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*Oct. 8, 9, 13, 14, 15 Dec. 21

EDWIN McDONALD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Narcotic drugs—Charge of trafficking—Evidence of association with convicted drug addict—Alleged conspiracy by police against accused—Whether acquittal on same facts of charge of conspiracy to traffic raises question of res judicata—The Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, s. 4, as re-enacted by 1953-54, c. 38.

The accused, who had previously been acquitted on the same facts on a charge of conspiracy to commit the same indictable offence, was convicted on the substantive charge of being in possession of a drug for the purpose of trafficking. This conviction came at a new trial ordered by the Court of Appeal. The conviction was affirmed by the Court of Appeal, and the accused was granted leave by this Court to appeal on six grounds.

Held (Cartwright J. *dissenting*): The appeal should be dismissed.

Per Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: As held by the Court of Appeal, there was no violation at the trial of the principle that the prosecution cannot attack initially the character of the accused and that he is to be tried upon the evidence pertaining to the crime with which he is charged.

2. The evidence which the accused sought to introduce for the purpose of attacking the credibility of the witnesses, was not properly admissible. The accused wanted to show a conspiracy on the part of the narcotic squad to prepare false reports and give false evidence against him. It was proposed to lead evidence that two other persons, at other hearings, had given inaccurate evidence, on the basis that such evidence would be admissible because they were members of the same police squad as the witnesses in this case and were "acting in concert" together. This was proposed to be done by putting in evidence of a transcript of their testimony at the other hearings.

3. The crown was under no duty to call these two officers as they were not witnesses to the important incidents related to this case. Consequently, there was no necessity for the trial judge, in instructing the jury, to comment upon the fact that they had not been called.

4. There was no substance to the contention that the trial judge had failed adequately to present to the jury the theory of the defence.

5. The submission that it was wrong to permit the Crown to adduce evidence as to the movements of F (who had been seen talking to the accused on the day of the offence) in the absence of the accused, and as to F's addiction to drugs and his previous convictions for narcotic offences, could not be maintained. That evidence was relevant to the charge of trafficking which was laid under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act*. The clear purpose of s. 4(4) of the Act is that once there has been a finding of possession the onus then rests upon the accused to prove that he was not in possession for the purpose of trafficking. This cannot preclude the Crown from bringing evidence in its case in chief to establish the purpose of trafficking, nor can defence counsel preclude the leading of such evidence merely by stating, as was done in this case, that the defence will be that the accused was not in possession of the drug.

6. The accused contended that the acquittal on the conspiracy charge must mean that the verdict resulted from a finding that he was not in possession of the drug, that there was *res judicata* in respect of the substantive charge and that he should have been permitted to adduce evidence of the acquittal. That contention could not be entertained. The essence of the charge of conspiracy is the agreement for that purpose. The verdict of innocence only established his innocence in respect of the conspiracy, and not that he was found not to be in possession. The principle of *res judicata* enunciated in *Sambasivam v. The Public Prosecutor, Federation of Malaya,* [1950] A.C. 458 at 479, only estops the Crown in the later proceedings from questioning that which was in substance the ratio of and fundamental to the decision of the earlier proceedings. The acquittal in the earlier trial was not relevant to the charge which was the subject-matter of this case and was not admissible in evidence.

Per Cartwright J., *dissenting*: It was the duty of the trial judge to admit the evidence related to the acquittal of the accused on the charge of conspiracy and to give to the jury an unequivocal direction that in approaching the question of his guilt or innocence they must give due weight to the facts thus conclusively established. These facts were that during the period which included the date of the offence of which the accused was convicted he was not engaged in a conspiracy with

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one J or others to have possession of a drug for the purpose of trafficking; their relevance could not be doubted as the Crown had elicited evidence tending to show that the appellant was working in a conspiracy with J to have a drug for the purpose mentioned. The matter fell within the reasoning of the *Sambasivam* case. If an acquittal necessarily involves a finding of fact, which fact would be an item of circumstantial evidence relevant to the question of guilt or innocence on the subsequent trial on another charge of the person acquitted, that fact may be proved in the last-mentioned trial, and is conclusively established by proof of the acquittal. It was of no significance that in cross-examination, the accused volunteered the information that he had been acquitted.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the accused. Appeal dismissed, Cartwright J. dissenting.

