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*Feb. 12.

AMEDEE BARON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Practice and procedure—Jury trial—Charge of the trial judge—Misdirection—Sworn statement by stenographer conflicting with report of the judge—Section 1020 Cr. C.

The appellant, having been convicted of the crime of rape and condemned to fifteen years imprisonment and lashes, appealed to the court of appeal principally on the ground that the trial judge had erred in his

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

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instructions given to the jury. In the record were the notes of the stenographer at the trial who certified, under oath, to the delivery of a charge by the trial judge which, as reported by him, contained a clear misdirection. The appellate court, having determined that, on the stenographic transcription, the appeal should be allowed, directed that a report be furnished by the trial judge in accordance with section 1020 Cr. C. The trial judge then prepared, two or three months after the trial, a certificate containing a number of statements made by him in answer to a corresponding number of objections to his charge which formed the grounds of appeal and stating, according to his recollection, that in fact his direction was precisely the contrary of that reported.

Held that such certificate of the trial judge was not a report within section 1020 Cr. C.: it did not contain the judge's "notes of the trial" nor was it a "report giving his opinion upon the case or upon any point arising in the case"; and, therefore, the court being left with nothing authentic and regularly before the court to establish that the charge was not as reported, the appellant was clearly entitled to a new trial. Section 1020 Cr. C. apparently contemplates that the judge or the magistrate should furnish "his notes of the trial" or his report immediately after the trial, or at least, so soon as an appeal is lodged; and it was never intended by this section to enable the trial judge, after an appeal had been argued, to put before the court of appeal, by way of certificate or otherwise, whether *proprio motu* or by direction of the court of appeal, his answer to the various points taken upon the appeal.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the conviction of the appellant for the crime of rape.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

C. Bourgeois K.C. for the appellant.

P. Bigué K.C. and *Laetare Roy K.C.* for the respondent.

At the close of the arguments by counsel for the appellant and for the respondent, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We regard this as a case of the utmost importance. A conviction for the crime of rape is always a serious matter. In the present case it is more than ordinarily so because the penalty imposed is fifteen years imprisonment and lashes.

(1) (1928) Q.R. 47 K.B. 371.

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It is the aim of this court, as of all courts of law, to do justice,—not abstract justice, but justice according to law. Elementary justice seems to require that a conviction for a serious crime should not stand if it may have been based on illegal evidence.

In criminal matters, under s. 1014 of the Code, the court of appeal may set aside a conviction, if of the opinion "that on any ground there was a miscarriage of justice." This power might well have been exercised here having regard to the charge as a whole. But, our jurisdiction is much more restricted. Under s. 1023 we can entertain an appeal only

against the affirmance of (*a*) conviction on any question of law on which there has been dissent in the Court of Appeal.

The present case has some most unpleasant aspects. A stenographer of repute has certified, under oath, to the delivery of a charge by the trial judge which, as reported by him, contains a clear misdirection. The learned trial judge, as reported, told the jury that a statement of the complainant to her aunt, which was admissible only to show the consistency of her conduct, in itself amounted to distinct evidence of the guilt of the accused.

On the other hand, we have also before us a statement or certificate, furnished by the trial judge under direction of the Court of King's Bench, in which he says his direction was not as so reported, but precisely the contrary. This is relied upon by the Crown as a report under s. 1020 of the Criminal Code, and it is contended that effect must be given to it and the stenographer's transcription ignored.

Were the certificate of the trial judge before us really a report made in conformity with s. 1020 of the Criminal Code, the case would present greater difficulty and it may be that effect would have to be given to it. But, as we read s. 1020, the certificate of the trial judge now before us, which consists in a number of statements made by him in answer to a corresponding number of objections to his charge, which formed the grounds of appeal, and was prepared by him some two or three months after the trial and after the argument of the appeal in the Court of King's Bench—indeed, counsel assure us, after that court had determined that, on the stenographic transcription, the appeal before it must be allowed,—is not such a report as

s. 1020 contemplates. It certainly does not contain the learned judge's "notes of the trial"; nor is it a "report giving his opinion upon the case or upon any point arising in the case."

S. 1020 provides that, as part of the material to be put before the court of appeal, the trial judge or magistrate shall furnish to the court "his notes of the trial" and shall also send "a report giving his opinion upon the case or upon any point arising in the case" and apparently contemplates this being done immediately after the trial, or at least, so soon as an appeal is lodged. It was never intended by this section to enable the trial judge, after an appeal had been argued, to put before the court of appeal by way of certificate or otherwise, whether *proprio motu* or by direction of the court of appeal, his answer to the various points taken upon the appeal. That, in substance, is what has been done in this case. We cannot regard such a certificate of the trial judge as having been properly given, nor as a report within s. 1020. That being so, we are left with nothing authentic and regularly before the court to establish that the charge was not what the stenographic transcription shews; and upon that, as already stated, the misdirection is so plain and so fatal in its consequences that a new trial is inevitable. Justice requires that a conviction where there is such grave uncertainty as to the propriety of the direction under which it was made should not be allowed to stand.

That such uncertainty exists in this case is obvious, since, against the accuracy of the note made at the moment of utterance by a careful, sworn stenographer, acting in the discharge of his usual functions, there is nothing but the recollection by a judge, however eminent and careful, of the precise language used by him some two or three months before.

This case is most exceptional. We trust such circumstances will not again arise; and the present decision can be relied upon only in a case which is on all fours with that before us.

The conviction will accordingly be set aside and a new trial had.

Appeal allowed.