1946
*Nov. 26, 27
*Dec. 20

DAVID TASS .... APPELLANT;

AND

HIS MAJESTY THE KING .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Evidence—Admissibility of—Admissions made by accused as witness on preliminary hearing of charge against another—No objection made to questions as incriminating—No claim for protection under section 5 of the Canada Evidence Act—Right of Crown to use admissions on trial of accused—Canada Evidence Act, R.S.C. 1927, c. 59.

The appellant was convicted on charges of having used a noxious fluid and instruments to procure an abortion. The facts of the case are the following: One Ford was charged with manslaughter in connection with the death of the woman in question. The appellant appeared as a witness for the Crown at the preliminary inquiry. In the course of his evidence, given without raising any objection nor claim for protection under section 5 of the *Canada Evidence Act,* the appellant made certain admissions which the Crown later put in evidence against him at his own trial. The appellant appealed to the Court of Appeal on the ground of improper admission in evidence of these admissions; but the conviction was affirmed by a majority of that Court.

Held: That the deposition of the appellant was properly admitted and the appeal should be dismissed.—If a person testifying does not claim the protection provided for by section 5 of the *Canada Evidence Act,* the evidence so given may be used against him at his own subsequent trial.

Judgment of the Court of Appeal ([1946] 2 W.W.R. 97) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming a conviction, on a trial before Donovan J. and a jury, on charges of offences relating to procuring an abortion.

Harry Walsh for the appellant.

C. W. Tupper for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The accused, Dr. David Tass, appeals from the judgment of the Court of Appeal for Manitoba dismissing his appeal from a conviction on charges that he

*Present:—Kerwin, Taschereau, Rand, Kellock and Estey J.J.

(1) [1946] 2 W.W.R. 97; (1946) 1 Criminal Reports (Canada) 378; 86 C.C.C. 97; [1946] 3 D.L.R. 804.

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did on or about October 22, 1944, unlawfully administer to Agnès Laderoute, a woman, with intent to procure a miscarriage of the said Agnès Laderoute, a noxious thing, to wit, a mixture of water, soap and lysol, and that he, on the same day, unlawfully used instruments on Agnès Laderoute, a woman, with intent to procure a miscarriage of the said Agnès Laderoute. The appeal is based upon two grounds of dissent in law of Mr. Justice Dysart although other matters of dissent are mentioned in the latter's judgment. As I have come to the conclusion that the appeal fails on the first ground, I do not say anything as to the second because Mr. Walsh quite properly agreed that, in that event, it would be unnecessary to do so.

Agnès Laderoute died October 23, 1944. An inquest was held and subsequently one Edward J. Ford was charged with manslaughter in connection with the woman's death and the preliminary inquiry in connection with that charge was held before a police magistrate on November 23, 1944. Tass was subpoenaed to appear as a witness at that inquiry. He attended and was sworn and gave evidence without raising any objection to answering any question upon the ground that his answer might tend to criminate him, as he was entitled to do by subsection 2 of section 5 of the *Canada Evidence Act*. After testifying that he had been called to Ford's house to attend the woman and that he found her dead, he was asked as to what he found in the room and as to any previous knowledge he had of the woman or of her condition. He admitted that he knew she was pregnant, that he drove her in his automobile to a point about one and one-half city blocks from Ford's house and that he knew Ford would conduct an abortion as he "felt he had done them before." From these admissions and others in his testimony at the preliminary inquiry, it is plain that, if the examination was admissible, the jury was entitled to find him guilty.

I disagree with the view of the dissenting judge below that this evidence of Tass was not relevant to the charge against Ford. It was suggested that an arrangement had been made between certain members of the police force and Crown counsel to put Tass in the witness box at Ford's preliminary inquiry in order to secure from Tass an admis-

sion of his guilt. It was even suggested that the magistrate had been a party to this arrangement. I find no evidence that any of the named parties had entered into such an arrangement or that it had been decided to arrest and prosecute Tass before the preliminary inquiry into the charge against Ford, and the matter is therefore left with Tass as a witness in a proceeding under oath admitting his guilt of the crimes now charged against him and that he did not claim the protection provided for by the *Canada Evidence Act*. Under these circumstances the decision in *Regina* v. *Coote* (1) is conclusive.

