1954

*Nov. 5, 8
*Dec. 9

OVILA BOUCHER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Murder—Alleged misdirection on doctrine of reasonable doubt and circumstantial evidence—Alleged inflammatory language by Crown counsel to jury—Criminal Code, ss. 1014(2), 1025.

The appellant was found guilty of murder. His appeal to the Court of appeal was unanimously dismissed. He now appeals to this Court, by special leave, on grounds of misdirection with reference to reasonable doubt, circumstantial evidence and inflammatory language used by Crown counsel in his address to the jury.

Held (Taschereau and Abbott JJ. dissenting), that the appeal should be allowed, the conviction quashed and a new trial ordered.

1. There was no misdirection in the trial judge's charge with respect to the doctrine of reasonable doubt.

Per Kerwin C.J., Kellock, Estey, Locke, Cartwright and Fauteux JJ.: Difficulties would be avoided if trial judges would use the well known and approved adjective "reasonable" or "raisonnable" when describing that doubt which is sufficient to require the jury to return a verdict of not guilty.

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

2. There was misdirection by the trial judge with reference to the rule as to circumstantial evidence. Neither the language of *Rex v. Hodge* ((1838) 2 Lewin C.C. 227) nor anything remotely approaching it was used.

Per Kerwin C.J. and Estey J.: Even though expressions other than the ones used in the *Hodge* case are permissible, a trial judge should use the well settled formula and so obviate questions arising as to what is its equivalent.

3. Crown counsel exceeded his duty when he expressed in his address by inflammatory and vindictive language his personal opinion that the accused was guilty and left with the jury the impression that the investigation made before the trial by the Crown officers was such that it had brought them to the conclusion that the accused was guilty.

It is improper for counsel for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused. The right of the accused to have his guilt or innocence decided upon the sworn evidence alone uninfluenced by statements of fact by the Crown prosecutor, is one of the most deeply rooted and jealously guarded principles of our law.

4. Per Kerwin C.J., Rand, Kellock, Estey, Cartwright and Fauteux JJ.: It could not be safely affirmed that had such errors not occurred the verdict would necessarily have been the same.

Per Locke J.: There was a substantial wrong and consequently s. 1014(2) of the *Code* had no application.

Per Taschereau and Abbott JJ. (dissenting): As the verdict would have necessarily been the same there had been no substantial wrong or miscarriage of justice.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the appellant's conviction on a charge of murder.

A. E. M. Maloney, Q.C. and *F. de B. Gravel* for the accused.

P. Miquelon and *P. Flynn* for the respondent.

The judgment of Kerwin C.J. and Estey J. was delivered by:—

THE CHIEF JUSTICE:—The first question of law upon which leave to appeal to this Court was granted is:—

(1) Were the jury misdirected by the learned trial judge with reference to the doctrine of reasonable doubt?

The trial judge, in my view, did not misdirect the jury, but the difficulties occasioned by what he did say would not arise if trial judges would use the well-known and

(1) Q.R. [1954] Q.B. 592.

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approved word "reasonable" or "raisonnable" when describing that doubt which is sufficient to enable a jury to return a verdict of not guilty.

There was clear misdirection by the trial judge with respect to the second question of law which the appellant was permitted to raise:—

(2) Were the jury misdirected by the learned trial judge with reference to the rule as to circumstantial evidence?

The evidence against the appellant was entirely circumstantial. "In such cases", as this Court pointed out in *The King* v. *Comba* (1), "by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person". This, of course, is based upon the decision in *Rex* v. *Hodge* (2); and, while we stated in *McLean* v. *The King* (3), "There is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.", in this case neither that language, nor anything remotely approaching it was used. Even though, according to the judgment in *McLean,* other expressions might be permitted, the experience of the Courts in Canada in the last few years justifies a further warning that a trial judge should use the well settled formula and so obviate questions arising as to what is its equivalent. Because of the misdirection in this case, the conviction cannot stand, unless the Court, exercising the power conferred upon it by s.s. 2 of s. 1014 of the *Criminal Code,* considers that there has been no substantial wrong or miscarriage of justice.

Before dealing with that problem, it is well to set out the third question of law which the appellant was allowed to argue:—

(3) Was the appellant deprived of a trial according to law by reason of the fact that the crown counsel used inflammatory language in his address to the jury?

