J. W. PARADIS.....APPELLANT; 1933

AND * Nov. 10, 13. * Dec. 22.

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Conspiracy—Evidence—Proof of unlawful agreement—Instances when evidence is relevant—Whether irrelevant evidence, prejudicial to accused, should be merely ruled out, or a new trial ordered, is a matter primarily to be decided by trial judge.

On a charge of conspiracy, the agreement itself, no doubt, is the gist of the offence; but the actual agreement need not be proven by direct evidence. It may be gathered from several isolated doings, having possibly little or no evidentiary value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

Admissions directly from the mouth of the accused of a nature to elucidate the true meaning and the character of his relations with an alleged co-conspirator constitute relevant evidence.

On a charge of conspiracy to set fire to a building, evidence of a recent attempt on the part of the accused to induce another person (not connected with the present charge) to commit the offence, is relevant as tending to establish criminal intent and guilty design, if the defence is trying to assign an innocent purpose to the acts directly charged as establishing the conspiracy.

It is not error for a trial judge to permit proof of acts of the alleged conspiracy to be given in evidence before the agreement to conspire has been established, provided the latter is in fact proved during the course of the trial.

There may be extreme cases where an unexpected and irrelevant reference made by a witness to a statement alleged to have been made by an accused is so prejudicial, that merely ruling out the evidence is insuffi-

* PRESENT:—Duff C.J. and Rinfret, Smith, Crocket and Hughes JJ.

1933

PARADIS v. THE KING

Rinfret J.

cient fully to protect the accused, and the jury should be discharged and the prisoner tried before a fresh jury. But it is primarily for the trial judge to decide whether such a course ought to be followed, under the circumstances of the particular case; and a court of appeal will always approach with great caution a question as to the propriety of that decision.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the jury's verdict of conviction of the present appellant on his trial (before Gibsone J. and a jury) on a charge of conspiracy to commit arson. The material facts for the purposes of the present appeal, and the questions in issue in the appeal, are sufficiently stated in the judgment of Rinfret J., now reported. The appeal to this Court was dismissed.

Lucien Gendron K.C., *Oscar Gagnon* and *William Paradis* for the appellant.

Valmore Bienvenue, K.C., for the respondent.

The judgment of the court was delivered by

RINFRET J.—This case is the consequence of a fire which partly destroyed a furniture factory at Daveluyville, in the province of Quebec, during the night of the 29th of December, 1931.

In May, 1932, one Donat Pépin, who was night watchman at the factory, was convicted of having wilfully set the fire.

In June of the same year, the appellant was charged with conspiracy to commit the crime with Pépin, or with other persons unknown. He was found guilty by the jury. He appealed to the Court of King's Bench, and the conviction was confirmed by a majority of the judges of that Court, Howard J. dissenting with regard to the admissibility in evidence of certain telegrams and of the testimony of one Bergeron. The points of dissent alone must be considered and determined on the present appeal.

First, as to the telegrams.—

In attempting to place before the jury the facts tending to establish the existence of the conspiracy, it was part of the Crown's case to prove that Pépin had been hired as night watchman at Daveluyville, at the suggestion and through the endeavours of Paradis, in furtherance of the plot to burn the factory.

On December 21, 1931, Paradis was proven to have written to the Victoriaville Furniture Co., owners of the factory, a letter reading as follows:—

Paradis & Pellerin Limitée,
Successeurs de J. W. Paradis & Jean A. Pellerin,
J. W. Paradis, Courtier en Assurances,

Victoriaville, Qué. ce 21 décembre 1931.

Victoriaville Furniture Ltd.,
Victoriaville, P.Q.

Messieurs:—*Attention M. Georges Cantin.*

J'ai examiné les polices d'assurance et je considère qu'il serait mieux pour vous d'avoir un gardien de nuit et un de jour, parce que les compagnies d'assurances croient qu'un homme ne peut pas garder pendant 24 heures, parce que lorsqu'il a gardé pendant 12 heures, c'est tout ce qu'il peut faire.

Alors veuillez donc, s'il vous plaît, vous entendre avec M. Donat Pépin, le garçon de Jules, pour qu'il puisse garder la nuit.

J'ai parlé à M. Pépin qui est allé recevoir un char de bois actuellement, mais il doit revenir mercredi soir, et il serait prêt à commencer jeudi. En attendant je notifie les compagnies d'assurance que vous avez un gardien de jour et un de nuit.

Bien à vous,

(Signé) J. W. Paradis.

In that letter as will have been noted, Paradis stated he had already spoken to Pépin about the suggested engagement.

The next day, December 22, the following telegrams were alleged to have passed between Pépin and Paradis:—

Daaquam, Qué. 22 décembre 1931.

J. W. Paradis,

Veuillez me faire remplacer par Maurice Lachance, rue St-Jean-Baptiste, d'ici quelques jours; je serai pas Victoriaville avant vendredi, tel qu'entendu tous les deux.

Donat Pépin.

Victoriaville, le 22 décembre 1931.

Monsieur Donat Pépin,
Daaquam, Co. Montmagny.

Sur quel train arriverez-vous vendredi?

