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LAWRENCE DEACON.....APPELLANT;

*May 12, 13 14, 15

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal Law—Murder—Evidence—Crown witness declared adverse—Effect of cross-examination by Crown counsel on previous statement made police—Effect of cross-examination by Defence counsel on sketch attached to said statement—Whether admissible to test credibility, or evidence of content—Canada Evidence Act—Where witness declared adverse ss. 9 and 10 to be read together to make applicable proviso to s. 10—But proviso does not make that evidence which would not otherwise be evidence—S. 1014 of the Criminal Code—Charge to jury—Misdirection—New Trial.

The appeal was from the judgment of the Court of Appeal for Manitoba (1947) 55 Man. R. 1, dismissing (Adamson J. and Donovan J. dissenting) appellant's appeal from his conviction on a charge of murder. At the trial Helen Elizabeth Berard, a witness for the Crown, gave evidence contradictory to statements made previously by her to the police and at the inquest of the deceased. On motion of Crown counsel the trial judge declared her an adverse witness and Crown counsel thereupon cross-examined her on a previous statement, without making it an exhibit, which consisted of five pages written by the witness and an extra page on which appeared a sketch drawn by her showing the back of the head of a taxi driver to have a bald spot. (The taxi driver, with whose murder the accused was charged, did not have a bald spot.) The five pages and the sketch were not fastened together at the time of their inception. Counsel for the accused in cross-examining the witness showed her the sketch, which at the preliminary inquiry had been attached to the sheets containing the writing, but which he at the trial removed and handed to the witness. The trial judge ruled that the entire statement including the sketch should go in as an exhibit (14) filed by the defence. In charging the jury the trial judge said it was their duty keeping in mind his charge as to reasonable doubt, to establish if possible in which of the conflicting statements of the witness lay the germ of truth. The accused did not testify nor were any witnesses called on his behalf.

Held: The judgment appealed from and the conviction should be set aside and a new trial directed.

Per the Chief Justice and Kerwin, Taschereau and Estey JJ.: The prior self-contradictory statements of Crown witness Helen Elizabeth Berard, both sworn and unsworn, had no probative or evidential value as against the accused, and were not evidence of their content and could be used only to impeach the credit of the witness Berard, even though defence counsel cross-examined on them. The learned trial judge erred in going on the assumption that such prior self-contradictory statements were evidence of their content and inviting the jury to find "what germ of truth" there was in them.

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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The said prior self-contradictory statements were not evidence of their content and the jury should have been so instructed, and not having been so instructed, it was not possible to say with confidence that without them the jury would have found a verdict of guilty.

There was an error at the trial for the reasons specified above in connection with exhibit 14, and it could not be said that there was no substantial wrong or miscarriage of justice, within section 1014 of the *Criminal Code*. The sketch and the written document being one document from the commencement, the effect of what Crown counsel had done was to make available the whole of it so that counsel for the accused became entitled to refer to the sketch, not mentioned by Counsel for the Crown; while the action of counsel for the accused had the effect of making the writing, as well as the sketch, an exhibit; but neither one could serve as evidence against the accused except, in so far as the witness adopted them as part of her testimony, and did not take the exhibit out of the category of something merely going to the creditibility of the witness and raise it to the status of something that as against the accused was to be taken as evidence of the truth contained in the writing.

Assuming that where a witness is declared adverse by the trial judge, sections 9 and 10 of the *Canada Evidence Act* should be read together so as to make applicable the last part of the proviso in subsection 1 of section 10:—

> "and that the judge, at any time during the trial may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit," this does not mean that the trial judge may make that evidence which would not otherwise be evidence. Target Tillson Birch (1924) 18 Cr. A.R. 26 at 28, 29 and the trial judge erred in directing the jury that they could treat the written part of exhibit 14 as evidence of the truth of what is therein stated Rex. *v.* Dibble (1908) 1 Cr. A.R. 155, A. White (1922) 17 Cr. A. R. 59, Rex *v. Francis & Barber* [1929] 3 D.L.R. 593. The decision in John Williams (1913) 8 Cr. A. R. 133 distinguished. There was nothing in the evidence given by the witness Berard at the preliminary inquiry as read into the record of the trial to show that she was a self-confessed perjurer. Douglas Walter Atkinson (1934) 24 Cr. A.R. 144 distinguished. Rex *v.* Kadeshevitz [1934] O.R. 213; 61 C.C.C. 193 and Rex *v.* Ferguson 83 C.C.C. 23 at 25 referred to.

