1951

*Nov. 29, 30
*Dec. 17.

PAUL LEMAY .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal Law—Evidence—Sale of drugs—Denial by accused—Proof of identification—Duty of Crown as to calling witnesses—Whether notice of appeal must be signed by Attorney General—Power of Court of Appeal to reverse acquittal and enter conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49—Criminal Code, ss. 1013(4), 1014, 1023(2).

The appellant was charged with having unlawfully sold a drug. The evidence for the prosecution was that Bunyk, an officer of the R.C.M.P., saw the accused, who was already known to him, sitting at a table in a restaurant. Bunyk, who was at the time accompanied by an informer, one Powell, could not say whether Powell saw the accused or not. Bunyk entered the restaurant alone and sat down beside the accused at whose table one Lowes was also sitting, and thereupon purchased the drug from the accused. Neither Powell nor Lowes was called as a witness. The accused denied that he was the man from whom the purchase was made and testified that he was not present, he also denied any knowledge of any person named Lowes. The proceedings were by way of speedy trial, and the trial judge, although stating that he disbelieved the accused, acquitted him because of the failure of the prosecution to call Lowes or account for his absence. The appeal taken by the Crown was allowed and a conviction entered.

Held: The appeal should be dismissed (Cartwright J., dissenting in part, would have ordered a new trial).

Held, that counsel acting for the prosecution has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor has been influenced by some oblique motive (of which there is here no suggestion). This is not to be regarded as lessening the duty of the prosecutor to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. The appeal should be dismissed since there was no obligation on the Crown to call either Powell or Lowes at the trial. (*Adel Muhammed El Dabbah* v. *A.G. for Palestine* [1944] A.C. 156 applied; *Rex* v. *Seneviratne* [1936] 3 All E.R. 36 explained).

(*Rex* v. *Lemay* (100 Can. C.C. 367), a decision of the Court of Appeal for British Columbia in an appeal by the same accused from his previous conviction on the same charge and ordering a new trial, overruled).

Per Locke J.: Since the *Criminal Code* is silent, the Criminal Law of England as it existed on the 19th day of November, 1858, governs the matter. If what appears to have been considered as a rule of practice prior to 1858 had become part of the common law of England, the

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

principle applicable was as stated in *R.* v. *Woodhead* (1847) 2 C. & K. 520, and *R.* v. *Cassidy* (1858) 1 F. & F. 79, and the Crown was under no obligation to call either Powell or Lowes as a witness. (*R.* v. *Sing* (1932) 50 B.C.R. 32 and *R.* v. *Hop Lee* (1941) 56 B.C.R. 151 referred to).

Held also, that since it is not expressed either explicitly or inferentially in s. 1013(4) of the *Criminal Code* that the Attorney General should personally sign the notice of appeal to the Court of Appeal, there is no substance to the objection that the notice was signed by B. as agent for the Attorney General of British Columbia. (Locke J. agreed with Robertson J.A. that the signature by the agent was sufficient since the appeal was substantially and actually in the name of, and for, the Attorney General of British Columbia).

Held further, following *Beleyea* v. *The King* [1932] S.C.R. 279, that the Court of Appeal had the power to enter a conviction, it appearing that not only did the trial judge not accept or believe the accused's testimony but he believed and accepted the evidence of the R.C.M.P. officer, and that he dismissed the charge only because he considered wrongly that the Crown had to call Lowes or account for his absence. (Cartwright J., dissenting in part, would have ordered a new trial on the ground that it did not appear certain but only probable that the trial judge would have convicted but for his erroneous ruling on the point of law).

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing, O'Halloran J.A. dissenting, the Crown's appeal from the accused's acquittal at trial on a charge of unlawful sale of drugs.

J. Stevenson Hall for the appellant. S. 1013(4) of the *Criminal Code* gives the right of appeal to the Attorney General and the power to appeal cannot be delegated by the Attorney General. Therefore the notice of appeal to the Court of Appeal signed by B. as agent for the Attorney General of British Columbia was not proper in form and in accordance with s. 1013(4) of the Code (*Rex* v. *Gallant* (2) and *Rex* v. *Perry* (3)).

Powell and Lowes were essential Crown witnesses who were present throughout the major part of the transaction of selling between Lemay and Bunyk, and should, therefore, have been called as witnesses. The appellant relies in this respect upon the dissenting judgment of O'Halloran JA. and the cases therein referred to, and specially to *Rex* v. *Seneviratne* (4) and *Rex* v. *Guerin* (5).

(1) 100 Can. C.C. 365.
(2) [1945] 1 D.L.R. 471.
(3) [1945] 4 D.L.R. 762.
(4) [1936] 3 W.W.R. 360 at 378.
(5) (1931) 23 C.A.R. 39 at 42.

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The Court of Appeal erred in directing a conviction to be entered. If the setting aside of the acquittal is upheld, a new trial should be directed, since it does not appear from the judgment of the trial judge that he was satisfied of facts which proved the accused guilty. He stated that he disbelieved the accused but does not state expressly, nor does it follow by irresistible inference from anything he does say, that he accepted the evidence of Bunyk. He does not say that, but for the rule of law which he applied, he would have found the accused guilty. It is not certain that he would have convicted the accused. (*Rex* v. *Gun Ying* (1) and *Rex* v. *Tonelli* (2)).