J. W. Paradis.

Daaquam, 22 déc. 1931.

J. W. Paradis,

Je calcule arriver vendredi par train de nuit.

Donat Pépin.

1933

PARADIS v. THE KING

Rinfret J.

There was ample evidence for the jury to find that the telegrams had been actually exchanged between the parties. But the appellant sought to discount their evidentiary value on the ground—to quote the learned dissenting judge—that

> The language of the telegrams conveys no hint of any concealed, sinister purpose; one has to read into them what is not there to give them any such import. And that is all the writing connected with the accused that there is of record. No one professes to have been present when the alleged plot was formed between Paradis and Pépin or to have overheard it or even to have seen them together in conference before the fire.

We think the objection is untenable. Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from "several isolated doings", (Kenny—"Outlines of Criminal Law", p. 294) having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

In that view, the telegrams exchanged between Pépin and Paradis were undoubtedly receivable. Indeed, when connected with the other facts of the case, they might well be regarded as part of the agreement itself. At least, they formed important links in the chain of detached acts of the parties obviously tending towards the common design and from which the conspiracy might be inferred.

We have no doubt that, in the premises, the telegrams were rightly admitted in evidence by the learned trial judge.

The other question raised by the dissenting judgment refers to the legality of portions of Bergeron's testimony with regard to certain conversations he declared he had with the appellant on the 22nd of December, 1931, and later with Pépin before and after the fire.

Proof of the conversation with the appellant should not have been permitted—so it is contended—" because of its obvious irrelevance ".

Bergeron testified that, on the 22nd of December—and therefore barely six days before the happening of the fire—

the appellant, who was then his employer, called him to his office and offered him five hundred dollars to burn the factory. He stated furthermore that he asked him to drive with him to Daveluyville. On their way, to quote the words of the witness himself,

> Dans l'automobile, il m'a proposé de mettre le feu à la manufacture, même de me faire nommer gardien à la manufacture; qu'il pouvait me faire nommer quand il voudrait; que c'était facile pour lui; qu'il n'avait que la peine de donner une lettre etc.

After they had reached Daveluyville, Paradis showed him around the factory and, during the course of this visit, pointed to him a likely convenient place to set the fire ("Ici, ce serait une très bonne place, c'est bien sec"). He added:

> Le bon temps pour faire brûler ça, c'est le jour de Noël au soir, pendant la messe de minuit; tout le monde serait à l'église, il y aurait personne pour remarquer le gars qui mettrait le feu.

And, as he was positively indicating his unwillingness to act, Bergeron relates that Paradis then said:

> J'aurais bien Donat Pépin pour faire la job . . . (mais) il n'est pas ici; il est rendu au diable au vert. J'ai reçu un télégramme à matin, il ne pourra pas être ici avant le Jour de Noël après-midi . . . Il ne sera pas là; puis, finalement, on pourra pas le faire brûler le jour de Noël.

Thereupon, seeing that Bergeron persisted in his refusal, Paradis is stated to have said:

> Pense plus à ça. Parles-en pas même à ta femme çà, je ne voudrais pas que personne sache çà.

We are unable to agree that the above evidence ought not to have been received. So far as it contained admissions directly from the mouth of the accused of a nature to elucidate the true meaning and the character of his relations with Pépin, the evidence was clearly relevant. If, as suggested by counsel for the appellant, it tended to show, on the part of the accused, a previous attempt to commit a similar offence, still in our opinion the trial judge was right in allowing it to be made in the present case. Indeed, in our view, it was more than evidence of a similar offence; it proved an effort by Paradis to pursue the very object of the conspiracy.

Treating the matter merely from the viewpoint of a similar offence, the rule is that acts of the accused, though not forming part of the incriminated transaction, are relevant, if they bear

> upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental.

1933

PARADIS v. THE KING

Rinfret J.

(*Makin* v. *Attorney-General for New South Wales* (1); and see *Baker* v. *The King* (2).

It was competent to the Crown to adduce evidence with the object of showing that the appellant had in mind the setting of the fire to the Daveluyville factory. Bergeron's deposition afforded proof on Paradis' part of a recent attempt to induce Bergeron to commit the offence coinciding with the first steps in the conspiracy with which Paradis was charged. To these initial steps in the alleged unlawful agreement, the defence was trying to assign an innocent purpose. The impugned evidence was relevant as tending to establish criminal intent and guilty design; in fact, it was evidence of the intention to do the very thing for which he was indicted.

The other portions of Bergeron's testimony to which exception was taken have reference to statements of Pépin related by Bergeron and alleged to have been made a few days before the fire, on the 26th of December, 1931, as well as after the fire, in January and February, 1932.

In the dissenting judgment, the objection to the admissibility of those statements is put upon exactly the same ground as the objection in respect of the telegrams already discussed. It is said that neither the telegrams, nor the testimony of Bergeron with regard to the conversations with Pépin, should have been admitted "inasmuch as the Crown failed to make by other means *prima facie* proof of the existence of the alleged conspiracy."

