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JOSEPH ARTHUR McCONNELL AND NEIL LEATH BEER ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Jury trial—Possession of housebreaking instruments—Whether trial judge's instructions to jury amounted to comment on failure of accused to testify—Whether new trial only remedy—Canada Evidence Act, R.S.C. 1952, c. 307, s. 4(5)—Criminal Code, 1953-54 (Can.), c. 51, ss. 295(1), 592(1)(b)(iii).

The appellants were convicted of possession of housebreaking instruments, contrary to s. 295(1) of the *Criminal Code*. The trial judge instructed the jury that they did not have to accept the explanations given to the police by the accused because they had not been given under oath. Upon counsel for the accused taking objection to that portion of the charge, the trial judge recharged the jury that they were not to take the previous charge as meaning that the onus was upon the accused to testify, and that the jury was not to be influenced by their failure to testify. It was argued before the Court of Appeal that these observations offended against the

*PRESENT: Fauteux, Judson, Ritchie, Hall and Spence JJ.

provisions of s. 4(5) of the *Canada Evidence Act*, R.S.C. 1952, c. 307, as being a comment on the failure of the accused to testify, and that a new trial should necessarily be had. The Court of Appeal, by a majority judgment, affirmed the conviction. The accused appealed to this Court.

Held (Hall and Spence JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Judson and Ritchie JJ.: The language used by the trial judge was not so much a "comment" on the failure of the accused to testify as a statement of their right to refrain from doing so, and it should not be taken to have been the intention of Parliament in enacting s. 4(5) of the *Canada Evidence Act* to preclude judges from explaining to juries the law with respect to the rights of accused persons in this regard. The remarks of the judge viewed in context and on a reasonable interpretation do not amount to a comment in breach of the section. That section was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt. It would be "most naive" to ignore the fact that when an accused fails to testify, there must be at least some jurors who say to themselves "if he didn't do it, why didn't he say so". It is for this reason that it is of the greatest importance that a trial judge should remain unhampered in his right to point out to the jury that there is no onus on the accused to prove his innocence by going into the witness box. To construe s. 4(5) of the *Canada Evidence Act* as interfering with that right not to testify would run contrary to the purpose of the section itself.

Even if the comment was a violation of s. 4(5), this was a proper case for the application of s. 592(1)(*b*)(iii) of the *Criminal Code*.

Per Hall and Spence JJ., *dissenting:* The trial judge's explanations clearly violated s. 4(5) of the *Canada Evidence Act*. Consequently, an error fatal to the validity of the proceedings has occurred and the remedy is not in trying to speculate whether it had a material or no effect on the jury, but in a new trial.

Droit criminel—Procès par jury—Possession d'instruments d'effraction—Les directives du juge au jury étaient-elles des commentaires sur l'abstention des accusés de témoigner—Est-ce qu'un nouveau procès est le seul remède—Loi sur la preuve au Canada, R.S.C. 1952, c. 307, art. 4(5)—Code criminel, 1953-54 (Can.), c. 51, art. 295(1), 592(1)(b)(iii).

Les appelants ont été déclarés coupables d'avoir eu en leur possession des instruments d'effraction, contrairement à l'art. 295(1) du *Code criminel*. Dans ses directives, le juge au procès a dit aux jurés qu'ils n'étaient pas obligés d'accepter les explications données à la police par les accusés parce que ces explications n'avaient pas été données sous serment. Lorsque le procureur des accusés s'est objecté à cette partie des directives, le juge au procès, dans de nouvelles directives, a dit aux jurés qu'ils ne devaient pas considérer les instructions antérieures comme voulant dire qu'il incombait à l'accusé de témoigner, et que les jurés ne devaient pas être influencés par l'abstention des accusés de témoigner. En Cour d'appel, on a soutenu

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que ces remarques allaient à l'encontre des dispositions de l'art. 4(5) de la *Loi sur la preuve au Canada*, S.R.C. 1952, c. 307, comme étant un commentaire sur l'abstention des accusés de témoigner, et qu'il fallait nécessairement un nouveau procès. La Cour d'appel, par un jugement majoritaire, a confirmé la déclaration de culpabilité. Les accusés en ont appelé à cette Cour.

Arrêt: L'appel doit être rejeté, les Juges Hall et Spence étant dissidents.

Les Juges Fauteux, Judson et Ritchie: Le langage employé par le juge au procès était plutôt un énoncé du droit des accusés de s'abstenir de témoigner qu'un «commentaire» sur leur abstention de le faire, et on ne doit pas considérer que le Parlement avait l'intention, par l'art. 4(5) de la *Loi sur la preuve au Canada*, d'empêcher les juges d'expliquer au jury la loi concernant les droits des accusés à cet égard. Les remarques du juge, considérées dans leur contexte et raisonnablement interprétées, ne sont pas un commentaire en violation de l'article. Le but de cet article est de protéger les accusés contre le danger d'avoir leur droit de ne pas témoigner présenté au jury de manière à suggérer que leur silence est utilisé pour masquer leur culpabilité. On serait des plus naïfs si on mettait de côté le fait que lorsqu'un accusé ne témoigne pas il y a au moins quelques-uns des jurés qui se disent «s'il ne l'a pas fait, pourquoi ne le dit-il pas». C'est pour cette raison qu'il est de la plus grande importance que le juge au procès soit libre de signaler au jury que l'accusé n'a pas le fardeau d'établir son innocence en témoignant. Interpréter l'art. 4(5) de la *Loi sur la preuve au Canada* comme portant atteinte à ce droit de ne pas témoigner irait à l'encontre du but de l'article lui-même.