Douglas McKay Brown for the respondent. The narrative had been completely unfolded by Bunyk. The evidence of Lowes was not essential to the unfolding of the narrative and under the circumstances of the evidence, the Crown was not obliged to call him as a witness. There was no duty on the part of the Crown to call Lowes, who was associating with the accused, a known criminal engaged in the drug traffic. From the principles laid down in *Rex* v. *Seneviratne* (*supra*) and *Rex* v. *Hop Lee* (3), it is clear: (*a*) There is no general obligation on the part of the Crown to call every available witness; (*b*) Their Lordships refused to lay down any rule to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case; (*c*) That, speaking generally, they could not approve of an idea that the prosecution must call witnesses irrespective of consideration of number, and of reliability, or that the prosecution ought to discharge the functions both of prosecution and defence; (*d*) Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution. Under the circumstances of the present case, it was not mandatory on the part of the Crown to call Lowes or Powell as a witness. In the case of *Adel Muhammed El Dabbah* v. *A.G. for Palestine* (4), it was stated that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion unless, perhaps, it

(1) 53 Can. C.C. 378 at 380.
(2) 99 Can. C.C. 345.
(3) (1941) 56 B.C.R. 151.
(4) [1944] A.C. 156.

can be shown that the prosecutor has been influenced by some oblique motive. There is no suggestion of such a motive here. The Crown, therefore, exercised that discretion in not calling Powell or Lowes as witnesses.

There is a distinction to be made between the Crown's duty of calling witnesses and the question of identification.

In view of the decision of this Court in *Beleyea* v. *The King* (1), the Court of Appeal had the power to convict the accused. Since the trial judge would have convicted if he had not considered that in law he could not, therefore the Court of Appeal was right in doing what it did.

S. 1013(4) of the Criminal Code does not say that the notice of appeal to the Court of Appeal must be signed personally by the Attorney General. It is sufficient if the appeal is substantially and actually taken in the name of the Attorney General. The present case is different from that of *Rex* v. *Gallant* (*supra*) cited by the appellant.

The case of *Rex* v. *Lee Fong Shee* (2) is cited to show the clandestine nature of the drug traffic and the difficulty to obtain a conviction.

The judgment of the Chief Justice and of Kerwin, Taschereau, Kellock, Estey and Fauteux JJ. was delivered by

KERWIN J.:—The appellant Lemay was charged with having sold a drug to Steven Bunyk, on September 21, 1950, at Vancouver contrary to the provisions of the *Opium and Narcotic Drug Act, 1929,* as amended. Lemay was tried on that charge and acquitted by His Honour Judge Sargent in the County Court Judges' Criminal Court. On an appeal by the Crown to the Court of Appeal for British Columbia (3) that acquittal was set aside, a conviction entered, and the case remitted to the trial judge for sentence. Under subsection 2 of section 1023 of the *Code* as enacted by section 30 of chapter 55 of the Statutes of 1947, Lemay now appeals to this Court alleging that his conviction was erroneous on two grounds (*a*) the Court of Appeal erred in finding that it was not essential that the Crown call as a witness one Henry Powell, a Royal Canadian Mounted Police informer, and one Art Lowes, both of whom it was alleged were present throughout the

(1) [1932] S.C.R. 279. (2) 60 Can. C.C. 73.
(3) 100 Can. C.C. 365.

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major part of the transaction of selling between the appellant and Bunyk; (*b*) the notice of appeal to the Court of Appeal, which was signed "Douglas McKay Brown, Agent for the Attorney General of British Columbia", was not proper in form or in accordance with section 1013(4) of the *Criminal Code* as enacted by section 28 of chapter 11 of the Statutes of 1930. These grounds will be considered in order.

Steven Bunyk, who is a member of the Royal Canadian Mounted Police, testified that he had known Lemay by sight for some time previous to 21st September, 1950, having seen him on about twelve occasions and having seen his picture several times. He described Henry Powell as a coloured boy used by the Royal Canadian Mounted Police and paid by them as an informer. Powell had pointed Lemay out to Bunyk on the street, and on September 20, the two of them went to see Lemay in room 10 in a rooming house in Vancouver known as the Beacon Rooms. Failing to find Lemay there, Bunyk, still accompanied by Powell, proceeded to depart when he saw Lemay at the head of the stairs leading to the ground floor, whereupon Lemay said to Bunyk: "I thought you were coming as I saw you pass the cafe several times." Nothing else was said upon that occasion.

On the next day, September 21 (the date of the alleged offence), Bunyk and Powell walked in a westerly direction, on the south side of Hastings Street, towards the Malina Cafe. The door to the cafe is on the east side of the cafe with a window immediately to the west. Bunyk looked through that window and saw Lemay sitting in a booth on the west side of the cafe. Bunyk could not say that Powell saw the accused. Bunyk entered the cafe and sat down near Lemay in the booth and there the transaction occurred, which is the basis of the charge. It is not denied that on that occasion Bunyk paid three dollars and received the drug but Lemay denied that he was the man from whom the purchase was made and testified that he was not present. Also sitting in the booth was the other man referred to, known to Bunyk as Art Lowes. The accused denies any knowledge of such a person. He denies knowing Bunyk or seeing or speaking to him on September 20 or 21. He admits that he lived in room 10 in the Beacon Rooms

for some time prior to September 20 but states he moved from there on that date. While he says he was away from Vancouver during parts of August and September, he admits being in the city on September 20 and 21 and that on some occasions he had taken his meals at the Malina Cafe.

Neither Powell nor Lowes was called as a witness. For some time prior to September 20, Bunyk was acting as an under cover agent and he stated that Powell came from the United States and that he did not know where he was. Then the following question and answer appear in the record:—

Q. Do you know of any inquiries which have been made to locate him?

A. Inquiries were made to the Federal Bureau of Narcotics in Seattle but they have failed to locate him.

As to Lowes, Bunyk testified that he knew him to see him but that he had no idea how Lowes happened to be with Lemay on September 21 and that Lowes had no connection with the case as far as the Royal Canadian Mounted Police was concerned and that Lowes was not an operator for that organization.

Prior to the hearing before His Honour Judge Sargent, Lemay had been convicted on the same charge by His Honour Judge Boyd, but that conviction was set aside by the Court of Appeal (1), consisting of O'Halloran, J.A., Robertson, J.A., and Sidney Smith, J.A. (dissenting), on the ground that Powell had not been called as a witness. On the Crown's appeal from the acquittal on the new trial, Sidney Smith, J.A., adhered to the view that he had expressed on the prior appeal, while Robertson, J.A., decided that on the second trial it appeared that Powell had not looked through the window. As to Lowes, he considered that the fact that that individual was associated with a drug pedlar, as Lemay was found to be, probably convinced the Crown that his evidence would not be reliable. He pointed out that the fact that Lowes was present was made known at the preliminary hearing and, notwithstanding this, counsel for Lemay did not ask that Lowes be subpoenaed or for an adjournment to permit him to have him before the Court, and that the Court was not bound to discharge the functions of the defence. O'Halloran J.A.