M. Robb, Q.C., and *C. Thomson*, for the appellant.

J. D. Hilton, Q.C., for the respondent.

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

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] affirming the conviction of the appellant on a charge of being in possession of heroin for the purpose of trafficking. The conviction was made following a trial by jury on November 18, 1958.

The date of the offence alleged was September 18, 1955. The appellant was tried in April, 1957, on a charge of conspiracy to commit the indictable offence of having possession of heroin for the purpose of trafficking, and was acquitted. He was tried before a jury on the substantive charge in October, 1957, and was convicted, but, on appeal, the Court of Appeal[2] ordered a new trial, following which the trial in question in these proceedings was held.

The evidence on behalf of the Crown was mainly that of two RCMP officers, Corporal Macauley and Constable Yurkiw. Briefly summarized, this was that at about 6.55 p.m. on September 18, 1955, the appellant was observed to make a throwing motion near a hydro pole on Dupont Street in Toronto and then to depart. The two officers then discovered a cigarette package near the pole, which contained

[1] [1959] O.W.N. 187, 124 C.C.C. 278, 30 C.R. 243.
[2] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.

fifty capsules of heroin. Some of these were removed and then, after the package had been initialled, it was replaced near the pole. As Yurkiw was about to replace the package they saw one Fillmore, a convicted drug addict, walk past the pole.

Later, at about 8.40 p.m., the appellant was seen to cross Dupont Street to the pole and make a motion as though picking something up. The base of the pole was subsequently searched and it was found that the package was gone. The police officers then saw the appellant and Fillmore together about 240 feet away.

Later they saw the appellant's car stalled in the middle of the street on Lansdowne Avenue, about one block south of Dupont Street, and being pushed by one Cook into a parking lot. The appellant then got into Cook's car and drove away, following which Macauley and Yurkiw found the appellant's car on the parking lot.

Subsequently, at about 9.30 p.m., the cigarette package, containing no narcotics, was found on the lawn of a house about six to eight feet from the place where the appellant and Fillmore had been seen earlier standing together.

Evidence was given by Constable Webster of the RCMP that at about 11.30 p.m. he, in company with Corporal LaBrash, saw the appellant and one Fred Walsh leave 180 Lansdowne Avenue, go to a parking lot and put something into the gas tank of the appellant's car. The appellant then drove off.

Leave to appeal to this Court was granted on six grounds of appeal, each of which was fully argued.

The first ground alleged was that the Crown led evidence and cross-examined the appellant and other witnesses for the defence to show the appellant's association with known criminals, including persons with previous convictions for narcotic offences, and to show that the appellant had committed other criminal acts of which he had not been convicted. It was contended that the Crown had generally attacked the appellant's character, both before and while he was in the witness box, and had sought to have it inferred that, by reason of his alleged associations with persons of bad character, he was likely to have committed the offence charged.

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With respect to this point, I agree with what has been said concerning it in the judgment of the Court of Appeal and am of the opinion that it fails.

The second point argued was that counsel for the appellant had been prevented from adducing the most substantial supporting aspects of his defence; namely, that a small group of officers, acting in concert, were engaged in submitting false reports and preparing false evidence to implicate the appellant in the traffic of drugs during the period surrounding September 18, 1955.

The evidence which counsel for the appellant sought to adduce was taken on the voir dire, but was not given before the jury. In brief, it was that Constable Tomalty of the RCMP, at the preliminary hearing, and Corporal LaBrash of the RCMP, at the conspiracy trial, had testified to having seen the appellant in the company of one Fred Walsh in the early hours of October 19, 1955, whereas, in fact, the evidence was that Walsh was in custody at the No. 8 Police Station in Toronto, sometimes referred to as the Pape Avenue Station, at the time in question.