It is true that at the time of that decision there was no such provision as subsection 2 of section 5 of the *Canada Evidence Act*. That Act removes a safeguard a person had at common law to refuse to answer any questions that might criminate him. He is now obliged to do so but such evidence may not be used against him if he claims the protection of the Act. It has been pointed out in several cases such as *Rex* v. *Clark* (2), *Re Ginsberg* (3), and *Rex* v. *Barnes* (4) that the protection now afforded may not be as wide as that under the common law and objections have been raised from time to time as to the possibility of the evidence acquired under the Act being used to build up a case against a person who may be subsequently charged with an offence. However that may be, the matter seems quite clear that if the person testifying does not claim the exemption, the evidence so given may be later used against him, and this notwithstanding the fact that he may not known of his rights; *Regina* case (1).

The appeal should be dismissed.

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

KELLOCK J.—This is an appeal from the judgment of the Court of Appeal of Manitoba affirming (Dysart J. *ad hoc* dissenting) the conviction of the appellant before Donovan J. and a jury on the 11th day of May, 1945, in respect of two counts in an indictment, namely, attempt to procure a miscarriage and use of instruments to procure a miscarriage.

(1) (1873) L.R. 4 P.C. 599.
(2) (1902) 3 O.L.R. 176.
(3) (1917) 40 O.L.R. 136.
(4) (1921) 49 O.L.R. 374.

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In view of the opinion which I have formed with respect to the appeal it is necessary to mention only one ground of dissent. The appellant had given evidence upon a preliminary inquiry with respect to charges then pending against one Ford, arising out of the same facts out of which the appellant was himself later charged and part of this evidence was admitted against the appellant at his trial. Dysart J. was of opinion that this evidence was inadmissible. His view may be summarized as follows: that the evidence was irrelevant to the matter with which the preliminary inquiry was concerned, namely, the pending charges against Ford; that counsel for the prosecution had conducted the part of the examination objected to from an improper motive, viz: merely to obtain the admissions for use against the witness himself and that the magistrate was a party to this scheme; that the appellant had ceased properly to be a witness at all and his failure to avail himself of the provisions of section 5 of the *Canada Evidence Act,* R.S.C., c. 59 was immaterial and did not render his answers subsequently admissible against him.

In the course of his reasons the learned judge stated that the evidence in question had been

> extracted from a man who was so strongly suspected of complicity in Ford's crime that the authorities had decided to arrest and prosecute him.

However, counsel for the appellant before us quite frankly admitted that this view of the learned judge was not supported by the evidence.

When the evidence objected to is examined its relevancy is not, in my opinion, open to objection. It is shown that there was a common design between the appellant and Ford with respect to the matter in question and the principle referred to in *Koufis* v. *The King,* (1) is applicable. The examination of the appellant was therefore proper and accordingly there is no foundation for the allegation as to any ulterior motive on the part of either the Crown Attorney or the magistrate. Being properly before the magistrate it was for the appellant to invoke the provisions of section 5 of the *Canada Evidence Act.* Not having done so his evidence is properly admissible against him. It is not therefore necessary to consider whether the examination objected to would have been other than

(1) [1941] S.C.R. 481, at 488.

admissible against Tass if it could have been established that it was irrelevant to the pending charge against Ford. *Rex* v. *Sloggett,* (1); *Rex* v. *Graham,* (2); *The King* v. *Van Meter,* (3) may be referred to.

As to the other ground of dissent which was argued before us, counsel for the appellant took the position that if he could not support the first ground of dissent it was unnecessary for us to deal with the second.

I would dismiss the appeal.

Appeal dismissed.