(1) 100 Can. C.C. 367.

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dissented. He retained the view he had held on the prior appeal as to Powell because he considered the explanation of Powell's absence was of a vague and general character. That view was to the effect that there is a rule whereby the Crown was bound to call Powell as a witness essential to the unfolding of the narrative. He also considered that it was difficult to avoid the reflection that if Lowes could have identified Lemay, the Crown would not have failed to call him, particularly since the Crown knew from the first trial that Lemay denied being in the cafe and, therefore, on the same basis, that the Crown was bound to call him as a witness. He proceeded further to deal with what he described as a fundamental aspect, viz., the trial judge's attitude towards Lemay's testimony. These views of the learned Justice of Appeal cannot be accepted since it is plain upon a reading of the reasons of the trial judge that he believed the evidence of Bunyk and certainly he categorically stated that he did not believe the evidence of Lemay. The trial judge had the witnesses before him and it was not necessary that he itemize the reasons which led him to conclude that Lemay's evidence was not to be believed.

While certain decisions in the British Columbia Courts are referred to in the reasons for judgment in the Court of Appeal, as well on the first appeal as on the second, all the arguments on behalf of Lemay in connection with the first ground of appeal are garnered from the following statement in the judgment of Lord Roche, speaking on behalf of the Judicial Committee in *Seneviratne* v. *Rex* (1). "Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution." Now, in addition to this statement being *obiter* as Lord Roche clearly stated, it also appears from page 48 of the first report and page 377 of the second, that he was dealing with the case of the maid Alpina (and similar cases) whose good faith was not questioned by the Crown, and pointed out that what she had said was given apparently without previous cross-examination as to other and previous oral state-

(1) [1936] 3 All E.R. 36 at 49; 3 W.W.R. 360 at 378.

ments. It was pointed out that this was both undesirable and not permitted by any sections of the Ceylon Law of Evidence Ordinance. Lord Roche continued:

> It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Roy* v. *R.* ((1914) 1 L.R. 42 Calc., 422: 14 Digest 273, 2816 (ii)) to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination.

Then follows the statement relied on. In truth Lord Roche was dealing with an entirely different matter, and reading the whole of his reasons it is clear that not only was he not laying down any such rule as that here asserted but one directly contrary to it.

It is made abundantly plain from the subsequent decision of the Judicial Committee in *Adell Muhammed* v. *A.G. for Palestine* (1), delivered by Lord Thankerton (which was not brought to the attention of the Court of Appeal), that no such rule as has been contended for, and apparently applied by the majority of that Court on the first appeal and by the dissenting judge on the second appeal, has ever been laid down. The earlier cases are referred to in the argument of counsel for the accused in the Palestine case but *Seneviratne* v. *Rex* is not mentioned. At pages 167, 168 and 169, Lord Thankerton deals with the contention that the accused had a right to have the witnesses whose names were on the information but who were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence. Their Lordships agreed with the trial judge and the Court of Criminal Appeal in Palestine that there was no obligation on the prosecution to tender these witnesses. However, while the Court of Criminal Appeal had held that that was the strict position

(1) [1944] A.C. 156.

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in law, they expressed the opinion that the better practice was that the witnesses should be tendered at the close of the case for the prosecution so that the defence might cross-examine them if they wished, and the Court desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed. Their Lordships of the Judicial Committee doubted whether that rule of practice as expressed by the Court of Criminal Appeal sufficiently recognized that the prosecutor has a discretion and that the Court will not interfere with the exercise of that discretion unless perhaps it could be shown that the prosecutor had been influenced by some oblique motive. Lord Thankerton referred to the judgment of Baron Alderson in *Reg.* v. *Woodhead* (1), that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment; that they should be in Court but that they were to be called by the party who wanted their evidence. Lord Thankerton also referred to *Reg.* v. *Cassidy* (2) where Baron Parke, after consultation with Cresswell J. stated the rule in similar terms. Lord Thankerton does go on to say that it is consistent with the discretion of counsel for the prosecutor, which is thus recognized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examinaion by the defence, but it remains a matter for the prosecutor's discretion. Reference was also made to an interlocutory remark by Lord Hewart in *Rex* v. *Harris* (3): "in criminal cases the prosecution is bound to call all the material witnesses before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury." Lord Thankerton said that in their Lordships' view, the Chief Justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are.

In the present case there did not appear on the back of the charge sheet the name of any witness but that fact is unimportant. Powell and Lowes did not give evidence at the preliminary inquiry. There was no obligation on the Crown to call either of them at the trial and we are there-

(1) (1847) 2 C. & K. 520. (2) (1858) 1 F. & F. 79.
(3) [1927] 2 K.B. 587 at 590.

fore not concerned with the question whether the explanation of Powell's absence was satisfactory or not. Of course, the Crown must not hold back evidence because it would assist an accused but there is no suggestion that this was done in the present case or, to use the words of Lord Thankerton, "that the prosecutor had been influenced by some oblique motive." It is idle to rely upon such expressions as this or the one used by Lord Roche without relating them to the matters under discussion but the important thing is that unless there are some particular circumstances of the nature envisaged, the prosecutor is free to exercise his discretion to determine who are the material witnesses.

The second ground of appeal may be disposed of in a few words. Subsection 4 of section 1013 of the *Code* enacts:

> (4) Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

It is not contended that Mr. Brown was not the agent of the Attorney General of British Columbia or that he did not have the latter's authority to institute the appeal to the British Columbia Court of Appeal but it is said that at least the Attorney General personally should have signed the notice of appeal. It is sufficient to say that it is not so expressed in the subsection, either explicitly or inferentially, and that there is no substance to the objection.