Per Rand J.: The effect of counsel for the accused offering in evidence the sketch made by the witness Berard and cross-examining her thereon, was to introduce in evidence the written statement which accompanied the sketch and simply completed the evidence of the statement. It did not extend the statement's relevancy beyond credibility. The trial judge erred in holding that counsel for the accused, by putting the sketch in evidence, must be taken to have introduced the statement itself as substantive evidence on behalf of the accused, and in charging the jury that the incriminating facts contained in the statement were to be treated as having general testimonial character from which, and the rest of the evidence, the jury was to extract the truth. An error in such a vital matter cannot be held to have been unquestionably overborne by the rest of the case presented.

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APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing (Adamson J. and Donovan J. dissenting) the appellant's appeal from his conviction, at trial before Major J. and a jury, on a charge of murder.

H. Walsh for the appellant.

A. A. Moffat K.C. and *J. H. Stitt* for the respondent.

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

KERWIN J.:—This appeal from a decision of the Court of Appeal for Manitoba (1) affirming the appellant's conviction on a charge of murder is based upon dissents by Adamson J. and Donovan J. The former would have set aside the conviction and ordered a new trial on the following grounds:—

1. That the prior self-contradictory statements of Crown witness Helen Elizabeth Berard, both sworn and unsworn (viz. exhibits 12, 13 and 14 and the inquest evidence), had no probative or evidential value as against the accused, and were not evidence of their content and could be used only to impeach the credit of the witness Helen Elizabeth Berard, even though defence counsel cross-examined on them.

2. The learned Trial Judge erred in going on the assumption that such prior self-contradictory statements were evidence of their content and inviting the jury to find "what germ of truth" there was in them.

3. That the said prior self-contradictory statements were not evidence of their content and the jury should have been so instructed, and not having been so instructed it was not possible to say with confidence that without them the jury would have found a verdict of guilty;

Donovan J. dissented on these grounds in substance, and also on other grounds but, furthermore, came to the conclusion that the accused should be acquitted. I cannot agree that there should be an acquittal but since, in my view, there was error at the trial for the reasons specified above in connection with exhibit 14, and I am unable to say there was no substantial wrong or miscarriage of justice within section 1014 of the Criminal Code, it follows that there should be a new trial, and I therefore refrain from discussing the evidence at length or the other grounds of dissent mentioned by Donovan J., with one exception.

Exhibit 14 consists of five pages of a statement written by the witness Berard and an extra sheet on which appears a sketch drawn by her showing the back of the head of

(1) (1947) 55 Man. R. 1.

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a taxi driver to have a bald spot. The taxi driver, with whose murder the accused was charged, did not have a bald spot. I take it from the evidence, as did also the Chief Justice of Manitoba, that the five pages containing the written statement of Berard, and the sketch, really formed one document from their very inception, although the various sheets were not fastened together at that time.

At the trial Berard, called as a witness by the Crown, was declared adverse by the trial judge under section 9 of the *Canada Evidence Act* and by leave of the judge, Crown counsel cross-examined her as to her previous written statement in exhibit 14 without making it an exhibit. Berard admitted having made this statement but said it had been written under fear of the police and denied the important part of it in which she placed the accused with her in the taxi at the time of the slaying. Counsel for the accused later showed her the sketch, which at the preliminary inquiry had been attached to the sheets containing the writing but which counsel for the accused at the trial removed and handed to the witness separately. This sketch and the written statement being one document from the commencement, the effect of what Crown counsel had done was to make available the whole of it so that counsel for the accused became entitled to refer to the sketch, not mentioned by counsel for the Crown, as possibly affecting the written part. Counsel for the accused put in the sketch as an exhibit and it is contended for the Crown that this made the writing an exhibit and that what was narrated therein was evidence of the truth thereof. While the action of counsel for the accused had the effect of making the writing as well as the sketch an exihibit, neither one could serve as evidence against the accused except, of course, in so far as the witness adopted them as part of her testimony at the trial.