Même si le commentaire était une violation de l'art. 4(5), il s'agit ici d'un cas où l'on doit appliquer l'art. 592(1)(*b*)(iii) du *Code criminel*.

Les Juges Hall et Spence, *dissidents:* Les explications données par le juge au procès étaient clairement une violation de l'art. 4(5) de la *Loi sur la preuve au Canada*. En conséquence, il y a eu une erreur fatale à la validité des procédures et le remède est un nouveau procès et non pas de se demander si cela a influencé le jury, substantiellement ou non.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant la déclaration de culpabilité prononcée contre les appelants. Appel rejeté, les Juges Hall et Spence étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellants' conviction. Appeal dismissed, Hall and Spence JJ. dissenting.

John O'Driscoll, for the appellants.

Ronald G. Thomas, for the respondent.

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[1] [1967] 2 O.R. 527, (1968), 2 C.R.N.S. 50, 1 C.C.C. 368.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] affirming the conviction of the appellants on a charge that they did, without lawful excuse, have in their possession instruments for house-breaking contrary to s. 295 (1) of the *Criminal Code*.

It should be said at the outset that this is an appeal brought pursuant to the provisions of s. 597(1)(*a*) of the *Criminal Code* and that the jurisdiction of this Court rests upon the dissenting opinion of Mr. Justice Wells in the Court of Appeal for Ontario.

The facts which gave rise to this prosecution were that at 12:35 a.m. on September 3, 1966, the appellant Beer was sitting behind the steering wheel of a motor vehicle owned by his wife which was parked at the rear of some dry cleaning premises in Sault Ste. Marie. The head lights were turned off, the motor was running and the appellant McConnell was some 60 feet away under an open window of the premises in question. A search of the motor vehicle revealed an iron bar, a screw driver and a table knife either on or under the front seat of the vehicle. Beer admitted ownership of these instruments and told the police that the screw driver was being used because they were having trouble with the ignition and that the bar was used for taking off hub caps. Mrs. Beer gave evidence to the effect that her husband had been using the screw driver to work on the car and that the bar had been moved from the trunk to underneath the front seat at the time of a camping trip during the previous summer when the table knife had also been used. The arrangements that Beer may have made during the previous summer do not appear to me to be an explanation for having the tools where they were found at the time and place in question, and the fact that at the time of the arrest, a complete jack, including a wheel nut wrench with a chisel affair on the other end of it was found in the back trunk of the car, appears to me to weaken considerably the explanation for the presence of the bar under the front seat. In addition to this, Beer's evidence in explanation of the presence of the bar was elicited on cross-examination of a Crown witness and is

[1] [1967] 2 O.R. 527, (1968), 2 C.R.N.S. 50, 1 C.C.C. 368.

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self-serving so that in my view its admissibility was highly questionable.

McConnell admitted his association with Beer but explained his presence under the open window of the dry cleaning establishment by saying that he was relieving himself. While this may afford a reason for his being where he was, it does not seem to me to afford any explanation for being associated with Beer in the possession of the instruments in question.

I do not think that it is open to question that the instruments found by the police were capable of being used for housebreaking and it appears to me desirable in this regard to refer to the final paragraph of the reasons for judgment of Judson J., with which the majority of this Court concurred, in *Tupper v. The Queen*[2] where he spoke of the effect of s. 295(1) of the *Criminal Code*. Mr. Justice Judson there said:

> Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

In the present case neither of the accused gave evidence at the trial, and in the course of his charge the learned trial judge pointed out to the jury that they did not have to accept the unsworn explanation which McConnell had given to the police for his presence under the open window.

Upon counsel for the accused taking objection to this portion of the charge, the learned trial judge recalled the jury and said:

> Gentlemen of the Jury, it was pointed out that in the course of my charge to you I stated that you did not have to accept the explanations of the accused because those explanations were not made under oath. You are not to take it from that that there is any onus upon the accused to prove their innocence by going into the witness box and testifying in their defence. There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence. You are not to be influenced in your decision by either of the accused not going into the witness box and testifying, but the Court does point out that these explanations were given and when made were not made under oath and it is not only for that reason alone but for any other number of reasons that may occur to you, to decide if you will accept these explanations.