(1) [1938] S.C.R. 396. (2) (1838) 2 Lewin C.C. 227.
(3) [1933] S.C.R. 688 at 690.

It is the duty of crown counsel to bring before the Court the material witnesses, as explained in *Lemay* v. *The King* (1). In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty. In the present case counsel's address infringed both of these rules.

I now turn to s.s. 2 of s. 1014 of the *Code*. The test to be applied was laid down in *Schmidt* v. *The King* (2): "that the onus rests on the crown to satisfy the Court that the verdict would necessarily have been the same". While I am inclined to the view that that test has been met, I understand that several members of the Court think otherwise and, therefore, under the circumstances of this case, I will not record a dissent.

The judgment of Taschereau and Abbott JJ. (dissenting) was delivered by:—

TASCHEREAU, J.:—L'appelant a été accusé d'avoir assassiné un nommé Georges Jabour Jarjour, à St-Henri, comté de Lévis, le 3 juin 1951, et a été trouvé coupable de meurtre à la suite d'un procès devant le jury, présidé par l'honorable Juge Albert Sévigny. La Cour du Banc de la Reine (3) a unanimement confirmé ce verdict. Après avoir obtenu la permission de l'honorable Juge Kellock de la Cour Suprême du Canada, l'appelant a inscrit la présente cause devant cette Cour. Ses griefs d'appel sont les suivants:—

1. Le juge dans son adresse aux jurés, ne les a pas légalement instruits sur la doctrine du doute raisonnable.

2. La règle qui doit être suivie dans le cas de preuve circonstantielle n'a pas été suffisamment expliquée.

3. L'accusé n'a pas obtenu un procès équitable eu égard aux faits de la cause, étant donné que l'avocat de la Couronne, dans son adresse aux jurés, a fait usage d'un langage enflammé.

(1) [1952] 1 S.C.R. 232. (2) [1945] S.C.R. 438 at 440.
(3) Q.R. [1954] Q.B. 592.

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Je suis d'opinion que le premier motif d'appel n'est pas fondé. Un résumé de ce que le président du tribunal a exprimé à maintes reprises sur le doute que peuvent entretenir les jurés, se trouve dans l'extrait suivant de son adresse:—

> Si la Couronne ne prouve pas le fait, le crime, de façon à établir une certitude morale, une certitude qui donne la conviction à l'intelligence, une certitude qui satisfait la raison et dirige le jugement à rendre, et que les jurés ont un doute sérieux sur la culpabilité de l'accusé, c'est leur devoir et ils sont obligés de donner *le bénéfice de ce doute à l'accusé* et de le déclarer non coupable.

Évidemment, le jury a nécessairement compris par ces mots, qu'il devait être satisfait de la culpabilité de l'accusé, au delà d'un doute raisonnable. Sinon, ce dernier devait en avoir le bénéfice et être déclaré non coupable.

Le second grief est plus sérieux. Depuis au delà de cent ans, la règle concernant la direction qui doit être donnée aux jurés lorsqu'il s'agit de preuve circonstantielle, a été posée dans la cause de *Hodge* (1). S'adressant aux jurés, le Baron Alderson s'est exprimé ainsi:

> That before they could find the prisoner guilty they must be satisfied, not only that those circumstances *were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*

Cette jurisprudence a depuis été suivie, et il suffit de référer aux causes suivantes pour se convaincre qu'elle a été constante:—(*Wills on Circumstantial Evidence* (7th ed. pp. 320 and 321) *Rex.* v. *Natanson* (2), *Rex.* v. *Francis and Barber* (3), *Rex.* v. *Petrisor* (4), *MacLean* v. *The King* (5).

Malgré que les tribunaux se sont montrés très sévères sur la nécessité qu'il y a d'instruire le jury dans le sens indiqué dans la cause de *Hodge,* il ne s'ensuit pas que la formule soit sacramentelle, et que l'accusé aura droit à un nouveau procès si les termes exacts ne sont pas employés. (*MacLean* v. *The King supra*) Ce serait exiger un trop grand formalisme, et le droit criminel ne va pas jusque là. Il faut cependant retrouver dans les paroles du juge au procès, au moins l'équivalent, qui fera comprendre aux jurés que dans

(1) (1838) 2 Lewin CC. 227.
(2) (1927) 48 C.C.C. 171.
(3) (1929) 51 C.C.C. 351.
(4) (1931) 56 C.C.C. 390.
(5) [1933] S.C.R. 690.