The fact that the sketch was put in as an exhibit, and therefore the writing, does not take the exhibit out of the category of something merely going to the credibility of the witness and raise it to the status of something that as against the accused is to be taken as evidence of the truth of the statements contained in the writing. A contrary proposition would be entirely foreign to our criminal law.

Assuming that where a witness for the Crown is declared adverse by the trial judge, sections 9 and 10 of the *Canada Evidence Act* should be read together so as to make applicable the last part of the proviso in subsection 1 of section 10:—

> and that the judge, at any time during the trial may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit,

this does not mean that the trial judge in making "such use of it for the purposes of the trial as he thinks fit" may make that evidence which would otherwise not be evidence. This would appear to be so in principle and was the view of the Court of Criminal Appeal in *Target Tillson Birch*, (1).

The trial judge directed the jury that they could treat the written part of Exhibit 14 as evidence of the truth of what is therein stated. That this was wrong is made plain by all the text-books and such cases as *Rex* v. *Dibble*, (2), *A. White* (3), *Rex* v. *Francis & Barber*, (4). The decision of the Court of Criminal Appeal in England in *John Williams* (5), must be read with care. Apparently a witness gave the same testimony at the trial as on a previous occasion except that she gave a different date for certain important occurrences and it was held that the jury might consider that part of the previous testimony to which she agreed at the trial. There is nothing in this case that conflicts with the general proposition.

It was argued that on the authority of *Leonard Harris* (6), and *Douglas Walter Atkinson* (7), the jury should have been warned that the evidence of Berard was of no value. In the *Atkinson* case (7), a witness was stated by the Lord Chief Justice, at page 125, to be not only an accomplice in connection with charges against the accused of perjury and subornation of perjury but also herself a perjurer. That precise point does not arise here because there is nothing in the evidence given by Berard at the preliminary inquiry as read into the record of the trial to show that she was a self-confessed perjurer. So far as her testimony at the trial was shown to be contradictory to

(1) (1924) 18 Cr. A.R. 26, at 28, 29.
(2) (1908) 1 Cr. A.R. 155.
(3) (1922) 17 Cr. A.R. 59.
(4) [1929] 3 D.L.R. 593.
(5) (1913) 8 Cr. A.R. 133.
(6) (1927) 20 Cr. A.R. 144.
(7) (1934) 24 Cr. A.R. 123.

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the written statement in Exhibit 14, certain expressions in the Leonard Harris case do afford a basis for the argument of counsel for the present appellant. While it must be borne in mind that the appeal in that case was dismissed the Lord Chief Justice is reported to have said at page 149:—

> The learned judge directed the jury in the proper way, namely, that the effect of the previous statement taken together with the sworn statement was to render the girl a negligible witness and that the jury must consider whether the case was otherwise and by others made out.

As to this, I agree with Riddell J., in *Rex* v. *Kadeshevitz* (1), that that cannot be taken to correctly set forth the law. That is not to say that there may not be cases where it is advisable for a trial judge to point out a weakness in the Crown's case, particularly if it arises from the bad record of the principal Crown witness. It was so put, and not as a principle of law, by Chief Justice Robertson, speaking for the Court of Appeal for Ontario, in *Rex* v. *Ferguson* (2).

Because the trial judge in this case instructed the jury that Berard's statement in exhibit 14 might be taken as evidence of the truth of what was therein stated, the judgment appealed from and the conviction should be set aside and a new trial directed.

RAND J.:—This is an appeal from a conviction for murder. In the Court of Appeal there were dissents on a number of questions of law, but I do not find it necessary to deal with more than one.