It was argued before the Court of Appeal, as it was before this Court, that these observations offended against

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[2] [1967] S.C.R. 589 at 593, 2 C.R.N.S. 35, 63 D.L.R. (2d) 289, [1968] 1 C.C.C. 253.

the provision of s. 4(5) of the *Canada Evidence Act* and that a new trial should accordingly be had. Section 4(5) of the *Canada Evidence Act* reads as follows:

> The failure of the person charged or of the wife or husband of such person to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

Mr. Justice Evans, in the course of his reasons for judgment in the Court of Appeal, with which MacKay J.A. agreed, expressed himself in the following terms:

> The principle underlying the prohibition in Section 4(5) is the protection of the accused. Originally it was part of the same enactment by which the disability of an accused person to testify was removed. *R. v. Romano* 24 C.C.C. 30. In a jury case when an accused does not testify on his own behalf, this fact is immediately known to the jury and one would be most naive to believe that it is not considered by them in their deliberations. To hold that an accidental slip or an innocuous statement indicating the failure of the accused to testify must *ipso facto* result in a reversible error does violence to the intent and meaning of the Statute.
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> I am of the opinion that the impugned statement must be considered solely in the light of possible prejudice to the accused. If there is no possibility of prejudice then it does not amount to misdirection because it is a statement of law and amounts to an explanation of the legal rights of an accused who has already adopted a position of which the jury is aware. The absence of such a legal explanation might well react unfavourably to the accused particularly when defence counsel fails to explain to the jury his client's legal right to remain silent.
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> * * *
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> In the present case I have carefully considered the "comment" objected to and I am unable to find that it could be considered in any way prejudicial to the appellants. It is favourable to the accused since it is an explanation of the legal right of the accused persons to adopt the position which they did adopt coupled with a clear warning by the Trial Judge that no prejudicial inference is to be drawn from their election to remain out of the witness box. There is no suggestion in the remarks of the Trial Judge that there was evidence peculiarly within the knowledge of the appellants which they could give and which they failed to give.

Mr. Justice Evans did, however, express the view that "once it was determined that the comment violated the statutory provisions it was a fatal defect and a new trial was mandatory". Although Mr. Justice MacKay agreed with Evans J.A. that the remarks of the trial judge did not constitute a "comment" so as to offend against s. 4(5), he did not agree that the effect of such a comment, if made, was to make "a new trial mandatory." Mr. Justice MacKay said:

> I desire, however, to express the view that even if the comments of the learned trial judge in reference to the appellants not giving evidence

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could be construed as offending against section 4(5) of the *Canada Evidence Act*, that this would be a proper case to apply the provisions of section 592(1)(*b*)(iii) of the *Criminal Code*.

In his dissenting opinion, Mr. Justice Wells took the view that in recharging the jury as he did the learned trial judge had made a direct comment on the failure of the accused to testify and that in so doing he had violated the provisions of s. 4(5) of the *Canada Evidence Act*, and that a new trial was accordingly necessary. Mr. Justice Wells, who found the matter to be concluded by the decision of this Court in *Bigaouette v. The King*[3], expressed himself as follows:

> Looking at what the learned trial judge said in the case at bar, it would appear to me that in this case there is a much more direct comment on the failure of the accused to testify in their own defence. It is not a mere pointing out that certain matters are not contradicted, it deals directly with their failure to testify at their trial. In my opinion, this direct comment comes squarely within the prohibition of the Statute and renders a new trial necessary. The matter is decisively concluded in my opinion by the judgment of the late Chief Justice which I have quoted from in *Bigaouette v. The King*.

In the *Bigaouette* case Sir Lyman Duff, at p. 114, speaking on behalf on this Court, adopted the law as being

> . . . correctly stated in the judgment of Mr. Justice Stewart in *Rex v. Gallagher*, 1922 37 C.C.C. 83 in these words:
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> ' . . . it is not what the judge intended but what his words as uttered would convey to the minds of a jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.'

It is, I think, pertinent to observe that at the conclusion of his reasons for judgment in *Wright v. The King*[4] Chief Justice Rinfret, speaking for the majority of this Court, said:

> We think the *Bigaouette* case certainly goes as far on that subject as this Court would care to go . . .

In the *Bigaouette* case the accused was charged with the murder of his mother and he admitted that he was in the house at the time when the death was said to have

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[3] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.

[4] [1945] S.C.R. 319, 83 C.C.C. 225, 2 D.L.R. 523.

occurred and in the *Gallagher* case the accused was the last person known to have been seen with the deceased whose murder he was accused of having committed; in each case the learned trial judge was found to have commented on the accused's failure to testify in explanation of these circumstances. There is nothing of this kind in the present case. Here the language used by the trial judge to which objection is taken was not so much a "comment" on the failure of the persons charged to testify as a statement of their right to refrain from doing so, and it does not appear to me that it should be taken to have been the intention of Parliament in enacting s. 4(5) of the *Canada Evidence Act* to preclude judges from explaining to juries the law with respect to the rights of accused persons in this regard. I am accordingly in agreement with Mr. Justice Evans "that the remarks of the trial judge viewed in context and on a reasonable interpretation do not amount to a comment in breach of the section".