In registering a conviction, the Court of Appeal had the authority of this Court in *Belyea* v. *The King* (1). It was there pointed out that by section 1014 of the *Criminal Code*, the powers of a Court of Appeal on hearing an appeal by a person convicted are, under subsection 3, in the event of the appeal being allowed, to

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered, or

(*b*) direct a new trial;

and in either case may make such other order as justice requires.

This section is made applicable on an appeal by the Attorney General against an acquittal by the provisions of subsection 5 of section 1013 as enacted by section 28 of chapter 11 of the Statutes of 1930, that *mutatis mutandis*

(1) [1932] S.C.R. 279 at 297.

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on the appeal thereby given, the Court shall have the same powers as it has on an appeal by the accused. Chief Justice Anglin pointed out that while it seemed rather a strong thing to hold that the effect of the words *mutatis mutandis* is that that clause must be made to read "on an appeal by the Attorney General to

(*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered;"

yet that apparently was the construction put upon the provision by the Appellate Division of the Supreme Court of Ontario. Chief Justice Anglin continued by stating that while it had occurred to some members of this Court that the correct course would be to apply clause (*b*) and to direct a new trial, the Court was merely affirming the facts found by the trial judge and upon them reached the conclusion that the only course open to the Appellate Division was to allow the appeal and convict the accused.

Upon reading the reasons for judgment of His Honour Judge Sargent, I am convinced that not only did he not accept or believe the appellant's testimony but he believed and accepted the evidence of Bunyk and it was only because he considered himself bound by the previous decision of the Court of Appeal for British Columbia that he dismissed the charge.

The appeal should be dismissed.

RAND J.:—I think it clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal in the earlier proceeding held. Material witnesses in this context are those who can testify to material facts, but obviously that is not identical with being "essential to the unfolding of the narrative." The duty of the prosecutor to see that no unfairness is done the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed.

On the other two points also, I concur, and the appeal must be dismissed.

LOCKE J.:—The appellant, Paul Lemay, was in the month of September 1950 charged with having, at the City of Vancouver, sold a narcotic drug to one Stephen Bunyk, contrary to the provisions of the *Opium and Narcotic Drugs Act*, and on that charge, after a preliminary enquiry, was committed for trial by the Deputy Police Magistrate on October 6, 1950.

At the preliminary hearing, evidence for the Crown was given by Bunyk, an officer in the Royal Canadian Mounted Police, to the effect that he had on September 21, 1950, proceeded to a restaurant on Hastings Street in Vancouver, in company with one Powell, and entering the restaurant alone purchased the drug from Lemay in the presence of one Art Lowes.

Thereafter, having elected to take a speedy trial before His Honour Judge Bruce Boyd, a judge of the County Court at Vancouver, he was found guilty and sentenced to a term of imprisonment and a fine. Powell, an informer in the employ of the Mounted Police, who had not entered the restaurant with Bunyk, was not called by the Crown at the trial before the learned County Court Judge, though the fact that he had accompanied Bunyk to the restaurant was mentioned. I would infer from the reasons for judgment delivered upon this appeal that the name of Lowes was not mentioned at the trial and it is clear that he was not called as a witness. The present Appellant appealed to the Court of Appeal for British Columbia (1) and that court, by a decision of the majority (Sidney Smith J.A. dissenting), set the conviction aside upon the ground that as, apparently, Powell had seen the accused in the restaurant his evidence was material on the question of identification, and that there was an obligation on the prosecution to call him. Adopting an expression used by Lord Roche, in delivering the judgment of the Judicial Committee in *Rex* v. *Seneviratne* (2), that witnesses essential to the "unfolding of the narrative on which the prosecution is based" must be called by the prosecution, O'Halloran J.A., with whom Robertson J.A. agreed, said in part:

> If all material witnesses are not called by the prosecution, the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our courts have long recognized as essential to a fair trial.

(1) 100 Can. C.C. 367.

(2) [1936] 3 W.W.R. 360 at 378.

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Lemay appeared for trial again before His Honour Judge R. A. Sargent of the County Court of Vancouver on February 8, 1951, and was represented by counsel. Bunyk gave evidence that Powell had accompanied him to the restaurant and had not entered and, while not mentioning in his evidence in chief the presence of Lowes, did so in cross-examination, saying that Lowes was sitting in a booth in the restaurant with Lemay when he had purchased the drug. Describing the transaction he said that Lemay had in his hand a fingerstall containing capsules wrapped in silver paper when he (Bunyk) sat down opposite him in the booth and asked if he could get one, whereupon Lemay took one of the capsules and placed it on the table in front of him and he thereupon paid Lemay $3.00. Some evidence was given at the hearing of efforts made by the Crown to locate Powell and of their failure but, in the view that I take of this matter, it is unnecessary to consider its sufficiency since if the Crown was under a legal obligation to call Powell or account for his absence, clearly there was the same obligation in respect of Lowes who saw the whole transaction, and no effort was made to account for the failure to call him.

It is of importance to note that while the appellant had known from the date of the preliminary hearing before the Deputy Police Magistrate that Bunyk had, according to his story, been accompanied by Powell to the restaurant and had purchased the drug in the presence of Art Lowes, no request was made at the commencement of the trial before His Honour Judge Sargent or during the course of the trial for a direction that the Crown should either call them or assist the defence in locating them, or for an adjournment so that they could be located. The only evidence of identification was that of Constable Bunyk who, while a police officer, had been working under cover in Vancouver and who had during a period of weeks before the date of the purchase seen Lemay a number of times. Lemay's defence was simply a complete denial of the whole affair and he swore that he had never seen Bunyk before the latter appeared in the Police Court to give evidence. As to Lowes, he said that while he might know him he did

not know him by that name. On the question of credibility, the learned trial judge, in giving judgment, said in part:

> The accused went into the box and categorically denied any sale of narcotics and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony.