une cause comme celle qui nous occupe, où la preuve est circonstantielle, pour trouver un accusé coupable, ils doivent être satisfaits non seulement *que les circonstances sont compatibles avec sa culpabilité,* mais *qu'elles sont aussi incompatibles avec toute autre conclusion rationnelle.*

Malheureusement, l'équivalent de cette directive qui doit être nécessairement donnée, ne l'a pas été. Le savant président du tribunal a bien attiré l'attention du jury sur la preuve circonstantielle; il leur a bien dit qu'elle devait être forte et convaincante, mais il n'a pas, à mon sens, expliqué la véritable doctrine que j'ai citée plus haut et qu'exige la loi.

L'appelant prétend enfin que la procureur de la Couronne, au cours de son adresse au jury, a fait usage d'un langage enflammé en faisant appel à leurs passions, avec le résultat qu'ils auraient été entraînés à ne pas juger cette cause comme des hommes raisonnables.

La situation qu'occupe l'avocat de la Couronne n'est pas celle de l'avocat en matière civile. Ses fonctions sont quasi-judiciaires. Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue. La modération et l'impartialité doivent toujours être les caractéristiques de sa conduite devant le tribunal. Il aura en effet honnêtement rempli son devoir et sera à l'épreuve de tout reproche si, mettant de côté tout appel aux passions, d'une façon digne qui convient à son rôle, il expose la preuve au jury sans aller au delà de ce qu'elle a révélé.

Je suis donc d'opinion qu'en ce qui concerne les directives du président du tribunal, relatives à la preuve circonstantielle, il y a eu erreur de droit. Je crois également, après avoir analysé l'adresse au jury du procureur de la Couronne, qu'il y a eu exagérration de langage. Mais je ne crois pas que ces deux motifs soient suffisants pour ordonner un nouveau procès. L'article 1014 du *Code Criminel* est ainsi rédigé, et je pense que dans les circonstances de cette cause, il doit trouver toute son application:

1014. A l'audition d'un pareil appel d'un jugement de culpabilité, la cour d'appel doit autoriser le pourvoi, si elle est d'avis

a) Qu'il y a lieu d'infirmer le verdict du jury pour le motif qu'il est injuste ou non justifié par la preuve; ou

b) Qu'il y a lieu d'annuler le jugement du tribunal à cause d'une décision erronée sur un point de droit; ou

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c) Que, pour un motif quelconque, il y a eu déni de justice; et

d) Dans tout autre cas, la cour doit renvoyer l'appel.

2. La cour peut aussi renvoyer l'appel si, malgré son avis que l'appel pourrait être décidé en faveur de l'appelant, pour l'un des motifs susmentionnés, elle est aussi d'avis qu'il ne s'est produit aucun tort réel ou déni de justice.

Il ne me paraît pas utile d'analyser les faits que la preuve a révélés au cours du procès. Il sera suffisant de dire qu'à sa lecture, je me suis convaincu que même si la directive du juge eut été conforme à la loi, et si le procureur de la Couronne eut fait usage d'un langage plus modéré, le verdict aurait été *nécessairement le même*. Je suis satisfait qu'il n'y a eu aucun déni de justice et que l'accusé n'a subi aucun tort réel. *Gouin* v. *The King* (1); *Stirland* v. *Director of Public Prosecutions* (2); *Schmidt* v. *The King* (3).

Je rejetterais l'appel.

RAND J.:—Three grounds of appeal were taken: an error in the charge as it dealt with the burden of proof on the Crown; a failure to give an instruction on the test required for circumstantial evidence; and certain statements of Crown counsel in his address to the jury.

The first ground can be disposed of shortly. The words objected to were "hors de tout doute sérieux". Whatever difference there is between this and the usual formula was swept away by subsequent language with which the jurors were at least more familiar: they must have "une absolue certitude de la vérité de l'accusation qu'ils ont à juger"; other expressions were to the same effect. The instruction, as a whole, was more favourable to the accused than is customary.

The rule as to the sufficiency of proof by circumstances is that the facts relied on must be compatible only with guilt and admittedly no instruction of that nature expressly or in substance was given. The purpose of the rule is that the jury should be made alive to the possibility that the material facts might be given a rational explanation other than that of items plotting the course of guilty action. I think it should have been given, and I cannot say that the charge as a whole supplied its omission.