The contention of the appellant was that the Narcotic Squad of the RCMP in Toronto, consisting of LaBrash, Macauley, Tomalty, Yurkiw and Webster, were "acting in concert" to prepare false reports and give false evidence concerning the appellant and that the evidence above referred to should have been admitted as being relevant to the establishment of a conspiracy among them for that purpose.

It is true that on a charge of conspiracy the acts and declarations of each conspirator in furtherance of the common object are admissible in evidence as against the rest. The same rule has been applied in civil cases. The rule is, however, one which determines the admissibility of evidence as against a person who is a party to legal proceedings.

In the present case what is sought to be done is to introduce evidence of this kind, not as against a person charged with conspiracy or sued in relation to a conspiracy, but in respect of a witness who, it is alleged, was a party to a conspiracy not the subject of these proceedings. In the one case the conspiracy is in issue as a part of the case and the rule determines the kind of evidence which may be adduced

in relation to that issue. In the present case it is proposed to lead such evidence for the collateral purpose of attacking the credibility of a witness.

Facts to establish bias on the part of a witness may be elicited on cross-examination and, if denied, may be independently proved. It was open to the defence to cross-examine Macauley and Yurkiw as to whether they were parties to a conspiracy which sought wrongfully to obtain a conviction against the appellant. If denied, evidence which directly implicated either of them as being parties to a conspiracy for that purpose would be relevant because this would relate directly to the establishing of bias. But the evidence sought to be introduced here is not evidence of that kind. It was proposed to lead evidence that two other persons, at other hearings, had given inaccurate evidence, on the basis that such evidence would be admissible because they were members of the same RCMP squad as the witnesses who gave evidence in this case and were "acting in concert" together. This was proposed to be done, not by calling these two persons themselves, but by putting in evidence of a transcript of their testimony at the other hearings. In my opinion this is not evidence which is properly admissible for the purpose of attacking the credibility of the witnesses in this case.

The third ground of appeal was that the Crown did not call as a witness either LaBrash or Tomalty and that the learned trial judge did not instruct the jury as to the inferences which they might draw from this fact.

That counsel for the Crown was under no duty to call either Tomalty or LaBrash is, I think, sufficiently established by the decision of this Court in *LeMay v. The King*[1]. Neither LaBrash nor Tomalty was a witness to the important incidents on Dupont Street on the evening of September 18, 1955. Any evidence they could give related only to collateral matters. This being so, I do not see why there was any necessity for the learned trial judge, in instructing the jury, to make any comment upon the fact that they had not been called to give evidence.

[1] [1952] 1 S.C.R. 232, 102 C.C.C. 1, 14 C.R. 89.

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The fourth point submitted was that the learned trial judge failed adequately to present to the jury the theory of the defence. I agree with the Court of Appeal that there is no substance to this contention.

The fifth ground of appeal is that the Crown was permitted to adduce evidence as to the movements of Fillmore in the absence of the appellant and as to Fillmore's addiction to drugs and his previous convictions for narcotic offences.

The charge in this case was laid under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act* of being in possession of heroin for the purpose of trafficking. The evidence relating to Fillmore was relevant to the question of trafficking. The appellant contended, however, that, because of the provisions of subs. (4) of s. 4 of that Act and because it had been stated by counsel for the defence, at the outset of the trial, that the defence would be that the appellant was not in possession of the drug at the time and place alleged, the Crown was, therefore, not entitled to lead the evidence regarding Fillmore.

Subsection (4) of s. 4 provides as follows:

> In any prosecution for an offence under paragraph (*b*) of subsection (3), the court shall, unless the accused pleads guilty to the charge, first make a finding as to whether or not the accused was in possession of the drug; if the court finds that he was not in possession of the drug, the court shall acquit him; if the court finds that the accused was in possession of the drug, the court shall give the accused an opportunity of establishing that he was not in possession of the drug for the purpose of trafficking, and if the accused establishes that he was not in possession of the drug for the purpose of trafficking, he shall be acquitted of the offence as charged but shall, if the court finds that the accused was guilty of an offence under subsection (1), be convicted under that subsection and sentenced accordingly; and if the accused fails to establish that he was not in possession of the drug for the purpose of trafficking he shall be convicted of the offence as charged and sentenced accordingly.