Then saying that he did not feel that there was sufficient evidence to make a finding as to whether Powell did or did not see the transaction, that the evidence had shown that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police and that no explanation had been given as to why he had not been called or what, if any, attempts had been made to find him, after quoting from the judgment of O'Halloran J.A. as to the obligation of the Crown to call all material witnesses, dismissed the charge against the prisoner.

The Attorney-General of the Province of British Columbia appealed to the Court of Appeal (1) under the provisions of subsection 4 of section 1013 of the *Criminal Code* and that Court, by a decision of the majority (O'Halloran J.A. dissenting) allowed the appeal, set the acquittal aside and directed that a conviction be entered and the case remitted to the trial judge for sentence.

The appellant alleges two errors in the judgment appealed from: the first, that the notice of appeal to the Court of Appeal which was signed by Douglas Mackay Brown, agent for the Attorney-General of British Columbia, was an insufficient compliance with section 1013(4) of the *Code*, and the second, in finding that it was not essential to the Crown to call Powell and Lowes as witnesses at the trial.

As to the first of these points there was no disagreement in the Court of Appeal and I respectfully agree with Mr. Justice Robertson that the signature by the agent of the Attorney-General was sufficient.

The contention of the appellant upon the second point is that, as stated by Mr. Justice O'Halloran, Lowes and Powell were material witnesses on the question of the identification of Lemay and there was an obligation in law upon the Crown to call them. For the Crown it is said that it is for the Crown prosecutor, as the representative

(1) 100 Can. C.C. 365.

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of His Majesty, to decide what evidence is to be called for the prosecution and that, subject to something in the nature of bad faith on his part, such as endeavouring to obtain a conviction by suppressing the truth (in which event the trial judge could properly intervene), his decision in the matter may not be interfered with. It is perhaps unnecessary to say that there is no suggestion of any such impropriety on the part of those representing the Crown at the preliminary hearing and the trial of this matter.

Since the *Criminal Code* is silent on the matter, the obligation contended for by the appellant, if it exists, must be part of the common law of British Columbia. The question, or one closely allied to it, has been considered in a number of decisions in England. In *R.* v. *Simmonds* (1), where counsel for the Crown declined to call a witness whose name appeared on the back of the Indictment, Hullock B. said that, though the prosecution were not bound to call every witness whose name was on the indictment, it was usual to do so and, if it was not done, he as the judge would call the witness so that the prisoner's counsel might have an opportunity to cross-examine him. In a note to this case there is a reference to *R.* v. *Witebread,* where on a trial for larceny the prosecution omitted to call an apprentice of the prosecutor who had been implicated in the theft and who had been examined at the police office and before the grand jury and whose name was on the back of the indictment. Counsel for the prisoner contended that the witness ought to be called but counsel for the prosecution declined, saying that the prisoner's counsel might himself call him if he chose. Holroyd and Burrough JJ. held that the prosecutor's counsel was not bound to call all the witnesses whose names were on the indictment merely to let the other side cross-examine them. The note further reports, however, that in the case of *R.* v. *John Taylor,* tried in the same year, Park J. called all the witnesses whose names appeared on the back of the indictment whom the prosecutor had not called, merely to allow the prisoner's counsel to cross-examine them. In *R.* v. *Beezley* (2), Littledale J. said that counsel for the prosecution who had closed his case without calling all of the witnesses whose names were on the indictment should call all of them, in

(1) (1823) 1 C. & P. 84.

(2) (1830) 4 C. & P. 220.

order to give the prisoner's counsel an opportunity of cross-examining them. In *R.* v. *Bodle* (1), where the charge was murder and counsel for the Crown declined to call the father of the prisoner whose name was on the back of the indictment, Gaselee J., having conferred with Mr. Baron Vaughan, said that they were both of the opinion that if counsel for the prosecution declined to call a witness whose name is on the back of the indictment it is in the discretion of the judge who tries the case to say whether the witness should be called for the prisoner's counsel to examine him, before the prisoner is called on for his defence. In *R.* v. *Holden* (2), the charge was murder. The Crown did not call the daughter of the deceased person who, apparently had been present when the offence was committed, whose name was not on the back of the indictment and who was in court. Patteson J. said that she should be called and that every witness who was present at a transaction of that kind, even if they give different accounts, should be heard by the jury so as to draw their own conclusion as to the real truth of the matter. There had been a postmortem examination of the body of the deceased in the presence of three surgeons but, of these, only two were called to give evidence for the Crown, though the third was in court. Patteson J. said that he was aware that the name of this person was not on the back of the indictment but that as he was in court he would insist on his being examined and said:

> He is a material witness who was not called on the part of the prosecution and as he is in court I shall call him for the furtherance of justice.

In *R.* v. *Bull* (3), counsel for the Crown said that there was one witness examined before the grand jury whom, on account of information he had since received, it was not his intention to call as a witness for the prosecution; on counsel for the prisoner objecting that it was unfair not to examine all those whose names were on the back of the bill and Crown counsel saying that his intention was to put the witness into the box, Vaughan J. said that the proper course was to put the witness into the box and that:

> every witness ought to be examined. In cases of this kind counsel ought not to keep back a witness because his evidence may weaken the case for the prosecution.

(1) (1883) 6 C. & P. 186. (2) (1838) 8 C. & P. 606.
(3) (1839) 9 C. & P. 22.

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In *R.* v. *Stroner* (1), Pollock C.B. directed the prosecution to call two persons as witnesses for the prosecution whose evidence he considered to be material and whose names were not on the back of the indictment but who were in court as witnesses for the accused. In *R.* v. *Barley* (2), where the prosecution did not call two witnesses whose names were on the back of the indictment, Pollock C.B. after consulting with Coleridge J. intimated that the witnesses ought to be called by counsel for the prosecution, whereupon the witnesses were placed in the box and sworn on the part of the Crown and cross-examined on behalf of the prisoner.

The practice in the matter appears to have been clarified in 1847 when in *R.* v. *Woodhead* (3), where counsel for the Crown, after stating the case for the prosecution, had observed that he did not deem it necessary to call all the witnesses whose names were on the back of the indictment, unless counsel for the prisoner should desire it, Alderson B. said:

> You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule.