(1) [1926] S.C.R. 539. (2) [1944] A.C. 315.
(3) [1945] S.C.R. 440.

There are finally the statements of counsel, which I confine to those dealing with the investigation by the Crown of the circumstances of a crime:

> C'est le devoir de la Couronne, quand une affaire comme celle-là arrive, n'importe quelle affaire, et encore plus dans une affaire grave, de faire toutes les recherches possibles, et si au cours de ces recherches avec nos experts on en vient à la conclusion que l'accusé n'est pas coupable ou qu'il y a un doute raisonnable, c'est le devoir de la Couronne, messieurs, de le dire ou si on en vient à la conclusion qu'il n'est pas coupable, de ne pas faire d'arrestation. Ici, c'est ce qu'on a fait.
>
> Quand la Couronne a fait faire cette preuve-là, ce n'est pas avec l'intention d'accabler l'accusé, c'était avec l'intention de lui rendre justice.

Many, if not the majority of, jurors acting, it may be, for the first time, unacquainted with the language and proceedings of courts, and with no precise appreciation of the role of the prosecution other than as being associated with government, would be extremely susceptible to the implications of such remarks. So to emphasize a neutral attitude on the part of Crown representatives in the investigation of the facts of a crime is to put the matter to unsophisticated minds as if there had already been an impartial determination of guilt by persons in authority. Little more likely to colour the consideration of the evidence by jurors could be suggested. It is the antithesis of the impression that should be given to them: they only are to pass on the issue and to do so only on what has been properly exhibited to them in the course of the proceedings.

It is difficult to reconstruct in mind and feeling the court room scene when a human life is at stake; the tensions, the invisible forces, subtle and unpredictable, the significance that a word may take on, are sensed at best imperfectly. It is not, then, possible to say that this reference to the Crown's action did not have a persuasive influence on the jury in reaching their verdict. The irregularity touches one of the oldest principles of our law, the rule that protects the subject from the pressures of the executive and has its safeguard in the independence of our courts. It goes to the foundation of the security of the individual under the rule of law.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel

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have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

The answer of the Crown is that notwithstanding these objectionable features, there has been no substantial miscarriage of justice; that the proof of guilt is overwhelming and that the jury, acting judicially, must necessarily have come to the same verdict.

Sec. 1014(2) of the *Criminal Code* provides that the Court

> may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

By sec. 1024 this Court, on an appeal, shall

> make such rule or order thereon in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires . . .

It will be seen that under the former section the Court is to exercise its discretion in the light of all the circumstances. Appreciating to the full the undesirability, for many reasons, of another trial, I find myself driven to conclude that nothing short of that will vindicate the fundamental safeguards to which the accused in this case was entitled.

The conviction, therefore, must be set aside and a new trial directed.

LOCKE J.:—I have had the advantage of reading the reasons to be delivered in this matter by my brother Cartwright. I agree with what he has said in regard to the first and second questions of law. The failure to direct the jury upon what may be called the rule in *Hodge's* case appears to me to be directly contrary to the unanimous decision of this Court in *Lizotte* v. *The King* (1).

(1) [1951] S.C.R. 117.

Upon the third question, I have this to say. It has always been accepted in this country that the duty of persons entrusted by the Crown with prosecutions in criminal matters does not differ from that which has long been recognized in England.

In *Regina* v. *Thursfield* (1), counsel for the Crown stated what he considered to be his duty in the following terms:

that he should state to the jury the whole of what appeared on the depositions to be the facts of the case, as well those which made in favour of the prisoner as those which made against her, as he apprehended his duty, as counsel for the prosecution, to be, to examine the witnesses who would detail the facts to the jury, after having narrated the circumstances in such way as to make the evidence, when given, intelligible to the jury, not considering himself as counsel for any particular side or party.

Baron Gurney, who presided, then said:

The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party.

In *Regina* v. *Ruddick* (2), decided just after the passage of Denman's Act, Crompton J. said (p. 499):

I hope that in the exercise of the privilege granted by the new Act to counsel for the prosecution of summing up the evidence, they will not cease to remember that counsel for the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius—nor be betrayed by feelings of professional rivalry—to regard the question at issue as one of professional superiority, and a contest for skill and preeminence.