I think it is to be assumed that the section in question was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt.

As has been indicated by Mr. Justice Evans, it would be "most naive" to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves "If he didn't do it, why didn't he say so". It is for this reason that it seems to me to be of the greatest importance that a trial judge should remain unhampered in his right to point out to the jury, when the occasion arises to do so in order to protect the rights of the accused, that there is no onus on the accused to prove his innocence by going into the witness box. To construe s. 4(5) of the *Canada Evidence Act* as interfering with that right would, in my opinion, run contrary to the purpose of the section itself.

It was stressed in the course of the argument that by referring to the fact that the explanations of the accused were not given under oath, the trial judge was indirectly commenting on their failure to testify, and in my view this

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reasoning runs contrary to the decision of this Court in *Kelly v. The King*[5] where the accused had not gone onto the witness stand but had been permitted to address the jury and in so doing had made a number of statements of fact. In the course of his charge to the jury the trial judge said: (See 27 C.C.C. 138 at 166 and 167):

> But as far as facts are concerned the only way to bring them properly before a jury is to bring them out from the lips of the witnesses or documents submitted to you which have been proved. You should have the guarantee of the religious sanction of an oath backing up the statement before you should consider them. I am bound to say that, because I do not know whether I was quite justified in allowing the accused to make several of the statements he made. Any statements of facts made by the accused you should dispel from your minds.

And he later said:

> These matters could have been brought out in cross-examination and have been brought out from certain witnesses. I am not laying stress upon that not being done, but laying stress upon the facts laid before you without your having the sanction of an oath to commend them to you. These statements should be expunged from your mind.

It will be remembered that the facts to which the judge was referring were facts laid before the jury in the unsworn statement of the accused. One of the points raised in the case reserved by the trial judge and which was argued on the appeal to this Court was whether this language constituted a comment on the failure of the accused to testify, contrary to s. 4(5) of the *Canada Evidence Act*, and in the course of the reasons for judgment which he delivered on behalf of the majority of the Court, Mr. Justice Anglin said, at page 263:

> There was no comment whatever on the failure of the accused to testify. His right to do so was not mentioned during the trial. The learned judge merely discharged his duty in warning the jury against treating the statement which he had allowed the accused to make as the equivalent of sworn testimony; . . .

In the same case Mr. Justice Duff, speaking for himself at page 259, said:

> . . . I can find nothing, which, when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

If any further authority were needed, I would adopt the language used by Mr. Justice Longley in *The King v.*

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[5] (1916), 54 S.C.R. 220.

McLean[6] as being applicable to the present case. In that case the trial judge, in the course of his charge to the jury, had said:

> Now you are not to consider the prisoner at all in this matter. He has the right to do as he did; that is to sit there and say nothing . . .

and Mr. Justice Longley, speaking on an equal division of the Court, said:

> I am aware that in both Canada and the United States decisions have gone very far in the direction of shutting out anything which bore the semblance of comment on the part of judge or counsel in respect of the non-testifying of the prisoner on his trial. But it seems to me there should be some limit to this doctrine, and I think the limit should be where the reference could not be construed as unfavorable to the prisoner, nor its effect as occasioning any substantial wrong or miscarriage on the trial. What the learned judge said, on this trial, could only be regarded, I think as favorable to the prisoner, since it instructed the jury that the prisoner had a clear right, under the law, to remain silent.

As I have indicated, I agree with the opinion of the majority of the Court of Appeal that the remarks of the trial judge to which objection is here taken do not constitute a "comment" in contravention of s. 4(5) of the *Canada Evidence Act*, but I am bound to say, with the greatest respect for those who may hold a contrary view, that I do not agree with the suggestion in the reasons for judgment of Mr. Justice Evans to the effect that the case of *Bigaouette v. The King*[7] is to be treated as authority for the proposition that whenever a breach of that section occurs it constitutes a "fatal defect" in the proceedings making a new trial "mandatory" so that the curative provisions of s. 592(1)(*b*)(iii) cannot be applied.

No one would, I think, question the binding effect of the decision rendered by Sir Lyman Duff, C.J., on behalf of this Court in the *Bigaouette* case. That was a case of murder in which the evidence was almost entirely circumstantial and the language used by the learned trial judge, which was construed as relating "to the failure of the accused to testify" was, in my opinion, such that it could not have been said with any certainty whether or not the jury would necessarily have convicted on the circumstantial evidence if the offending words had been omitted. It was no doubt for this reason that the Chief Justice made

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[6] (1906), 39 N.S.R. 147.

[7] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.

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no mention whatever of the provisions of the curative section of the *Criminal Code*. What the Chief Justice did say before adopting the language used by Mr. Justice Stuart in *Gallagher's* case, was:

> It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la defense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145.