Counsel for the prisoner then asked whether if he called these persons he would make them his own witnesses, to which Alderson B. replied:

> Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to shew them unworthy of credit, however falsely the witnesses might have deposed.

In *R.* v. *Cassidy* (4), where the prosecutor refused to call a witness whose name was on the back of the indictment and counsel for the prisoner contended that "according to the usual practice" he ought in fairness to do so, Baron Parke said that while the usual course was for the prosecutor to call the witness and, if he declined to examine, the prisoner might cross-examine him, he thought the practice

(1) (1845) 1 C. & K. 650.
(2) (1847) 2 Cox 191.
(3) (1847) 2 C. & K. 520.
(4) (1858) 1 F. & F. 79.

did not stand upon any very clear or correct principle and was supported only on the authority of single judges on criminal trials, and he should, therefore, follow what he considered the correct principle, that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He then said that he would follow the course said to have been pursued by Campbell C.J. in a recent case, who ruled that the prosecutor was not bound to call such a witness and that, if the prisoner did so, the witness should be considered as his own. Upon counsel for the prisoner saying that he believed that Creswell J. had acted differently, Parke B. consulted with the latter and then said that Creswell J. had informed him that he had always allowed the prosecutor to take his own course in such circumstances, without compelling him to call the witness if he did not think fit to do so, and that he entirely agreed with what Baron Parke proposed to do.

The judgment of Baron Parke in *Cassidy's* case was delivered in March 1858. Section 11 of the *Criminal Code* declares that the criminal law of England as it existed on November 19, 1858, in so far as it has not been repealed by any ordinance or act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the Province of British Columbia. Prior to the enactment of the *Code* the matter had been dealt with and the same date fixed by a proclamation issued under the public seal of the colony of British Columbia by Governor Douglas on November 19, 1858, and by an Ordinance to assimilate the general application of English Law (30 Vict. c. 70) adopted by the Legislative Council of British Columbia on March 6, 1867. In substantially the same form, the provisions of the Ordinance are continued in the *English Law Act,* c. 111, R.S.B.C. 1948, section 2. The matter we are considering has not been dealt with by statute. If, therefore, what appears to

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have been considered as a rule of practice prior to 1858 had become part of the common law of England, the principle was as stated by Baron Alderson in *R.* v. *Woodhead* and Baron Parke in *R.* v. *Cassidy*. That these decisions are to be regarded as correctly stating the law of England as it was in 1858 is settled by the decision of the Judicial Committee in *Adel Muhammed* v. *Attorney-General for Palestine* (1). Lord Thankerton, it will be noted, in delivering the judgment of the Judicial Committee, said in part:

> While their Lordships agree that there was no obligation on the prosecution to tender these witnesses, and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

While the case was an appeal from the Court of Criminal Appeal of Palestine and the conviction had been made under the Criminal Code Ordinance 1936 of that State, it is apparent that the matter had not been dealt with by statute and that the law of Palestine was in this respect the same as that of England.

In delivering the judgment in the appeal taken by Lemay to the Court of Appeal from his conviction, O'Halloran J.A. refers to two decisions of the courts of British Columbia in which the matter was considered. In *R.* v. *Sing* (2), where the Crown did not call certain witnesses whose names were on the back of the indictment, Macdonald J., referring to *R.* v. *Woodhead* and *R.* v. *Cassidy* and to a more recent decision in *R.* v. *Wiggins* (3), ruled that, unless the Crown saw fit to do so, it was not necessary to call all of the witnesses whose names appeared. Counsel for the prisoner contended that there were two other witnesses called at the preliminary who should be called, in order that he might cross-examine them, but the report of the matter does not indicate that any such order was made. In *R.* v. *Hop Lee* (4), where the charge was selling narcotic drugs, the Crown did not call a Chinese witness who was in the employ of the police and who had been a witness to the sale. The accused was convicted and appealed to the Court

(1) [1944] A.C. 156 at 168.
(2) (1932) 50 B.C.R. 32.
(3) (1867) 10 Cox 562.
(4) (1941) 56 B.C.R. 151.

of Appeal and the report shows that counsel for the Crown there took the attitude that the Crown was under no obligation to call all the witnesses and that this particular man was a "stool pigeon" whose evidence could not be relied upon. The Court unanimously dismissed the appeal and it may be noted that McDonald J.A. (afterwards C.J.B.C.) quoted a length from the judgment of Lord Roche in *Rex* v. *Seneviratne,* which has been so much discussed in the present matter, including that passage where it is said that their Lordships could not, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence.

In the present matter the prisoner, who was tried before His Honour Judge Sargent in February 1951, had known since the previous September that Bunyk would give evidence that he had been accompanied to the restaurant by Powell and that Lowes was sitting in the booth with him when the sale was made to the constable. The proceedings following the committal were, by reason of the election of the appellant, by way of speedy trial and there was thus no indictment upon which the names of the witnesses proposed to be called would be endorsed and there is no suggestion that any step was taken on the part of the prosecution which would lead counsel for the accused to expect that they would be in court when the matter came up for hearing and thus available to give evidence, as was the case in *R.* v. *Woodhead.* Powell was an informer in the employ of the police and, even had he been available, counsel for the Crown might well have decided not to call him as a witness for the prosecution, as was done in the case of Hop Lee. As to Lowes, the only information concerning him in the record is that Constable Bunyk on re-examination said that he (Lowes) had no connection with the matter "as far as the R.C.M.P. is concerned" and that he was not an operator for the R.C.M.P. From the fact that Lowes was, according to Bunyk, sitting at the table in the restaurant with Lemay when the latter produced the finger-stall containing the small packages of the drug and made the sale to Bunyk, it might be inferred that Lowes was a confederate of the latter, since, otherwise, he would be unlikely to commit a criminal offence in his presence. If