An article entitled "The Ethics of Advocacy", written by Mr. Showell Rogers, appears in Vol. XV of the Law Quarterly Review at p. 259, in which the cases upon this subject are reviewed and discussed. Speaking of the principles above referred to, the author says:

Any one who has watched the administration of the criminal law in this country knows how loyally—one might almost say how religiously—this principle is observed in practice. Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the name of the Crown. When there is no private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be performed.

These are the principles which have been accepted as defining the duty of counsel for the Crown in this country.

(1) (1838) 8 C. & P. 269.

(2) (1865) 4 F. & F. 497.

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In *Rex* v. *Chamandy* (1), Mr. Justice Riddell, speaking for the Ontario Court of Appeal, put it this way (p. 227):

> It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.

In the last Edition of Archbold's Criminal Pleading, Evidence and Practice, p. 194, the learned author says that prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates.

It is improper, in my opinion, for counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case.

In an address by the late Mr. Justice Rose, which is reported in Vol. XX of the Canadian Law Times at p. 59, that learned Judge, referring to Mr. Rogers' article, pointed out a further objection to any such practice in the following terms:—

> Your duty to your client does not call for any expression of your belief in the justice of his cause . . . The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a decided advantage over his opponent if represented by a younger, weaker, or less well known man.

In my opinion, these statements accurately define the duty of Crown counsel in these matters.

An extract from one of the passages taken from the address of counsel for the Crown by my brother Cartwright reads:—

> C'est le devoir de la Couronne, quand une affaire comme celle-là arrive, n'importe quelle affaire, et encore plus dans une affaire grave, de faire toutes les recherches possibles, et si au cours de ces recherches avec nos experts on en vient à la conclusion que l'accusé n'est pas coupable ou

(1) (1934) 61 C.C.C. 224.

qu'il y a un doute raisonnable, c'est le devoir de la Couronne, messieurs, de le dire ou si on en vient à la conclusion qu'il n'est pas coupable, de ne pas faire d'arrestation. Ici, c'est ce qu'on a fait.

These are statements of fact and not argument and, in making them, counsel for the Crown was giving evidence. The matters stated were wholly irrelevant and, had the counsel in question elected to go into the witness box to make these statements on oath, the proposed evidence would not have been heard. In this manner, however, these facts were submitted to the jury for their consideration.

The statements were calculated to impress upon the jury the asserted fact that, before the accused had been arrested, the Crown, with its experts, had made a thorough investigation and was satisfied that he was guilty beyond a reasonable doubt. Introduced into the record in this manner, there could be no cross-examination to test their accuracy.

The address of Crown counsel to the jury ended in this manner:—

On voit tous les jours des crimes encore plus nombreux que jamais, des vols et bien d'autre chose, au moins celui qui vole à main armée ne fait pas souffrir sa victime comme Boucher a fait souffrir Jabour. C'est un crime révoltant d'un homme dans toute la force de l'âge, d'un athlète contre un vieillard de 77 ans qui n'est pas capable de se défendre. J'ai un peu respect pour ceux qui volent quand au moins ils ont donné une chance à leur victime de se défendre, mais j'ai aucune sympathie, aucune et je vous demande de n'en pas avoir, aucune sympathie pour ces lâches qui frappent des hommes, des amis. Jabour n'était peut-être pas un ami, mais c'était un voisin, du moins ils se connaissaient.

Lâchement, à coups d'hache.—Et, si vous rapportez un verdict de coupable, pour une fois ça me ferait presque plaisir de demander la peine de mort contre lui.

The Crown prosecutor, having improperly informed the jury that there had been an investigation by the Crown which satisfied the authorities that the accused was guilty, thus assured them on his own belief in his guilt and employed language calculated to inflame their feelings against him.

In *Nathan House* (1), where a conviction was quashed on the three grounds of misreception of evidence, misdirection and the conduct of counsel, Trevethin, L.C.J., referring to the fact that counsel for the Crown had made an appeal to religious prejudice in his address to the jury, said that

(1) (1921) 16 C.A.R. 49.

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the language complained of was highly improper and that it was impossible to say that it could not have influenced the jury.

In delivering the judgment of the House of Lords in *Maxwell* v. *Director of Public Prosecutions* (1), Lord Sankey, L.C. said in part (p. 176):—

> . . . it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues.

