MAX STEIN .....APPELLANT; 1928

*Oct. 29.

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Evidence—Conviction on charge of receiving stolen goods —Evidence of statements made by the thieves in presence of accused— —Misdirection in judge's charge to jury—Contention that no miscarriage of Justice (Cr. Code, s. 1014 (2)).

The accused was convicted on a charge of receiving stolen goods, knowing them to have been stolen. At his trial, evidence was admitted of statements made in his presence by the supposed thieves to a constable. In charging the jury, the judge referred to these statements as evidence that might be regarded, but warned them of the danger of accepting evidence of accomplices without corroboration. On objection by accused's counsel to the charge, he recalled the jury and said: "I have already warned you in this case it would be most dangerous for you to rely on (the thieves') evidence as against the prisoner without feeling it was corroborated in other respects because (of) what they said (when) the prisoner was there. He did not express any particular assent to it and you should reasonably be bound by what he did assent to and I think on the whole it is almost worthless evidence for you."

Held: The conviction should be set aside and a new trial ordered, on the ground of misdirection. It is only when the accused, by "word or conduct, action or demeanour," has accepted what they contain, and to the extent that he does so, that statements made by other persons in his presence have any evidentiary value; and there was no evidence from which a jury might infer anything in the nature of an admission by accused of the accuracy of what was incriminating in the statements in question. The jury should have been told that, in the absence of any assent by the accused either by word or conduct to the correctness of the statements, they had no evidentiary value whatever as against him and should be entirely disregarded. It was impossible to say that there had been no miscarriage of justice, and apply s. 1014 (2) of the *Criminal Code;* 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 (*Kelly* v. *R.* 54 Can. S.C.R. 220); but here, in a most vital matter, the judge had not only failed to warn the jury to disregard the statements, but had actually stressed them, in that he in effect told the jury that they were "evidence" upon which, if corroborated, they might act.

Canadian Encyclopedic Digest, Ont. Ed., vol. 4, pp. 405, 406-7; *Makin* v. *Att. Gen. for New South Wales,* [1894] A.C. 57, at p. 70; *Ibrahim* v. *R.,* [1914] A.C. 599, at p. 616; *Allen* v. *R.,* 44 Can. S.C.R. 331; *Gouin* v. *R.,* [1926] S.C.R. 539; *R.* v. *Christie,* [1914] A.C. 545, referred to.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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Judgment of the Court of Appeal for Manitoba (37 Man. R. 367) reversed.

APPEAL on behalf of the accused from the judgment of the Court of Appeal for Manitoba (1) affirming (Fullerton J.A. dissenting) his conviction at trial before Galt J. with a jury, for the offences of unlawfully receiving and of unlawfully retaining stolen goods, knowing same to have been stolen.

The grounds of appeal were: insufficiency of evidence on which a jury could convict, wrongful admission of evidence, and misdirection in the trial judge's charge to the jury.

At the trial the Crown called as a witness one Alexander, a detective, who, in the course of his evidence, deposed that, after the accused was arrested, he confronted him with the two men (one after the other) who had been charged with the theft of the goods in question, that (after giving the usual caution to these men and to the accused) he had questioned these men in the accused's presence; and what was said on that occasion (of which Alexander took notes at the time) was given by Alexander in evidence, counsel for the accused objecting to its admissibility. On the appeal it was contended (*inter alia*) on behalf of the accused that that evidence should not have been admitted, and that the statements made by the said two men on the occasion in question, to which the accused had not assented, were, in the trial judge's charge to the jury, wrongfully assumed to be evidence against the accused.

On the ground of misdirection in the trial judge's charge to the jury, this Court allowed the accused's appeal, set aside the conviction, and ordered a new trial. Portions of the judge's charge to which this Court made special reference are set out in the judgment now reported.

J. M. Isaacs for the appellant.

J. Allen K.C. for the respondent.

Argument by counsel for the appellant on the ground of misdirection was stopped by the Court, but he was directed to proceed, if so advised, on the other ground of his appeal, namely: that there were not sufficient evidence of identification of the goods alleged to have been stolen. Counsel

(1) 37 Man. R. 367; [1928] 2 W.W.R. 346.

representing the Attorney General was informed that he might confine his answer to the questions of misdirection and whether substantial wrong or miscarriage had resulted therefrom.

On the conclusion of the argument, the judgment of the court was rendered by

ANGLIN C.J.C.—We are all of opinion that the conviction cannot stand. There was clearly misdirection by the learned trial judge on a very important and most material matter.

Certain statements made in the presence of the accused by the supposed thieves to a constable (Alexander) were deposed to by the latter. In reference to these statements, and after reading at length to the jury the evidence pertinent thereto given by Alexander, the learned trial judge said:

> That's the interview that was mentioned to you by Alexander, and as I said before you must accept that evidence. Bear in mind it is very dangerous to accept the evidence of accomplices like these fellows unless you feel satisfied it corresponds with the truth as told by other witnesses;

and again

> In the 9th volume of Halsbury it states: To prove that the goods were stolen, a confession by the thief is admissible; if it was made in the prisoner's presence, but not otherwise. * * * The thief is an admissible witness but the alleged receiver should not be convicted on his evidence alone without corroboration.