I do not think that the meaning of any of the language employed by the Chief Justice in that case should be so enlarged as to be treated as authority for the general proposition that all "comments" which contravene s. 4(5), however innocuous they may be, are "fatal" in the sense that they are not curable by the application of the curative provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*. As is indicated in the excerpt above quoted from the reasons for judgment of Rinfret C.J. in *Wright v. The King*, the case of *Bigaouette* marks the limit to which "this Court would care to go" on the subject.

It is true that since the *Bigaouette* case three cases have been decided in the Court of Appeal of Ontario which hold that the provisions of s. 4(5) of the *Canada Evidence Act* constitute an arbitrary rule leaving no discretion to the court and that any breach of that section is fatal to the proceedings. These cases are *Rex v. McNulty and Courtney*,[8] and *Reg. v. Groulx and Nevers*[9] and *R. v. Lizotte*[10], but the contrary view has been adopted in British Columbia in *R. v. Darlyn*[11] and in New Brunswick in *Rex v. MacDonald*[12] and in *Ayles v. The Queen*[13]. In the case of *Molleur v. The King*[14], which was decided in 1948, Mr. Justice Casey, speaking on behalf of the majority of the

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[8] [1948] O.W.N. 827.

[9] [1953] O.R. 337, 16 C.R. 145, 105 C.C.C. 380.

[10] [1955] O.W.N. 593.

[11] [1947] 2 W.W.R. 872, 4 C.R. 366, 90 C.C.C. 142, [1948] 1 D.L.R. 203.

[12] (1948), 93 C.C.C. 15 at 21, 24, 8 C.R. 182, 23 M.P.R. 20.

[13] (1956), 119 C.C.C. 38, 8 D.L.R. (2d) 399.

[14] (1948), 93 C.C.C. 36, 6 C.R. 375, [1948] Que. K.B. 406.

Quebec Court of King's Bench at page 43, applied the curative section where crown counsel had made a comment on the failure of the accused to testify.

I am in agreement with the decision in the last three cited cases and would adopt the view expressed by Mr. Justice MacKay in the Court of Appeal in the present case to the effect that the provisions of s. 592(1) of the *Criminal Code* could be invoked in such a case as this even if the comment had been found to be in breach of s. 4(5) of the *Canada Evidence Act*. The relevant provisions of the *Criminal Code* read as follows:

> 592. (1) On the hearing of an appeal against a conviction, the Court of Appeal
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> (*a*) may allow the appeal where it is of the opinion that . . .
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, ...
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> (*b*) may dismiss the appeal where...
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> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; . . .

There are a number of authorities concerned with the proper application of s. 592(1)(*b*)(iii) which are to the effect that once an 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.

It appears to me that if the remarks of the learned trial judge in the present case could have been construed as a "comment" which offended against the provisions of s. 4(5), his error would have been an error in law and I can see no logical reason why the provisions of s. 592(1)(*b*)(iii) should not apply to an error in law which consists in the breach of the provisions of the *Canada Evidence Act* in the same way as they would apply to any other such error.

As I do not consider that the remarks made by the learned trial judge concerning the accused's right to keep silent were obnoxious to the statutory direction contained in s. 4(5) of the *Canada Evidence Act,* I would dismiss this appeal on that ground, but I am in any event satisfied

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that even if they could have been so construed, they could not have had any effect upon the outcome in the present case.

The judgment of Hall and Spence JJ. was delivered by

HALL J. (dissenting):—The facts are set out in the reasons of my brother Ritchie and I agree that the learned trial judge's charge to the jury was unexceptional in all but the one material respect in which, when he recalled the jury, he said:

> Gentlemen of the Jury, it was pointed out that in the course of my charge to you I stated that you did not have to accept the explanations of the accused because those explanations were not made under oath. You are not to take it from that that there is any onus upon the accused to prove their innocence by going into the witness box and testifying in their defence. There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence. You are not to be influenced in your decision by either of the accused not going into the witness box and testifying, but the Court does point out that these explanations were given and when made were not made under oath and it is not only for that reason alone, but for any number of reasons that may occur to you, to decide if you will accept those explanations.

He recalled the jury because counsel for the accused, at the conclusion of the charge, had said:

> Your Honour, you said when referring to the explanation of Mr. McConnell that the statement was not made under oath, and you said it is up to you to decide, was he there for that reason only. I believe it is not incumbent upon the accused to prove that was the only reason. The onus would be on the Crown to prove that that was not the only reason.

Counsel's objection to the charge related to the following:

> The explanations of Mr. Beer were not made under oath and you do not have to accept them. Consider the circumstances under which they were made and then decide. If you have any reasonable doubt, then you must give the accused the benefit of that doubt.

In my view there was no reason to recall the jury because the sentences just quoted did not call for any further explanation. The judge was merely stating what was the fact, namely, that the accused were not under oath when they gave their explanations to the police officers when first seen and that, of course, was clearly apparent to everyone. Statements made by an accused in circumstances which require him to make an immediate explanation, as was the case here, are clearly admissible and cannot, in the circumstances, be made under oath and, therefore, it is up

to the jury to decide whether or not the explanation is to be believed or is one that might probably be true. The learned judge in the present case had said towards the close of his charge:

> Thirdly, if in possession of the accused, if they are instruments of housebreaking, did the accused give you an explanation of having them with lawful excuse which might probably be true?
>
> If you have any reasonable doubt as to whether the explanation is probably true, you must give the accused the benefit of that doubt.