The right of the accused in this matter to have his guilt or innocence decided upon the sworn evidence alone, uninfluenced by statements of fact by the Crown prosecutor bearing directly upon the question of his guilt, and to have the case against him stated in accordance with the foregoing principles, were rights which may be properly described, to adopt the language of the Lord Chancellor in *Maxwell's* case, as being two "of the most deeply rooted and jealously guarded principles of our criminal law."

The infringement of these rights was, in my opinion, a substantial wrong, within the meaning of section 1014 (2) of the *Criminal Code,* and accordingly that provision has no application to this case: *Makin* v. *Attorney General for New South Wales* (2); *Allen* v. *The King* (3); *Northey* v. *The King* (4).

I would allow this appeal, set aside the judgment of the Court of Appeal and the verdict at the trial and direct that there be a new trial.

The judgment of Kellock, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Queen's Bench, Appeal Side (5), pronounced on the 15th day of June, 1954, dismissing the appeal of the appellant from his conviction on a charge of murder at his trial before Sevigny C.J. and a jury on the 15th of January, 1954.

(1) (1934) 24 C.A.R. 152.
(2) [1894] A.C. 69, 70.
(3) (1911) 44 Can. S.C.R. 331.
(4) [1948] S.C.R. 135.
(5) Q.R. [1954] Q.B. 592.

The appeal is brought pursuant to leave granted by my brother Kellock. The questions of law upon which leave to appeal was granted are as follows:

(i) Were the jury misdirected by the learned trial judge with reference to the doctrine of reasonable doubt?

(ii) Were the jury misdirected by the learned trial judge with reference to the rule as to circumstantial evidence?

(iii) Was the appellant deprived of a trial according to law by reason of the fact that the crown counsel used inflammatory language in his address to the jury?

As to the first question, I am of opinion that when all that was said by the learned Chief Justice in his charge to the jury as to the onus resting upon the Crown and as to the accused being entitled to the benefit of the doubt is considered as a whole it cannot be said that there was misdirection on this point. I do, however, venture to make the respectful suggestion that it would be well if trial judges when describing to the jury the doubt the existence of which prevents them from returning a verdict of guilt would refrain from substituting other adjectives for the adjective "reasonable" which has been so long established as the proper term to employ in this connection.

As to the second question of law on which leave to appeal was granted, it is common ground that the evidence against the appellant was wholly circumstantial. It is clear that throughout his charge the learned Chief Justice failed to direct the jury that before they could find the appellant guilty on such evidence they must be satisfied not only that the circumstances proved were consistent with his having committed the crime but also that they were inconsistent with any other rational conclusion than that the appellant was the guilty person. The rule requiring the giving of such a direction to the jury, usually referred to as the rule in *Hodge's Case* (1), has been long established and it is necessary to refer only to the following authorities. In *McLean* v. *The King* (2), the following passage in the unanimous judgment of the Court appears at page 690:

It is of last importance, we do not doubt, where the evidence adduced by the Crown is solely or mainly of what is commonly described as circumstantial, that the jury should be brought to realize that they ought not to find a verdict against the accused unless convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence. But there is no

(1) (1838) 2 Lewin C.C. 227. (2) [1933] S.C.R. 688.

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single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

In *The King* v. *Comba* (1), Duff C.J. giving the unanimous judgment of the Court said at page 397:

> It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

It is however desirable to point out, as was done by Middleton J.A. in *Rex* v. *Comba* (2), that the rule in *Hodge's* case is quite distinct from the rule requiring a direction on the question of reasonable doubt.

On this point I do not find it necessary to quote from the charge of the learned Chief Justice in the case at bar as I understand that all members of the Court agree that there was a failure to give the necessary direction.

As to the third question of law on which leave to appeal was granted, it appears that in the course of his address to the jury counsel for the Crown said:

> Le docteur nous dit au sujet du sang,—on nous a fait un reproche messieurs parce que nous avons fait faire une analyse du sang. Mais la Couronne n'est pas ici pour le plaisir de faire condamner des innocents.
>
> C'est le devoir de la Couronne, quand une affaire comme celle-là arrive, n'importe quelle affaire, et encore plus dans une affaire grave, de faire toutes les recherches possibles, et si au cours de ces recherches avec nos experts on en vient à la conclusion que l'accusé n'est pas coupable ou qu'il y a un doute raisonable, c'est le devoir de la Couronne, messieurs, de le dire ou si on en vient à la conclusion qu'il n'est pas coupable, de ne pas faire d'arrestation. Ici, c'est ce qu'on a fait.