The clear purpose of this provision is that, in the case of a charge of being in possession of a drug for the purpose of trafficking, once there has been a finding of possession the onus then rests upon the accused to prove that he was not in possession for the purpose of trafficking. I do not see how this can preclude the Crown from bringing evidence in its case in chief to establish the purpose of trafficking, or how defence counsel can preclude the leading of such evidence

merely by stating that his defence will be that the accused was not in possession of the drugs. The Crown must establish its case in respect of the charge laid. Subsection (4) of s. 4 assists the Crown in proving its case once possession has been established, but I cannot see how that subsection can serve to prevent the adducing of evidence which is obviously relevant to the charge as laid.

The sixth point is that the appellant was not permitted to adduce evidence of his previous acquittal on the charge of conspiracy, although the circumstances and evidence upon which the conviction was sought in the conspiracy trial included the incident upon which the substantive charge was based. It was contended by the appellant that the learned trial judge refused to allow the defence to rely on the findings of fact encompassed by the acquittal in the conspiracy charge in so far as such findings might be relevant in relation to the substantive charge of possession.

In fact, on cross-examination the appellant did testify as to his acquittal on the conspiracy charge, but counsel for the appellant was not permitted to lead evidence otherwise to prove that acquittal. The learned trial judge was obviously following the decision of the Court of Appeal made on the appeal which had been taken in the first trial and which dealt with this specific matter[1].

Counsel for the appellant, on this phase of his argument, relied upon the statement of the law regarding *res judicata* made by Lord MacDermott, who delivered the reasons for the decision of the Privy Council in *Sambasivam v. Public Prosecutor, Federation of Malaya*[2], as follows:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of

[1] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.
[2] [1950] A.C. 458 at 479.

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the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

In that case the accused had been tried on two charges, under the *Emergency Regulations,* 1948, of carrying a firearm and of being in possession of ammunition respectively. He was acquitted of the second charge, but a new trial was ordered on the first one.

At the second trial a statement of the accused was introduced which had not been in evidence at the first trial. If accepted as the truth, it went to prove his guilt on the second charge, of which he had been acquitted, as clearly as it would establish his guilt on the first charge. The statement was admitted and no intimation was given to the assessors of the fact that the accused had been acquitted on the second charge and was, therefore, to be taken as innocent of that offence.

In view of these circumstances it was felt that the acquittal of the appellant on the charge of being in possession of ammunition was relevant to the consideration by the assessors in the second trial of the effect of this statement. It might have been a ground for excluding the statement in its entirety, because it could not have been severed satisfactorily. The result of the omission to refer to the acquittal on the second charge was that the Crown was enabled to rely upon the existence of facts in respect of which there had already been a contrary finding in favour of the accused.

The appellant does not contend that in every case an acquittal on a charge of conspiracy must result in an acquittal on the substantive charge in respect of the crime to which the alleged conspiracy related. His argument is that in a case of the kind before us an accused could only become in wrongful possession of narcotics as a result of a conspiracy with somebody. Therefore, he contends that an acquittal on the conspiracy charge must mean that the verdict of acquittal resulted from a finding that the accused was not in possession of the drug. Consequently that finding is a bar to a conviction in respect of the substantive offence.

I do not accept the validity of this reasoning. The conspiracy charge was in relation to an alleged conspiracy to be in possession of drugs for the purpose of trafficking. The essence of that charge is the agreement for that purpose. The verdict of acquittal establishes, but only establishes, innocence in respect of the conspiring. It does not establish that the appellant was found not to be in possession of drugs. He could have been in possession of them without being party to a conspiracy to have that possession for the purpose of trafficking.