The leading witness for the prosecution was, in the course of her testimony, declared to be hostile, and the Crown was permitted to cross-examine her in relation to a previous statement in writing she had of her own volition prepared and handed to the police. In that she purported to give an account of the murder of the driver of a taxi in which she and the accused had been riding, but out of which she had got or was getting when the fatal act was committed, an account which directly connected the accused with that act. Her evidence in court, bringing their movements generally to the scene of the death con-

(1) [1934] O.R. 213; 61 C.C.C. 193. (2) (1944) 83 C.C.C. 23 at 25.

sistently with the statement, diverged from it in representing the taxi carrying the accused to have left the scene and in introducing a new taxi in which the killing took place, of which she was, virtually, a witness. The statement signed by her was produced in court and the examination on it proceeded by reading it passage by passage to her, the whole of which the witness admitted having made. The document itself was not further offered in evidence or otherwise read to the jury. On cross-examination, counsel offered in evidence a sketch made by her representing the scene of her movements in the vicinity of the crime. This sketch, showing the roads with streetcar tracks along which the taxi had passed and she had afterwards fled, contained also a drawing of the back of a man's head with a bald spot on it which the witness stated to represent the head of the driver of the taxi in which she and the accused had been passengers. There was evidence that the slain man had no such baldness. It later appeared that the sketch had accompanied the statement which it was intended by the witness to illustrate when given by her to the police. The Crown thereupon took the position that by putting the sketch in evidence, counsel must be taken also to have introduced the statement itself as substantive evidence on behalf of the accused. The trial judge so held, and in the charge (and as well in the address of Crown counsel) the incriminating facts contained in the statement were treated as having general testimonial character, from which and the rest of the evidence the jury was to extract the truth.

That such statements generally are limited to credibility and cannot be used as evidence of the truth of the facts to which they relate, is well established: *Rex* v. *Dibble* (1), *Rex* v. *Harris* (2), *Rex* v. *Francis & Barber* (3). It is quite true that it may be difficult to dissociate the matters of such statements from the facts brought before the jury by the witness and to nullify the influence they may have on the minds of the jurors in dealing with the evidence as a whole; but anything short of this would expose a

(1) (1908) 1 Cr. A.R. 155.
(2) (1927) 20 Cr. A.R. 144.
(3) [1929] 3 D.L.R. 593.

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person to a fabricated account of events, too dangerous to risk. But the whole field of cross-examination, in the discretion of the court, is opened and the matters of the statement can thus be brought within the test of the testimonial response of the witness. This might be taken as a reason for leaving all the facts, including the statement, to the consideration of the jury, but the long experience of the courts is against it.

It is argued that the case of *Rex* v. *Harris* (1), in which a similar question arose has been disregarded in *Rex* v. *Kadeshevitz* (2); but what was there dissented from was the apparent language of Hewart, L.C.J. that in the presence of such a contradiction the sworn testimony in court of the witness must be treated as wholly nullified. The Court of Appeal for Ontario held that the testimony might be considered by the jury notwithstanding the contradiction; but it accepted the view that the contradictory statements themselves could not be treated as substantive evidence, available for all purposes.

The question here, then, is whether, in the circumstances, the effect of the course taken by counsel for the accused has been to enlarge the relevancy of the statement. As the whole of it was read in court in the hearing of the jury and as the sketch was an explanatory part of it, the introduction of the latter by the defence simply completed the evidence of the statement that had been brought out. It was counsel's right to have the entire statement so presented without extending its relevancy beyond credibility. The addition to the record of the statement itself brought nothing new to the proceedings, and must be considered in any view to be limited likewise to its original purpose.

It is urged by Mr. Moffatt that notwithstanding this impropriety, the remaining evidence as a whole was of such weight as to enable us to say that the jury must, under proper directions and acting judicially, have found the accused guilty. From that view, on this particular point, Adamson, J. A. (*ad hoc*) dissented, and with him I

(1) (1927) 20 Cr. A.R. 144. (2) [1934] O.R. 213; 61 C.C.C. 193.

agree that the error in such a vital matter cannot be held to have been unquestionably overborne by the rest of the case presented.

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

Appeal allowed, conviction quashed and new trial directed.

Solicitors for the appellant: *McMurray, Greschuk, Walsh, Micay, Molloy, Denaburg and McDonald.*

Solicitor for the respondent: *J. O. McLenaghen.*