However, having recalled the jury, the learned judge then, in my view, clearly violated s. 4(5) of the *Canada Evidence Act* when he said:

> Gentlemen of the Jury, it was pointed out that in the course of my charge to you I stated that you did not have to accept the explanations of the accused because those explanations were not made under oath. *You are not to take it from that that there is any onus upon the accused to prove their innocence by going into the witness box and testifying in their defence. There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence.* You are not to be influenced in your decision by either of the accused not going into the witness box and testifying, but the Court does point out that these explanations were given and when made were not made under oath and it is not only for that reason alone, but for any number of reasons that may occur to you, to decide if you will accept these explanations.

(Emphasis added.)

Section 4(5) of the *Canada Evidence Act* reads:

> (5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution. R.S., c. 59, s. 4; 1948, c. 33, s. 1; 1953-54, c. 51, s. 749.

The question for decision is whether the learned judge, having contravened the provisions of s. 4(5) above, the error is fatal to the validity of the trial.

Courts of appeal in Canada have taken opposite views on this question. The decisions of the Court of Appeal of Ontario in *Rex v. McNulty and Courtney*[15] and *Reg. v. Groulx and Nevers*[16] and in *Reg. v. Lizotte*[17] are to the effect that the curative provisions of s. 592(1)(*b*)(iii) have no application where there has been a breach of the section. The contrary view was expressed in British

[15] [1948] O.W.N. 827.
[16] [1953] O.R. 337, 16 C.R. 145, 105 C.C.C. 380.
[17] [1955] O.W.N. 593.

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Columbia in *R. v. Darlyn*[18] and in New Brunswick in *R. v. Ayles*[19] and the same view was accepted in *Rex v. MacDonald*[20] and *Moleur v. The King*[21].

The matter has been dealt with in this Court in several cases including *Bigaouette v. The King*[22] and in *Wright v. The King*[23]. In the Bigaouette case, Sir Lyman Duff, at p. 114, speaking for the Court, said:

> It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145. The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher*, (1922) 37 Can. Cr. C. 83, in these words:
>
> > . . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.
> >
> > There must be a new trial.

In the *Wright* case, Chief Justice Rinfret, speaking for the majority of the Court, said:

> We think the *Bigaouette* case (1927) S.C.R. 112 certainly goes as far on that subject as this Court would care to go and, like the majority of the Court of Appeal, we are unable to find that the remarks here complained of could have any effect on the jury as being a comment "obnoxious to the statutory direction".

The pith of the decision in *Wright* was that what the learned trial judge had said was not a "comment" within the meaning of s. 4(5) of the *Canada Evidence Act*. The phrase "obnoxious to the statutory direction" used within quotation marks by Rinfret C.J.C. in the above extract

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[18] [1947] 2 W.W.R. 872, 4 C.R. 366, 90 C.C.C. 142, [1948] 1 D.L.R. 203.
[19] (1956), 119 C.C.C. 38, 8 D.L.R. (2d) 399.
[20] (1948), 93 C.C.C. 15 at 21, 24, 8 C.R. 182, 23 M.P.R. 20.
[21] (1948), 93 C.C.C. 36 at 41, 43, 46, 6 C.R. 375, [1948] Que. K.B. 406.
[22] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.
[23] [1945] S.C.R. 319, 83 C.C.C. 225, 2 D.L.R. 523.

from his reasons obviously referred to the phrase used by Duff J. (later C.J.C.) in *Bigaouette* as "plainly obnoxious to the enactment". The *Wright* case is authority only for the proposition that what was said in that case at the trial was not a comment and consequently the Court did not have to deal with whether, if there had been a comment, a new trial would necessarily have to be ordered. The case of *Kelly v. The King*[24], referred to by my brother Ritchie, is to the same effect. There the accused who was a building contractor, having dispensed with counsel, addressed the jury on his own behalf, and in so doing introduced topics and statements of fact which had nothing to do with the issues before the Court and made charges against prosecution counsel which had no relation to the issues being tried. The learned trial judge had permitted him to make these statements and charges and subsequently, in charging the jury, the learned judge pointed out to them that the statements of the accused so made in his address were not evidence and were to be disregarded, not having been given under oath. This Court held that in so doing, the learned trial judge had not *commented* in violation of the *Canada Evidence Act*. Duff J. (later C.J.C.) at p. 259 said:

> As to the first of these grounds I can find nothing, which, when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

In his reasons, speaking for the majority in the Court of Appeal, Evans J.A. said:

> In a jury case when an accused does not testify on his own behalf, this fact is immediately known to the jury and one would be most naive to believe that it is not considered by them in their deliberations.