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this be the proper inference to draw, is it to be said that, as a matter of law, the Crown was required to call Lowes as a witness for the prosecution and thus, assuming he should join with Lemay in denying that any such transaction had taken place, assist a guilty person to escape? From a practical view point, if that was the law, far from furthering the due administration of justice it would, in my opinion, actively retard it. In the case of those engaged in the illicit drug traffic, by working in pairs, the one making the sale would be assured at all times of having a witness with him available, in the case of a prosecution, to join in denying that anything of the kind had taken place and whom the Crown would be bound to call. For the appellant, reliance is placed upon that portion of the judgment of Lord Roche, hereinbefore referred to, where it was said that the witnesses essential to the "unfolding of the narrative on which the prosecution is based" must be called. This language must, however, be read together with its context, as was done by McDonald J.A. in Hop Lee's case, and so read it does not, in my opinion, sustain the contention of the appellant. If, indeed, there were any difference between what was said by Lord Roche in that case, which, as the report indicates, was *obiter,* and what was said by Lord Thankerton in the case of *Adel Muhammed* (and I think there is not), it is, in my opinion, the latter view that should be accepted.

The reasons for judgment delivered by His Honour Judge Sargent satify me that he believed the evidence of the witness Bunyk and that, had he not considered that he was bound to acquit the accused by reason of the failure of the Crown to call Lowes as a witness or account for his absence, he would have found the accused guilty.

As to the contention that there was error in the judgment appealed from, in that the appellant was found guilty and the case remitted to the trial judge for sentence, the matter appears to me to be determined against the appellant by the decision of this court in *Rex* v. *Belyea* (1).

I would dismiss this appeal.

(1) [1932] S.C.R. 279.

CARTWRIGHT J. (dissenting in part):—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) dated March 22, 1951, setting aside the judgment of acquittal of a charge of unlawfully selling a drug contrary to the provisions of the *Opium and Narcotic Drug Act* pronounced on the 27th February, 1951, by His Honour Judge Sargent, ordering a conviction to be entered and remitting the case to the trial judge to impose sentence.

The respondent was first tried for the said offence before His Honour Judge Boyd and was convicted on November 2, 1950. On December 22, 1950, this conviction was set aside by the Court of Appeal for British Columbia (2) (O'Halloran, Robertson and Sidney Smith, JJ.A.) the last named learned Justice of Appeal dissenting, and a new trial was directed.

The evidence mainly relied on by the Crown at the trial with which we are concerned, before His Honour Judge Sargent, was that of Constable Bunyk of the Royal Canadian Mounted Police who testified in chief that on the 21st of September, 1950, at about 9.15 a.m. accompanied by one Powell he approached the Malina Café in Vancouver; that he looked through the window and saw the appellant, who was already known to him, seated at a table in about the fifth booth on the west side of the café; that he can not tell whether Powell also looked through the window or saw the appellant; that he (Bunyk) entered the café alone and sat down beside the appellant; that the appellant had in his hand a grey finger-stall containing several capsules wrapped in silver paper and was trying to remove an elastic band from around the top of the finger-stall; that he said to the appellant—"Can I get one?" and the appellant replied "Yes"; that the appellant took one of the capsules from the finger-stall and placed it on the table in front of Bunyk; that he (Bunyk) picked it up and put it in his pocket and handed the appellant three dollars; that he left the café and rejoined Powell about two doors east of the café. In cross-examination and re-examination Bunyk testified that throughout the transaction which he had described in chief one Art Lowes was sitting in the booth with the appellant and that Lowes was

(1) 100 Can. C.C. 365. (2) 100 Can. C.C. 367.

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known to him (Bunyk). The following questions and answers are found in the re-examination:

Q. How did Lowes happen to be with LeMay at the time of this transaction?

A. I have no idea.

Q. Did the Art Lowes who was with LeMay at the time of the transaction have any connection with this case as far as the R.C.M.P. is concerned?

A. None whatever.

Q. Is Lowes an operator for the R.C.M.P.?

A. No, he is not.

The Crown proved that the capsule purchased by Bunyk contained the drug mentioned in the charge.

The appellant gave evidence. He denied having had anything to do with the matter; stated that he had never seen Bunyk prior to the preliminary hearing; that he did not use drugs and that he had never sold a drug to Bunyk or to anyone else. The learned trial judge reserved judgment and later dismissed the charge.

In examining the reasons for judgment of the learned trial judge it is necessary to know something of the earlier trial of the appellant and of the reasons which moved the Court of Appeal to set aside that conviction and direct a new trial.

The only substantial differences between the evidence given at the first trial and that given at the second which were suggested to be relevant to the determination of this appeal appear to be: (i) At the first trial the evidence in the view of the Court of Appeal indicated that Powell was in a position to see what occurred in the café at the time Bunyk purchased the drug, while the effect of the evidence in this regard at the second trial is summarized by the learned trial judge as follows:

I do not feel that there is sufficient evidence before me upon which to make any finding, either that Powell did or did not see the transaction between the accused and Bunyk.

(ii) At the first trial no evidence was given to shew why counsel for the Crown did not call Powell as a witness, while at the second trial evidence was received to the effect that he had disappeared and that inquiries as to his whereabouts were unproductive of result. (It should be mentioned that Mr. Hall argued that the evidence as to the making of these inquiries was inadmissible on the ground

that it was hearsay, but as, in my view, this evidence has no bearing on the result of the appeal I do not deal with this question.) (iii) At the first trial there was no evidence of the presence of Art Lowes at the time of the sale, indeed, Lowes was not mentioned at all.

The reasons for judgment of the Court of Appeal on the appeal from the conviction at the first trial are set out in full in the reasons of O'Halloran J.A. in the present case and are reported as LeMay (No. 1) in 100 C.C.C. pages 367 and 368. The question whether that judgment was right in the result is not before us and I express no opinion. That appeal was brought by the accused and under section 1014(*c*) of the *Criminal Code* it was the duty of the Court of Appeal to allow the appeal if of opinion that on any ground there was a miscarriage of justice.

