 44 Can. S.C.R. 331, at p. 339; *Makin* v. *Att.-Gen. for New South Wales* (1894) A.C. 57, at p. 70. That burden the Crown, in the view of the majority of the Court, has not discharged. There was non-direction by the learned trial judge in a vital matter, tantamount in the circumstances of this case to misdirection, and constituting a miscarriage of justice within subs. 1(*c*) of s. 1014 of the Criminal Code. Upon the whole case, and taking into consideration the entire charge, the majority of the Court, with respect, finds itself unable to accept the view expressed by the learned judge who delivered the majority judgment in the Appellate Division that "no substantial wrong or miscarriage of justice can have occurred" at the trial. (*Criminal Code*, s. 1014(2)).

Stein v. *The King, supra,* was an appeal from a judgment of the Court of Appeal for Manitoba (4). The court consisted of Perdue, C.J.M., Fullerton, Dennistoun, Prendergast and Trueman J.J.A. Fullerton J.A. dissented on the ground that statements made by persons other than the accused were wrongly admitted in evidence. Prendergast J.A. held that this evidence had been wrongly admit-

(1) [1927] S.C.R. 633.
(2) [1928] S.C.R. 553.
(3) 61 O.L.R. 147 at 164.
(4) 37 Man. R. 367.

ted but that the appeal should be dismissed as there was no substantial wrong or miscarriage of justice. (See the report at page 379). Trueman J.A. held that at least one of the statements admitted should have been refused and continued,—"independently altogether of the statements made by Paulin and Webster in the presence of Stein, the Crown's case was conclusively made out. The jury must inevitably have arrived at the same verdict had the impeached evidence not been admitted." (See report at page 388). The Chief Justice and Dennistoun J.A. simply agreed that the appeal should be dismissed. It seems clear that the *ratio decidendi* of the majority of the Court of Appeal for Manitoba was that although an error in law had been made no substantial wrong or miscarriage of justice had occurred. This court also held that the error in law complained of had occurred but, differing from the Court of Appeal, held that it could not be said that no substantial wrong or miscarriage of justice had actually occurred, and allowed the appeal.

The view that this court exercises its own judgment as to whether or not it can be said that no substantial wrong or miscarriage of justice has occurred, I think, appears not only from the two cases last cited but also from *Boulianne* v. *The King* (1) and *Schmidt* v. *The King* (2), in both of which this court gave effect to the argument that no substantial wrong or miscarriage of justice had occurred, and dismissed the appeals, and from *Chapdelaine* v. *The King* (3) in which this court allowed the appeal, refusing to give effect to the argument that no substantial wrong or miscarriage of justice had occurred.

I have no difficulty in reaching the conclusion that this is not a case in which it can be said that no substantial wrong or miscarriage of justice has occurred by reason of the errors in law made at the trial which have been pointed out above. The test to be applied is found in the words of Kerwin J., giving the judgment of the court in *Schmidt* v. *The King* (*supra*).

> . . . The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King* (1926) S.C.R. 539, from all of which it is clear that the onus rests on the Crown to satisfy

(1) [1931] S.C.R. 621.
(2) [1945] S.C.R. 438.
(3) [1934] S.C.R. 53.

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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* (1944) A.C. 315, 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 in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

As, in my view, there should be a new trial, it is not desirable that the evidence should be discussed at any length. I do not think it can be said that a properly instructed jury acting honestly and reasonably might not have acquitted the appellant.

For the reasons stated above and particularly because of error in regard to the matters set out in the first, second, fifth and sixth grounds of appeal, I am of opinion that the appeal should be allowed, the conviction quashed and a new trial ordered.

Appeal allowed; new trial ordered.

Solicitors for the appellant: *Alexandre Chevalier and G. Levesque.*

Solicitor for the respondent: *Noël Dorion.*