My brother Ritchie, in referring to this, states that it was in part to protect the accused from such speculations that s. 4(5) of the *Canada Evidence Act* was enacted. With deference, I cannot agree. The accused is accorded the protection he is entitled to by the mandatory directions which the trial judge must give that an accused is presumed to be innocent and that the burden of proving the guilt of an accused beyond a reasonable doubt rests upon the Crown. The learned trial judge adequately discharged his duty to the accused in the instant case when he said:

> For these reasons, therefore, both Mr. McConnell and Mr. Beer are presumed to be innocent until the Crown, his accuser, proves him guilty,

[24] (1916), 54 S.C.R. 220.

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and this presumption of innocence remains with the accused from the time they were charged and throughout this trial until the end and this presumption of innocence only ceases to apply at the end of the trial if, after hearing all evidence, you are satisfied that Mr. McConnell or Mr. Beer is guilty beyond a reasonable doubt.

The onus or burden of proving the guilt of these two accused persons beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden upon either of these two persons to prove his innocence. The Crown must prove beyond a reasonable doubt that they are guilty of the offence before they can be convicted.

The protection which an accused is entitled to under s. 4(5) is compliance with the positive injunction not to *comment* imposed upon the judge and counsel for the prosecution, in other words, no *comment* on the subject from either of them.

In the present case, Wells J.A. (now C.J.H.C.) took the view that in recharging the jury as he did, the learned judge had made a *comment* on the failure of the accused to testify, and in so doing, had violated the provisions of s. 4(5) of the *Canada Evidence Act* and that a new trial was, accordingly, necessary.

I am in full agreement with Wells J.A. Section 4(5) of the *Canada Evidence Act* is clear and unambiguous. In it Parliament has defined an area that is forbidden ground to the judge and to counsel for the prosecution. It is not a difficult matter for either or both to keep from entering the prohibited zone. If they refrain from doing what Parliament says they must not do, Courts of appeal and this Court will not be required to rationalize and refine these transgressions as they try to measure the depth of the imprint left on the minds of jurors as being consequential or inconsequential. No measurement of the effect of departing from the standards set by Parliament becomes necessary where the judge and counsel for the prosecution obey the law.

What the learned judge said in the instant case was clearly a comment. In my view, in dealing with a case of this kind, it is a case of comment or no comment. If there was no comment within the meaning of the statute as in the *Wright* and *Kelly* cases, that ends the matter. If there was a comment as in *Bigaouette,* an error fatal to the validity of the proceedings has occurred and the remedy is not in trying to speculate whether it had a material or no effect on the jury, but in a new trial. The accused in no

way contributed to the result. It flows solely from the failure of the judge or of counsel for the prosecution to obey the law which Parliament has clearly laid down.

As long as the doctrine of *stare decisis* is applicable, it is, I think, not open to this Court to refuse to follow *Bigaouette*. *Bigaouette* came to this Court by way of appeal from the Court of Queen's Bench of Quebec which Court had affirmed Bigaouette's conviction for murder, Allard J. dissenting. The dissent was on several grounds, including one that the learned trial judge had violated s. 4(5) of the *Canada Evidence Act*. Allard J. expressed this dissent as follows:

> 4° Le savant Juge, dans mon opinion, a aussi erré en droit, quand au bas de la page 30 il dit:
>
> «*Il était donc seul* avec sa mère à la maison, quand la mort est arrivée, et si l'accusé était seul avec sa mère quand elle a été tuée et égorgée, la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis. Car une pareille boucherie n'a pas dû se faire sans que l'accusé en eut connaissance.»
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> Et continuant dans le même ordre d'idées, il ajoute à la page 32 dans deux phrases qui se suivent, dont la première commence par les mots:
>
> «Il ne viendra à l'idée de personne et surtout . . . et dont la deuxième commence par les mots:
>
> «Il ne vous viendra pas à l'idée . . . . .
>
> Dans ces deux dernières phrases le savant juge écarte comme auteur possible du crime tous les gens du voisinage, c'est-à-dire des appartements voisins de celui de la victime pour ne laisser devant le jury que l'accusé comme l'auteur certain. Et dans la partie tirée du bas de la page 30 le savant juge, après avoir affirmé et conclu que l'accusé était seul à la maison avec sa mère quand elle a été tuée, il ajoute que la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis, car dit-il, pareille boucherie n'a pû se faire sans que l'accusé en eut connaissance.
>
> N'est-ce pas là reprocher à l'accusé de ne pas avoir rendu témoignage en sa faveur pour établir son innocence ou au moins dénoncer l'auteur du crime, n'est-ce pas là au moins suggérer au jury que l'accusé aurait dû établir, par son témoignage, qu'il n'avait pas tué sa mère et de plus donner le nom du coupable, s'il ne l'est pas lui-même.
>
> Le savant Juge affirme que l'accusé était seul avec sa mère quand le crime a été commis. Or, reprochant à la défense de ne pas avoir expliqué ce meurtre et dénoncé le coupable, c'était lui reprocher de ne pas avoir rendu témoignage lui-même. Ce commentaire du savant Juge constitue une violation formelle de l'acte de la preuve du Canada. Sec. 4 Sous-Section 5. La Couronne devait prouver la culpabilité de l'accusé. Ce dernier n'avait pas à établir son innocence. Cette seule partie de la charge du savant Juge est suffisante pour vicier le verdict du jury et lui donner droit à un nouveau procès. Nos recueils judiciaires contiennent plusieurs décisions en ce sens.
>
> Je me contenterai de citer un jugement de La Cour d'Appel de l'Alberta re *Rex vs Gallagher,* 37 C.C.C., page 83, où le Tribunal a décidé:
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> "Where the trial judge, in his charge to the Jury, in a criminal trial, suggests that evidence ought to have been given, which only the