Counsel for the Crown concluded his address to the jury as follows:

> On voit tous les jours des crimes encore plus nombreux que jamais, des vols et bien d'autre chose, au moins celui qui vole à main armée ne fait pas souffrir sa victime comme Boucher a fait souffrir Jabour. C'est un crime révoltant d'un homme dans toute la force de l'âge, d'un athlète contre un vieillard de 77 ans qui n'est pas capable de se défendre. J'ai un peu respect pour ceux qui volent quand au moins ils ont donné une chance à leur victime de se défendre, mais j'ai aucune sympathie, aucune et je vous demande de n'en pas avoir, aucune sympathie pour ces lâches qui frappent des hommes, des amis. Jabour n'était peut-être pas un ami, mais c'était un voisin, du moins ils se connaissaient.

(1) [1938] S.C.R. 396. (2) (1938) 70 C.C.C. 205 at 227.

Lâchement, à coups d'hache.—Et, si vous rapportez un verdict de coupable, pour une fois ça me ferait presque plaisir de demander la peine de mort contre lui.

There are a number of other passages in the address of this counsel to the jury which I do not find it necessary to quote as I think they can be fairly summarized by saying that counsel made it clear to the jury not only that he was submitting to them that the conclusion which they should reach on the evidence was that the accused was guilty, a submission which it was of course proper for him to make, but also that he personally entertained the opinion that the accused was guilty.

There is no doubt that it is improper for counsel, whether for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused.

The grave objection to what was said by counsel is that the jury would naturally and reasonably understand from his words first quoted above that he, with the assistance of other qualified persons, had made a careful examination into the facts of the case prior to the trial and that if as a result of such investigation he entertained any reasonable doubt as to the accused's guilt a duty rested upon him as Crown counsel to so inform the Court. As, far from expressing or suggesting the existence of any such doubt in his mind, he made it clear to the jury that he personally believed the accused to be guilty, the jury would reasonably take from what he had said that as the result of his investigation outside the court room Crown counsel had satisfied himself of the guilt of the accused. The making of such a statement to the jury was clearly unlawful and its damaging effect would, in my view, be even greater than the admission of illegal evidence or a statement by Crown counsel to the jury either in his opening address or in his closing address of facts as to which there was no evidence.

I conclude that in regard to both the second and third questions on which leave to appeal was granted there was error in law at the trial and that accordingly the appeal should be allowed unless this is a case in which the Court should apply the provisions of section 1014 (2) of the *Criminal Code*.

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The subsection mentioned has often been considered in this Court and, in the view that I take of the evidence, it is sufficient to refer to the judgment of Kerwin J., as he then was, in *Schmidt* v. *The King* (1):

> The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King*, from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted. The principles therein set forth do not differ from the rules set forth in a recent decision of the House of Lords in *Stirland* v. *Director of Public Prosecutions*, i.e., that the proviso that the Court of Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

As there is to be a new trial, I will, in accordance with the established practice of the Court, refrain from discussing the evidence and will simply state my opinion that it cannot be safely affirmed that the jury, had they been properly directed as to the rule in *Hodge's* case and had the improper remarks of Crown counsel not been made, would necessarily have convicted the appellant. This makes it unnecessary for me to consider the submission of counsel for the appellant, that even if the Court should be of opinion that had the trial been free from the errors in law dealt with above the jury would necessarily have convicted the appellant the conviction should nonetheless be quashed because these errors were of so fundamental a character that the appellant was deprived of his right to the verdict of a jury following a trial according to law and such deprivation is of necessity a substantial wrong, an argument which would have required a careful examination of the judgments in such cases as *Allen* v. *The King* (2) and *Northey* v. *The King* (3).

Having concluded that there was error in law at the trial in regard to both the second and third questions on which leave to appeal was granted and that this is not a case in which it can be said that had such errors not occurred the verdict would necessarily have been the same it follows that the conviction must be quashed.

(1) [1945] S.C.R. 438 at 440. (2) (1911) 44 Can. S.C.R. 331.
(3) [1948] S.C.R. 135.

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

Appeal allowed; conviction quashed; new trial ordered.

Solicitor for the appellant: *A. Maloney.*

Solicitor for the respondent: *P. Miquelon.*