As I see it, the principle of *res judicata* enunciated in the *Sambasivam* case only estops the Crown in the later legal proceedings from questioning that which was in substance the ratio of and fundamental to the decision in the earlier proceedings. The use of the statement of the accused in that case involved an allegation against the accused of guilt, in relation to the possession of ammunition, which had already been decided in his favour. The acquittal of the appellant, on the charge of having conspired with others to be in possession of drugs for the purpose of trafficking, did not decide in his favour that he had not been in possession of drugs on September 18, 1955. This being so, the acquittal in the earlier trial was not relevant to the charge which was the subject-matter of the present proceedings and was not admissible in evidence in those proceedings.

For the foregoing reasons I am of the opinion that this appeal should be dismissed, but the time during which the appellant has been confined in prison pending the determination of this appeal should count as part of the term of imprisonment imposed pursuant to his conviction.

CARTWRIGHT J. (*dissenting*):—The nature of this appeal and the facts out of which it arises are stated in the reasons of my brother Martland.

The notice of motion for leave to appeal to this Court sought to raise six questions of law and leave was granted as to all of them. I find it necessary, however, to deal with only the following two of those questions:

2. Whether the learned trial judge erred in law in preventing counsel for the applicant from adducing the most substantial supporting aspects of his defence, namely that a small group of officers acting in concert were

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engaged in submitting false reports and preparing false evidence to implicate the accused in the traffic of drugs during the period surrounding September 18th 1955, and whether the learned trial judge erred in law in not adequately setting out to the jury the above theory of the defence?

* * *

6. Whether the learned trial judge erred in law in refusing to allow counsel for the applicant to adduce evidence of a previous acquittal of the applicant on a charge of conspiring to possess narcotic drugs for the purpose of trafficking, especially as evidence was led by the Crown of the applicant's association with Victor Jowett and certain other persons named and persons unknown during the period under review, and erred in law in not charging the jury that such verdict of acquittal was binding and conclusive in all subsequent proceedings between the parties to the adjudication with respect to all facts which must necessarily have been decided in favour of the applicant in order that the first verdict could have been reached?

I propose to deal first with the last-mentioned point.

In September 1956 an indictment was preferred at the sittings of the Court of General Sessions of the Peace for the County of York, count 1 of which read as follows:

EDWIN McDONALD (the appellant) VICTOR JOWETT, JOSEPH NICOLUCCI, NORMAN LABRASSEUR, SADIE McINTOSH and FREDERICK WALSH, in the year 1955, at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, unlawfully did conspire together, the one with the other or others of them, and with Harry Ross and persons unknown, to commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the Opium and Narcotic Drug Act, contrary to the Criminal Code.

Counts 2 to 5 inclusive charged Jowett, Nicolucci, Walsh, McIntosh and LaBrasseur with having possession of the drug mentioned for the purpose of trafficking on or about specified dates in the year 1955.

Count 6 read as follows:

6. AND THE SAID JURORS FURTHER PRESENT that the said Edwin McDonald, on or about the 18th day of September, in the year 1955, at the said City of Toronto, unlawfully did have in his possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, contrary to Section 4(3)(*b*) of the Opium and Narcotic Drug Act, Revised Statutes of Canada, 1952, Chapter 201, and amendments thereto.

In December 1956, Jowett, Nicolucci, LaBrasseur, McIntosh and Walsh, were tried together on count number 1, before His Honour Judge Forsyth and a jury and on December 12, 1956, Jowett and Nicolucci were convicted and the other three were acquitted.

In April, 1957, the appellant was tried on count number 1, before His Honour Judge Forsyth and a jury and, on April 17, 1957, was acquitted.

In October 1957, the appellant was tried on count number 6 before His Honour Judge Factor and a jury and, on October 24, 1957, was convicted of having possession of the drug mentioned for the purpose of trafficking; on the following day he was sentenced to seven years' imprisonment.

On March 3, 1958, the Court of Appeal[1] gave judgment quashing this conviction and directing a new trial.

