MICHAEL MANOS .....APPELLANT; 1952

AND *Nov. 28 *Dec. 1 *Dec. 22

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Theft—Evidence—Testimony of accomplice—Corroboration —Corroborative inference is question of fact—Criminal Code, s. 1025.*

Applying *Rex* v. *Baskerville* [1916] 2 K.B. 658, it was held that, on a charge of theft, the jury were rightly told that the evidence as to a certain cheque was capable of being corroborative of the testimony of the accomplice who was the main witness against the appellant. Applying *Hubin* v. *The King* [1927] S.C.R. 442, it was also held that the jury should have been told that it was for them to decide if it was in fact corroborative. As it was impossible to state that no substantial wrong or miscarriage had occurred, the appeal was allowed and a new trial directed.

APPEAL from the judgment of the Court of Appeal for Ontario, dismissing the appellant's appeal from his conviction on a charge of theft.

*A. E. Maloney* for the appellant.

*W. B. Common Q.C.* for the respondent.

The judgment of the Court was delivered by:—

KERWIN J.:—The appellant was convicted in the Court of the General Sessions of the Peace in and for the County of York on a charge that in the year 1950 he stole approximately $38,000 in money, the property of S. P. Ryan, A. D. McAlpine and J. M. Ryan, contrary to the *Criminal Code*. The Court of Appeal for Ontario dismissed an appeal from his conviction and sentence and, pursuant to section 1025 of the *Code*, he appealed to this Court in accordance with leave granted by Cartwright J. on the following grounds:—

(*a*) Was the alleged fact that a certain cheque was given by the appellant to one, Elsie Teasdale, in or about the month of April, 1950, capable in law of being corroboration of the testimony of the said Elsie Teasdale?

(*b*) Did the learned trial judge usurp the functions of the jury in instructing them that the evidence concerning the said cheque was corroborative?

*PRESENT: Rinfret C.J. and Kerwin, Kellock, Cartwright and Fauteux JJ.

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In view of the conclusion reached, it is not advisable to refer to the evidence at the trial in detail. The substance of the charge against the appellant was that he had counselled and procured Elsie Teasdale to steal the money in question from her employers, the parties named in the indictment. Elsie Teasdale had already pleaded guilty to a charge of theft and had been sentenced. She was the main witness called against the appellant, and the trial judge charged the jury that as she was an accomplice they ought not to convict on her uncorroborated testimony. He also told the jury that the cheque given by the appellant to her in or about the month of April, 1950, was capable in law of being such corroboration. This cheque could not be found but, notwithstanding the argument of counsel for the appellant, we are satisfied that there was evidence upon which the jury could find that it had in fact been signed by the appellant and given to Elsie Teasdale.

Then it was said that while on her own testimony the cheque was to repay the amounts she had given the appellant from her own funds and from the sums she had stolen from her employers up to that time, the amount of the cheque exceeded the total of all of these amounts down to the date of the cheque. However, the jury were entitled to accept Elsie Teasdale's evidence that the amount of the cheque represented the approximate total and that any excess was to be repaid by her to the appellant. In that view of the matter and considering all the other evidence, the cheque was capable in law of being corroborative as it falls within the classical statement as to what may be corroboration as found in *Rex* v. *Baskerville* (1). The answer, therefore, to the first question must be in the affirmative.

The second question must also be answered in the affirmative. The charge to the jury must, of course, be read as a whole but it is necessary to refer only to the following portions of it. At one stage the trial judge told the jury:—

> I will tell you here there is some evidence corroborative of her evidence and if you accept that evidence you may believe her evidence, accept the whole of her story.

(1) [1916] 2 K.B. 658.

Later, after referring to the evidence as to the existence of the cheque given by the various bank officials, the trial judge continued:—

Gentlemen, you may or may not accept that evidence. If you do, that is evidence corroborative in a material respect and you may believe the whole or necessary parts of Miss Teasdale's evidence to bring in a verdict. If you do not accept the evidence as corroborative of her story, as I told you, you ought not to convict and should bring in a verdict of not guilty.

After considering the matter for over four hours, the jury returned and the foreman asked the following questions:—

. . . . something was said about the fact that it was unusual to convict a person based on or solely on the evidence of a convicted member or party to the offence. Could you perhaps go over that for us again and clarify it just to what extent?

The trial judge replied:—

I am very glad you asked about that because they are very important. You see, there is not enough evidence in this case, gentlemen, to convict the accused unless you accept the whole or important parts of the evidence of Miss Teasdale.

Now, as I have told you as a matter of law, as I am supposed to tell you the law, she is in law what is known as an accomplice, that is, if you find the accused guilty the two of them were both in it, she is guilty anyway, she is what you call an accomplice. You realize when you have two people accused of something there might be a tendency to put the blame on the other so a person who is admittedly guilty of a crime may not be too reliable, so the law is laid down that the judge must tell the jury they ought not to convict the accused on the evidence of an accomplice alone, it must be corroborated, that is, there must be some other evidence which backs it up in some material particular.

I have explained to you here that there is such evidence, which you accept it as corroboration, if you accept that evidence you may take her story, holus bolus if you want to. It is all in your hands; if there is no corroboration, I have to tell you there is not. Here I explained what the corroboration was; it was the evidence concerning this cheque which was signed by the accused which went through the bank. You heard the evidence about that and if you believe that evidence and accept it, it is open to you to accept the whole or any part of Miss Teasdale's evidence.

Particularly bearing in mind this last quotation, we think the charge was defective and that the jury should have been told clearly that the evidence as to the cheque was

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capable of being corroboration but that it was for them to decide if it was in fact corroborative. In *Hubin* v. *The King* (1), this Court decided, at page 444, that "whether corroborative inferences should be drawn is a question for the jury." This rule was infringed in the present case and it is impossible to state that no substantial wrong or miscarriage has occurred. This appeal must therefore be allowed and a new trial directed.

*Appeal allowed; new trial directed.*

Solicitors for the appellant: *Edmonds & Maloney.*

Solicitor for the respondent: *W. B. Common.*

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*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Cartwright and Fauteux JJ.

(1) [1927] S.C.R. 442.