But for the introductory allusion to the Alexander interview, all this might be taken to have reference to the testimony given orally by Paulin and Webster at the trial, which, however, was markedly less incriminating for the accused than were their answers to Alexander in the interview related by him—and the learned judge may have so intended these observations. Moreover, on objection being taken by the prisoner's counsel, citing *R.* v. *Christie* (1), counsel for the Crown replied:

> *Rex* v. *Christie* lays down this, that where a statement is made in the presence of the accused it is admissible in evidence, but in instructing the jury on the Statute (*sic*), your Lordship must point out that what is contained in the statement is not evidence unless it is admitted.

The learned judge thereupon recalled the jury and said to them:

> Objections are being raised by Mr. Isaacs (to) the evidence that has been put in by these two thieves, who did steal coats from Eatons. I have

(1) [1914] A.C. 545.

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already warned you in this case it would be most dangerous for you to rely on their evidence as against the prisoner without feeling it was corroborated in other respects because (of) what they said (when) the prisoner was there. He did not express any particular assent to it and you should reasonably be bound by what he did assent to and I think on the whole it is almost worthless evidence for you.

This is very far indeed from telling the jury, as the learned judge should have done, that, in the absence of any assent by the accused either by word or conduct to the correctness of the statements made in his presence, they had no evidentiary value whatever as against him and should be entirely disregarded.

Counsel representing the Attorney General at bar admitted that in his original direction the trial judge had failed to appreciate the rule laid down in *Christie's Case* (1), but argued that he had corrected this error when the jury was recalled. We think he rather accentuated it, however, by again referring to the statements as "*evidence*" susceptible of corroboration.

It has been urged that this misdirection did not cause a miscarriage of justice and that s. 1014 (2) of the *Criminal Code*, therefore, applies. That subject has been ably dealt with in a recent article on "Evidence" by Dr. D. A. MacRae, a professor in the Law School at Osgoode Hall, published in the Fourth Volume of the Canadian Encyclopaedic Digest, Ontario Edition, which reviews all the leading decisions. In section 17, at p. 405, referring to the *Makin Case* (2), the writer points out (notes "x" and "y") that Lord Herschell, in delivering the judgment of the Privy Council, said:

> The evidence improperly admitted might have chiefly influenced 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. * * * 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.

(1) [1914] A.C. 545.

(2) [1894] A.C. 57, at p. 70.

Dr. MacRae also quotes from the judgment of the Privy Council, delivered by Lord Sumner, in *Ibrahim* v. *R.* (1):

> Where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal * * * may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict * * * or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance * * * or most unlikely to have affected the verdict. * * * Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction.

The present provision of the *Criminal Code* of Canada (s. 1014 (2)) is substantially the same as that dealt with in the *Makin Case* (2), and in *Ibrahim* v. *R.* (3). This Court had, in the *Allen Case* (4), already taken the same view of the effect of the former section 1019 of the Criminal Code and, since the substitution for it in 1923 of s. 1014 (2) in its present form, the statement of the law made in the earlier case (*Allen* v. *The King* (4)) was reaffirmed in *Gouin* v. *The King* (5).

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. (*Kelly* v. *R.* (6). 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 only when the accused by "word or conduct, action or demeanour" has accepted what they contain, and to the extent that he does so, that statements made by other persons in his presence have any evidentiary value. In the present case there is no evidence in the record from which a jury might infer anything in the nature of an admission by the accused of the accuracy of what was incriminating in the statements

(1) [1914] A.C. 599, at p. 616.
(2) [1894] A.C. 57.
(3) [1914] A.C. 599.
(4) (1911) 44 Can. S.C.R. 331.
(5) [1926] S.C.R. 539.
(6) (1916) 54 Can. S.C.R. 220.

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of the thieves given in evidence by Alexander. When the jury was recalled, the learned trial judge, far from telling them, as Crown Counsel had suggested was the course indicated in *Christie's Case* (1), that the statements in question had no evidentiary value in the absence of some such admission by the accused, in effect told them that they were "evidence" upon which they might act, if corroborated, inasmuch as he said to them that it would be dangerous for them to rely upon such evidence as against the prisoner "without feeling that it was corroborated."

On this ground we are of opinion that the appeal must succeed.

As to the other ground taken by Mr. Isaacs, we are clearly of the view that there was sufficient evidence to go to the jury and that, if there had been a proper direction as to the statements so much discussed, the attack upon the conviction must have failed.

As in the recent cases of *Brooks* v. *The King* (2), and *Hubin* v. *The King* (3), "the circumstances do not seem to call for an unqualified order quashing the conviction and directing the discharge of the appellant." On the contrary, we think it clear that our discretion "should be exercised in such a manner as to afford the Crown an opportunity of once more putting the law in motion." *R.* v. *Burr* (4).

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

Appeal allowed, conviction set aside and new trial ordered.

Solicitors for the appellant: *Isaacs & Isaacs.*

Solicitor for the respondent: *John Allen.*

(1) [1914] A.C. 545.
(2) [1927] S.C.R. 633.
(3) [1927] S.C.R. 442.
(4) (1906) 13 Ont. L.R. 485.