The new trial was held before His Honour Judge Shea and a jury and resulted in a conviction on November 18, 1958. On the following day the appellant was sentenced to six years' imprisonment. An appeal was dismissed by the Court of Appeal[2] on April 29, 1959, and it is from that judgment that this appeal is brought.

In order to deal adequately with question 6, it is necessary to say something as to the course of the trial. It should first be mentioned that the indictment was not placed before the jury; they were given only a copy of count 6.

In his opening address to the jury Crown counsel said in part:

> Now the evidence began and it involves, as you heard from the charge, an incident on the 18th of September 1955, that is quite a while ago, and that particular day, pursuant to their instructions, two officers of the Royal Canadian Mounted Police, Corporal Macauley and Police Constable Yurkiw, were proceeding, *in the course of an investigation,* on Bloor St. in an easterly direction some time shortly after supper, I think around 6.55. As they were proceeding easterly, at the corner of Dundas and Bloor they were stopped for a stoplight and they saw an automobile which they knew or believed was the automobile of the accused Edwin McDonald, which was a red and black sedan, proceed in a northerly direction on Dundas and make a sharp right hand turn to go east on Bloor. *Now in relation to their investigation they were interested in this automobile,* so when the light changed they took off after it.

After outlining the incidents on Dupont St. in regard to the cigarette package containing capsules of heroin described in the reasons of my brother Martland, Crown counsel continued:

> The officers then went and got their car and started to go up and down the area to see where they had gone, and a short time later working down through these side streets got down to Bloor Street and as they

[1] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.
[2] [1959] O.W.N. 187, 124 C.C.C. 278, 30 C.R. 243.

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were coming in a westerly direction saw a car of *one Cook, who was known to them,* go up Margueretta Street, made a left hand turn in front of them and they went on past and went up Emerson Avenue, up the laneway, came across the stop of Emerson Avenue ahead of the Cook car and paused at the top and allowed the Cook car to pass them. I think they stopped about at the corner of Dufferin and I forget the name of the street, Wallace I believe, and allowed the car to pass them and they then followed this car and it came up and stopped back of the McDonald car where it had been left on the north side of Dupont. McDonald got out of Cook's car, got into his own car and drove it in a westerly direction on Dupont to Lansdowne.

* * *

McDonald got again into the Cook car and proceeded into a house farther down Lansdowne Avenue. Later that night, others observed, and the evidence will be how they came back *with other persons known to the Police* and picked up the McDonald car later on.

Counsel for the appellant submits that the effect of these passages and particularly the words I have italicized would be to convey to the jury that prior to the date of the alleged offence the activities of the appellant and "others known to the police" were the subject of a continuing investigation by the police, with the natural inference that the appellant and these others were working in association.

The first witness called by the Crown was Sergeant Gove who gave evidence as to the taking of certain photographs and as to the examination he had made of the cigarette package. In cross-examination, in the absence of the jury, counsel for the appellant put the following questions to Sergeant Gove:

Q. Now, Sergeant Gove, were you present at the trial of this same Edwin McDonald at this same court room, in the Court of General Sessions of the Peace in the County of York, held at Toronto, on the 8th, 9th, 10th, 11th, 12th, 15th, 16th and 17th days of April 1957 and did you give evidence at that trial on that date?

* * *

Q. And the next question, Sergeant Gove, is: was he, Edwin McDonald, there acquitted of a charge of conspiracy with Victor Jowett, Joseph Nicolucci, Harry Ross and persons unknown that at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, in the year 1955 he did commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the Opium and Narcotic Drug Act.

* * *

Q. And finally, Sergeant Gove, during that trial did you give substantially the same evidence as you have given here with reference to the taking of photographs at the general vicinity of Dupont and Emerson Avenues, Toronto, on September the 19th and with respect to the handling of a cigarette package with respect to fingerprints at some other time?