We have already indicated that, upon the ground thus stated, the opinion of the learned dissenting judge cannot be upheld; for, in our view, and quite independently of the declarations said to have been made by Pépin, there was evidence in the record establishing *prima facie* that the appellant was engaged in the unlawful conspiracy. Nor would it be error for a trial judge to permit proof of acts of alleged conspiracy to be given in evidence before the agreement to conspire has been established, if the latter is in fact proved during the course of the trial. *The King* v. *Hutchinson* (3).

No further point need be discussed, for that disposes of all the questions of law raised in the dissenting judgment

(1) [1894] A.C. 57. (2) [1926] S.C.R. 92, at 103.
(3) (1904) 8 Can. Cr. Cas. 486.

which alone is the foundation of the jurisdiction of this Court in the matter. Perhaps we may add that Pépin's statements to Bergeron were not received as proof against Paradis. The trial judge so ruled and the jury was so told. But the indictment mentioned Pépin's name as one of the conspirators and, in this way, it was sought to establish Pépin's connection by evidence tending to show the actual consummation of the crime by him. We will deal later on more fully with the statements of the 26th of December, 1931. As for those of January and February, 1932, they do not incriminate Paradis and in no way do they refer to him. In fact, if anything, that part of the evidence rather leads away from him; at most, it was unnecessary. More particularly in view of the express warning in the presiding judge's address, later to be referred to, we are unable to conclude that any harm was done in the special circumstances.

Before us, however, counsel for the appellant strongly urged that a particular statement of Pépin referring to the accused was of such a character that the whole trial was thereby vitiated.

Although we entertain serious doubt as to whether the point is covered by the dissenting judgment,—and our present view would be that it is not—since we have heard counsel for and against it, we may express the opinion that a full consideration of the able argument presented to us would not warrant, on this point, our interference with the judgment of the majority of the Court of King's Bench.

The statement incriminating Paradis was made on the 26th of December by Pépin to Bergeron, under the following circumstances:

In conformity with the telegrams exchanged on the 22nd of December and with the interview between Pépin and Paradis, as stated in the latter's letter of December 21 already referred to, Pépin had come to Victoriaville; and, on the 26th of December, he was preparing to leave for Daveluyville to take charge of his job as night watchman. That morning, so Bergeron testifies, he met Pépin on the street. Pépin was in Paradis' automobile, a Hudson car, on his way to the garage, where he was to take Paradis' truck for the purpose of driving to Daveluyville. The truck had been out of commission for some time; it required to

1933

PARADIS v. THE KING.

Rinfret J.

be looked after; it needed chains and a new battery. Pépin asked Bergeron to help him in this work of preparation. After they were through, and just as Pépin was leaving, he volunteered the statement that he was starting out for a "damned job". Bergeron said to him he would be better not to undertake it, to which Pépin is alleged to have made the unexpected reply: "Oh, well! I am a bachelor and the Paradis have lots of influence" ("Les Paradis ont de l'influence en masse").

Objection was taken immediately. A long discussion ensued at the conclusion of which the trial judge ruled that the reference to Paradis should be struck from the deposition. Notwithstanding the learned judge's ruling, the appellant strongly contends that the reference was so prejudicial to the accused that the jury should have been discharged and the prisoner tried before a fresh jury.

There may be extreme cases where the suggested procedure might be adopted, although we apprehend the question whether such a course ought to be followed is primarily for the trial judge to decide upon the circumstances of the particular case; and a court of appeal will always approach with great caution a question as to the propriety of that decision. In this instance, at all events, there are clearly no adequate grounds for holding that the learned judge ought to have acted otherwise than he did.

Bergeron's testimony as to the preparations made by Pépin, when leaving for Daveluyville, in Paradis' car, was admissible both as tending to show Paradis' connection with the scheme and as being evidence of acts done by Pépin within the scope of the objects of the conspiracy with which Paradis was identified. (*Baker* v. *The King*) (1). It was therefore contended by the Crown that Pépin's remarks, made at the time of doing such acts in pursuance of the common design, should not be regarded as mere admissions uttered by him but as "contemporaneous comments" so related to the incidents reported by Bergeron and so intimately connected with them as to form part of the acts themselves, the evidence of which was properly receivable. (See Russell on Crimes, 8th ed., vol. I, p. 189, and the authorities therein collected.) But it is not necessary to decide that point in this case, in view of the ruling

(1) [1926] S.C.R. 92 at 103.

made by the learned trial judge. We refer to it only to indicate that the mere mention of the appellant's name at the place complained of in Bergeron's testimony did not, in the circumstances, carry the serious consequences represented to us. In the premises, the evidence objected to was ruled out and all mention of Paradis' name by Pépin was ordered struck from the record. We find, moreover, that in his address to the jury the presiding judge gave them a special direction on this point. He reminded them of his decision that Pépin's statements mentioning the name of Paradis were inadmissible, that any such statements were made without right, and he warned them that the evidence in that respect should be regarded as excluded ("Des paroles que Pépin aurait dites, que Paradis était mêlé à l'affaire, ça, j'ai dit que ça ne pouvait pas faire preuve contre Paradis").

We are satisfied that the appellant has no substantial ground of complaint in the premises.

The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *William Paradis.*

Solicitor for the respondent: *Valmore Bienvenue.*