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accused could have given, he commits a breach of sub-section 5 of section 4 of the Canada Evidence Act which provides that the failure of the person charged . . . . . to testify shall not be made the subject of comment by the judge . . . . . and the accused is entitled to a new trial."

It is of particular significance that the decision in this Court setting aside the conviction for murder and granting a new trial was solely on this ground. Duff J. (as he then was) said at p. 113:

It should be said at the outset that the jurisdiction of this court rests upon the dissent of Mr. Justice Allard, and in particular upon his view, in which he was not in agreement with his colleagues, that the learned trial judge, in instructing the jury, *had failed to observe the imperative direction of subs. 5 of s. 4 of the Canada Evidence Act,* which, in effect, requires the trial judge to abstain from any comment upon the failure of the accused to take advantage of the privilege which the law gives him to be a witness at the trial in his own behalf.

(Emphasis added.)

The only question dealt with in the judgment of this Court was in relation to subs. (5) of s. 4 of the *Canada Evidence Act* and Duff J., speaking for the Court, concluded: "The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher*"[25] and he quotes the very passage relied upon by Allard J. in his dissent. It is pertinent to quote the whole paragraph in the judgment of Stuart J.A. in *Gallagher* from which the quote just mentioned was taken. He said:

I agree with what my brother Beck has said. But I would like to add that it is quite possible—or rather of course very probable—that the trial Judge did not intend to refer, even indirectly, to the failure of the accused to testify at the trial. The situation seems to me to be this that the trial Judge inadvertently used language which was, on the face of it, to say the least, clearly capable of being understood as a reference to the failure of the accused to testify although it seems tolerably clear that, in their proper meaning, the words used must be taken as a reference to such failure. But it is not what the Judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. *Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.*

(Emphasis added.)

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[25] (1922), 37 C.C.C. 83, 17 Alta. L.R. 519, 1 W.W.R. 1183, 63 D.L.R. 629.

My brother Ritchie says, regarding the fact that Duff J. did not refer to s. 1014(2) in *Bigaouette:* "That was a case of murder in which the evidence was almost entirely circumstantial and the language used by the learned trial judge, which was construed as relating 'to the failure of the accused to testify' was, in my opinion, such that it could not have been said with any certainty whether or not the jury would necessarily have convicted on the circumstantial evidence if the offending words had been omitted. It was no doubt for this reason that the Chief Justice made no mention whatever of the provisions of the curative section of the *Criminal Code.*" That ignores, in my view, the acceptance by Duff J. of the word 'fatal' in the quotation from *Gallagher* in which Duff J. says: "The law in our opinion is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher* ..." and it ignores also Duff J.'s description of Allard J.'s dissent as, "The learned trial judge, in instructing the jury, had failed to observe the *imperative* direction of subs. 5 of s. 4 of the *Canada Evidence Act.*" (Emphasis added) I fail to see how the use of the word 'imperative' and acceptance of the word 'fatal' by Duff J. can be explained away by conjecture as to the reason why Duff J. did not refer to the curative section of the *Code.* It is more logical, I think, with deference to contrary opinion, to accept that Duff J. knew and appreciated that 'fatal' meant 'not curable'.

If the law is as so stated by Stuart J.A. in *Gallagher* and proclaimed as correct in this Court by Duff J. in *Bigaouette,* it should not be departed from as would appear to be the effect of the majority opinion. The statement by Cartwright J. (as he then was) in *Binus v. The Queen*[26] states the circumstances in which this Court may depart from a previous judgment of its own. He said:

> I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam,* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons. The ancient warning, repeated by Anglin C.J.C. in *Daoust, Lalonde & Cie Ltée v. Ferland,* (1932) S.C.R. 343 at 351, 2 D.L.R. 642, *ubi jus est aut vagum aut incertum, ibi maxima servitus prevalebit,* should not be forgotten.

[26] [1967] S.C.R. 594 at 601, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

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There are no compelling reasons in the instant case to depart from the law as laid down in *Bigaouette* in 1927.

If Parliament intended to qualify the word "comment" in the said section to have it mean "comment adversely or prejudicially", it could have amended the statute accordingly or may still do so. It is not for the Court to do it.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed, HALL *and* SPENCE JJ. *dissenting.*

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