All these questions were objected to by Crown counsel and were disallowed by the learned trial judge, who regarded himself as bound to follow this course by the judgment of the Court of Appeal[1] on the appeal from the conviction before His Honour Judge Factor.

In the examination-in-chief of Corporal Macauley Crown counsel, referring to September 1955, brought out the following:

Q. And who was living at 58 South Kingsway, Swansea, Ontario, at that time, to your knowledge?

A. The accused man Edwin McDonald and another man known to me as Victor Jowett.

In the examination-in-chief of Constable Webster Crown counsel brought out that the appellant had been seen at 58 South Kingsway with Frederick Walsh.

The defence called a number of witnesses. Among these was Mrs. Near, a sister of the appellant, who testified in chief that Corporal Macauley had made a threat to the appellant some years prior to the date of the alleged offence at a time when the appellant and his brother Alex were living with her, the alleged threat being "I'll get you yet". In her cross-examination by Crown counsel the following appears:

Q. And where is Alex now?

A. Alex is living in Vancouver.

Q. Is that all you know about Alex, do you not know—

A. I beg your pardon?

Q. Do you not know that he is in jail on the West Coast at the moment?

A. No, I did not know that.

Q. You didn't? On a narcotics charge?

A. No, I didn't. He was here in July.

The defence called Mary Olive Lehman who was living with the accused as his wife at the time of the alleged offence to prove two things, (i) that he never went out without her on Sundays during a period which included September, 1955, and (ii) that he never went out without wearing a hat as he was sensitive about premature baldness. In her cross-examination, Crown counsel brought out the fact that at the date of the alleged offence she and the appellant were

[1] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.

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living in the same house with Jowett and his wife and that Jowett and the appellant were working together in taking bets on horse-races. The cross-examination continued:

Q. Did you have any knowledge at that time of any other source of income of this man Jowett?

A. I did not—I heard that he had sold the odd car, that he was a car dealer or something like that.

Q. But then you found out something else about him. What was that?

A. Well I never found out anything until his court case came out, that I heard anything about him.

Q. What did you find out?

A. Well that's just what they said.

Q. What was that?

A. That he had something to do with narcotics, I don't know. I still don't know actually what it was about.

Q. That came as quite a surprise to you?

A. Yes it did, because he seemed like a very nice man to me.

This was the Jowett named in count 1 of the indictment.

The effect of certain evidence given by police officers called by the Crown was summarized as follows in the closing address of Crown counsel to the jury:

And so much for all that my friend said in an hour and a half this morning in criticism of these officers. Why was the arrest not made for four months? Staff-Sergeant Carson told you, the officers told you. This was one facet in a larger investigation being carried on with great difficulty by these officers in the interest of the public to stem the flow of illicit heroin into our city. And it wasn't important to pick up an individual person who had a few "caps" but it was important, as you all know from your general knowledge of Police activities and investigations to find out what was the source, to get if they could the "top man". And so they were instructed to find out, not to arrest on that night but to find out where it was that McDonald was getting his source of supply.

Following the cross-examination of the witness Lehman and while she was still in the witness box defence counsel again, in the absence of the jury, sought permission to prove the fact that the appellant had been tried and acquitted on count 1. Crown counsel again objected and again the learned trial judge refused to allow this proof.

In my opinion the evidence tendered should have been received. It was legally admissible and was logically relevant to the question of the guilt or innocence of the accused on count 6, the charge on which he was being tried, for as between the Crown and the appellant his acquittal on count 1 conclusively established the facts that he was not on

or about September 18, 1955, or at any time in that year in conspiracy with Jowett or any of the other persons described in count 1 to have in his possession a drug for the purpose of trafficking. In my opinion it was the duty of the learned trial judge to admit the evidence and having done so to give to the jury an unequivocal direction that in approaching the question of the guilt or innocence of the appellant they must give due weight to the facts thus conclusively established.