The learned judge presiding at the second trial appears to me to have interpreted the reasons of the Court of Appeal in LeMay (No. 1) as laying down as a rule of law that the unexplained omission on the part of the Crown to call a witness shewn by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal. The learned trial judge appears to have inclined to the view that the failure to call Powell was sufficiently explained. He then proceeds:

> However, there is one other piece of evidence which came out in cross-examination, namely, that a third person, Lowes was present at the sale to Bunyk. Evidence was led by the Crown to show that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police, but no explanation was given as to why he had not been called, or what, if any, attempts were made to find him.
>
> On these facts I am faced with the principle laid down by the Court of Appeal in *Rex* v. *Lemay*. In that case, Mr. Justice O'Halloran said in the course of his judgment:
>
> > If all material witnesses are not called by the prosecution, the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our Courts have long recognized as essential to a fair trial.
>
> The judgment is binding on me in this case. Therefore, the motion to dismiss will be allowed and the charge dismissed.

The right of appeal against a judgment of acquittal is given to the Attorney-General by section 1013(4) and is, of course, restricted to grounds of appeal which involve a question of law alone.

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In my respectful opinion the learned trial judge erred in law in instructing himself that there is a rule of law such as he deduced from the judgment of the Court of Appeal in LeMay (No. 1) viz: that the unexplained omission on the part of the Crown to call a witness shewn by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal.

I do not propose to examine the authorities at length. I think it sufficient to refer to the judgment of their Lordships of the Judicial Committee delivered by Lord Thankerton in *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (1) and particularly at pages 167 to 169, where it is laid down that the Court will not interfere with the exercise of the discretion of the prosecutor as to what witnesses should be called for the prosecution unless, perhaps, it can be shewn that the prosecutor has been influenced by some oblique motive. I find no conflict between this judgment and that pronounced by Lord Roche, also speaking for the Judicial Committee in *Rex* v. *Seneviratne* (2). Counsel for the appellant laid emphasis on the following passage at page 378:

> Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

It must be remembered that *Rex* v. *Seneviratne* was a case in which the accused had been convicted of murder on purely circumstantial evidence. In the passage just quoted it appears to me that Lord Roche was referring to the duty which clearly rests upon the prosecutor to place before the Court evidence of every material circumstance known to the prosecution including, of course, those circumstances which are favourable to the accused. It must also be remembered that Lord Roche was not dealing with an argument of counsel for the accused that the prosecutor had failed to call witnesses that he should have called, but with the reply of counsel for the Crown to the argument of counsel for the defence that the prosecutor had called a number of witnesses who gave irrelevant and inadmissible evidence and whose evidence ought not to have been received.

(1) [1944] A.C. 156.

(2) [1936] 3 W.W.R. 360.

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise; nor do I intend to suggest that there may not be cases in which the failure of the prosecutor to call a witness will cause the tribunal of fact to come to the conclusion that it would be unsafe to convict. The principle stated by Avory J. in *Rex* v. *Harris* (1), that in a criminal trial where the liberty of a subject is at stake, the sole object of the proceedings is to make certain that justice should be done between the subject and the State, is firmly established.

While it is the right of the prosecutor to exercise his discretion to determine who the material witnesses are, the failure on his part to place the whole of the story as known to the prosecution before the tribunal of fact may well be ground for quashing a conviction. Such a case is that of *Edward Guerin* (2).

For the above reasons I am of opinion that the learned trial judge erred in directing himself that he was bound as a matter of law to acquit the appellant because of the fact that the Crown did not call Art Lowes as a witness; and that the Court of Appeal were right in deciding that the judgment of acquittal should be set aside.

As to the second ground of appeal argued before us—that the notice of appeal to the Court of Appeal was not in accordance with section 1013(4) of the *Criminal Code*—I agree with what has been said by my brother Kerwin.

It remains to consider Mr. Hall's final argument that the Court of Appeal erred in directing a conviction to be entered and that if the setting aside of the acquittal is upheld a new trial should be directed.

We are bound by the judgment of this Court in *Rex* v. *Belyea* (3), which decided that the wording of section 1013(5) of the *Criminal Code* is apt to confer jurisdiction on the Court of Appeal in an appeal brought by the Attorney-Generel under section 1013(4) not only to set aside the judgment of acquittal and to direct a new trial but, in a proper case, to direct a conviction to be entered, and

(1) [1927] 2 K.B. 587 at 594. (2) (1931) 23 C.A.R. 39.
(3) [1932] S.C.R. 279.

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it is irrelevant to inquire whether, if the matter were *res integra* I would have found the wording of the section sufficiently plain and unambiguous to effect so revolutionary a change in the pre-existing law.

In my opinion the power to direct that a conviction be entered after an acquittal by a trial judge has been set aside can be exercised only if it appears to the Court of Appeal from the judgment of the trial judge that he must have been satisfied of facts which proved the accused guilty of the offence charged. In the case at bar I do not think that this appears. It is quite true that the learned trial judge says:

> The accused went into the box and categorically denied any sale of narcotics, and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony.

but he nowhere states expressly, nor does it follow by irresistible inference from anything he does say, that he accepts the evidence of Bunyk. He does not say that, but for the supposed rule of law which he applied, he would have found the accused guilty. He does not indicate that he is left without any reasonable doubt as to his guilt. In the view he took of the law, it was, indeed, no more necessary for the learned trial judge to express himself upon any of these vital matters than it would have been for a jury to do so after being directed that in view of a point of law taken by the defence they must return a verdict of "not guilty". It is not, I think, sufficient that, from the reasons of the learned trial judge, it should appear to the Court of Appeal in the highest degree probable that he would have convicted but for his erroneous ruling on the point of law; it must appear certain that he would have done so.

I would allow the appeal to the extent of setting aside that part of the order of the Court of Appeal which directs a conviction to be entered and would order a new trial.

Appeal dismissed.

Solicitor for the appellant: *H. T. Fitzsimmons.*

Solicitor for the respondent: *Hon. Gordon S. Wismer.*