I agree with Mr. Robb's submission that as a matter of common sense it appears improbable, although not impossible, that the appellant could have had the fifty capsules of heroin and dealt with them as the officers testified he did unless he was engaged in a conspiracy such as that of which he had been acquitted, and that therefore the fact that he was not so engaged was relevant to the question which the jury were trying; but the matter does not rest there; Crown counsel, as appears from what is set out above as to the course of the trial, had elicited evidence having a tendency to show or at least to suggest that the appellant was working in conspiracy with Jowett and others, and the passage quoted from his closing address to the jury pointed unmistakably in that direction.

In my opinion the question falls within the reasoning contained in the passage from the *Sambasivam* case quoted by my brother Martland and in the following further passage at p. 480 of the report of that case:

> The fact appears to be—and the Board must judge of this from the record and the submissions of counsel who argued the appeal—that the second trial ended without anything having been said or done to inform the assessors that the appellant had been found not guilty of being in possession of the ammunition and was to be taken as entirely innocent of that offence. In fairness to the appellant that should have been made clear when the statement had been put in evidence, if not before.

Applying this reasoning to the facts of the case at bar it is my opinion that in fairness to the appellant the fact and the effect of his acquittal should have been made clear to the jury when the Crown had adduced evidence of his association with Jowett and of the latter's conviction on a narcotic charge, if not before.

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Cartwright J.

The governing principle is that if an acquittal necessarily involves a finding of fact, which fact would be an item of circumstantial evidence relevant to the question of guilt or innocence on the subsequent trial on another charge of the person acquitted, that fact may be proved in the last-mentioned trial, and is conclusively established by proof of the acquittal.

It follows that, in my view, question no. 6, quoted above, should be answered in the affirmative, and this is fatal to the validity of the conviction.

I have not overlooked the circumstance mentioned in the reasons of the Court of Appeal that the appellant, in the course of his cross-examination, although not asked about it, volunteered the information that he had been acquitted. In my opinion this is of no significance. The appellant was entitled not only to have the fact of the acquittal properly proved but also to have its effect clearly explained to the jury by the learned trial judge in the manner I have indicated above. Counsel agree that, in obedience to the ruling which the learned trial judge had made, defence counsel made no reference to the acquittal in his address to the jury.

Having reached this conclusion it is not strictly necessary for me to deal with question no. 2 but I wish to state briefly the principles on which, in my view, it would fall to be decided if it were necessary to express a final opinion upon it. It is clear that facts showing a witness to be biased may be elicited on cross-examination or, if denied, independently proved; see *R. v. Shaw*[1] and *Attorney-General v. Hitchcock*[2]. Evidence showing that a witness was a member of a conspiracy the object of which was to fabricate evidence against a party would be admissible as it would be cogent evidence of bias. I see no reason why in considering the admissibility of evidence tendered to prove a witness to be a member of such a conspiracy the Court should not follow the ordinary rule which is accurately stated in Phipson on Evidence, 9th ed., p. 98, as follows:

> On charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy, or the *participation* of the defendants be proved first, though either element is nugatory without the other.

[1] (1888), 16 Cox 503.

[2] (1847), 1 Ex. 91, 154 E.R. 38.

Of course the witness is not on trial, but once it is conceded that the question whether or not he is a participant in such an alleged conspiracy may be inquired into I see no reason why the rules of evidence which are applicable to both civil and criminal combinations would not govern the admission of any evidence tendered.

The circumstance that where such evidence is offered much time might be expended at a trial in inquiring into a collateral issue would not afford a sufficient ground for refusing to receive it. To decide whether in the case at bar the evidence tendered for the purpose of showing bias and rejected by the learned trial judge was properly rejected would require a critical examination of the record and as I have concluded that the appeal succeeds on another ground I do not pursue this question further.

I would allow the appeal and quash the conviction.

As the view of the majority of the Court is that the appeal fails, nothing would be gained by my expressing an opinion as to what further order should have been made had the conviction been quashed.

Appeal dismissed, CARTWRIGHT J. *dissenting.*

Solicitor for the appellant: M. Robb, Toronto.
Solicitor for the respondent: J. D. Hilton, Toronto.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.