NORMAN JOSEPH (RUFUS) PITRE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1932

*Dec. 19.

*Dec. 23.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Evidence—Trial—Direction to jury as to uncorroborated evidence of accomplice—Refusal to allow opinion evidence of ballistic expert—Competency to testify as to handwriting.

The judgment of the Supreme Court of New Brunswick, Appeal Division, setting aside a jury's verdict of acquittal of appellant on a charge of murder, and ordering a new trial, was affirmed, on the ground that

*PRESENT:—Rinfret, Lamont, Smith, Crocket and St. Jacques (*ad hoc*) JJ.

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the trial judge charged the jury in such a way as to give the impression that they should not convict on the uncorroborated evidence of an accomplice and, unless they found corroborative evidence, their duty was to acquit; that this was a misdirection in law; and, under the circumstances, probably had a material effect upon the jury's minds.

The jury should be told that it is within their legal province to convict, but should be warned that it is dangerous to convict, and may be advised not to convict, on the uncorroborated evidence of an accomplice. *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Rex* v. *Beebe,* 19 Cr. App. R. 22; *Gouin* v. *The King,* [1926] Can. S.C.R. 539, and other cases referred to.

Crocket J. took also the ground that the trial judge erroneously refused to allow a certain ballistic expert witness to state his opinion as to whether or not the bullet which caused the death had been fired from the revolver produced. (Rinfret, Lamont and Smith JJ., while holding that the trial judge's ruling out was wrong, were of opinion that, in view of later evidence from the same witness, the ruling out had not much effect).

Rinfret, Lamont and Smith JJ. held that the trial judge had rightly refused to allow the evidence of a certain witness as to certain letters being in appellant's handwriting, as the witness' competency to testify in that regard had not been established; a witness may be competent to testify as to a person's handwriting by reason of having become familiar with his handwriting through a regular correspondence; but in the present case the evidence to establish competency did not shew sufficient to constitute a "regular correspondence."

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division, setting aside the jury's verdict of acquittal of the present appellant on his trial (before Le Blanc J. and a jury) on a charge of murder, and ordering a new trial. The material facts for the purposes of the present appeal, and the questions in issue on the appeal, are sufficiently stated in the judgment of Smith J. now reported. The appeal to this Court was dismissed.

C. T. Richard for the appellant.

C. D. Richards K.C. for the respondent.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

SMITH J.—The appellant was indicted for murder and tried at Bathurst, N.B., on the 19th August, 1932, and acquitted. The verdict of not guilty was appealed to the Supreme Court of New Brunswick, Appeal Division, and was set aside on the 4th October, 1932, and a new trial ordered, on the following grounds:

1. The learned trial judge was in error in refusing to admit in evidence certain letters written by the accused and found undelivered in his cell.

2. The learned judge was in error in refusing to permit the ballistic expert witness, Dr. Rosalier Fontaine, to give evidence expressing his opinion as to the mortal bullet having been fired from the revolver in the possession of the accused.

4. The learned judge was in error in his charge to the jury on the question of corroboration:

(*a*) in instructing the jury that they should not convict instead of warning them of the danger of convicting on the evidence of an accomplice unless corroborated in some material particular implicating the accused;

(*b*) in placing undue stress on the point that they should not convict on the evidence of an accomplice unless corroborated in some material particular implicating the accused; and

(*c*) in instructing the jury as follows:

> If you have found that corroborative evidence and believe the evidence of Wallace Pitre and if you find that he has been corroborated in the way in which I have marked out to you, then your duty is to convict and to find the prisoner guilty. If you find the evidence of Wallace Pitre has not been corroborated in the way which I have marked out, then your duty is clear to acquit him.

The appeal is from this judgment, setting aside the acquittal on these three grounds.

The evidence excluded, which is referred to, in the first of the grounds mentioned, was that of Audina Auber, who was called to prove that certain letters, found in the cell of the accused, were in his handwriting. She testified that she had known the accused for six months, and that he had been " keeping company " with her; that he was away from home last winter, and sent her two post cards, which she read, but did not keep. She further testified that since the appellant had been in jail, she had received two letters from him, brought to her by some boys, one of whom she recognized.

Relying on the receipt, in this way, by the witness of the two post cards and the two letters, and on nothing else, the Crown proposed to prove by her that the paper writing

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produced marked "M" was in the handwriting of the appellant. This evidence was objected to, and the Court ruled, "I will not allow that evidence at present"; and the witness stood aside. She was recalled, at a later stage, but the Crown made no further effort to examine her as to the appellant's handwriting.

It is not necessary to prove handwriting by an expert witness, but it must be established that the witness has in some way become competent to testify as to the handwriting; and it has been laid down that a witness may be competent by reason of having become familiar with a person's handwriting through a regular correspondence or through having frequently seen the person's handwriting. On the bare facts established here, I do not think the learned trial judge erred in refusing to accept the witness as one competent to testify as to the appellant's handwriting. Two post cards and the letters, unanswered, without any indication as to their contents, or any circumstances brought out to indicate that the witness had reason to believe that these two post cards and two letters were actually in the handwriting of the accused, do not go far enough, in my opinion, to constitute a regular correspondence within the meaning of the rule laid down by Lord Coleridge in *Rex* v. *O'Brien* (1), as follows:

> To prove handwriting, it is necessary that a witness should have either seen the person write, or corresponded regularly with him, or acted upon such a correspondence. Then the witness may swear to his belief as to the handwriting, but without one of these foundations for his belief the question is inadmissible.

The Crown was not precluded by the ruling from further questioning the witness to show grounds for her belief that the documents she had received were really in the handwriting of the accused, but simply dropped the matter.

As to the second ground quoted above, Dr. Fontaine, a qualified expert, had examined the bullet of ·38 calibre that caused the death, and had examined also a ·38 calibre revolver shown to have been in the possession of the accused the day before the murder, and had fired another bullet from this revolver, and then compared by a microscope and photographs the marks left on the two bullets by the barrel of the revolver from which they had been fired. He found seven similar marks on each bullet. He

(1) (1911) 7 Cr. App. R. 29, at 31.

was asked, as an expert, from the experiment and observations he had made, his opinion as to whether or not the bullet which caused the death had been fired from the revolver mentioned. He testified that he was in a position to give an opinion, and was finally asked:

And what would be your opinion?

THE COURT: I will not allow him to express an opinion. I will shut it out.

This ruling was wrong, but it is claimed that the effect of it is modified by what followed. The witness is next asked if the points of similarity would indicate anything to him, and what, and he answered:

That indicates that the two bullets compared were fired from the same revolver.

THE COURT: They are indications——

A. It is an opinion, not a certitude.

THE COURT: You say that positively——?

A. They might indicate——

THE COURT: They are indications——?

A. They are indications——

THE COURT: That the two bullets might have come from the same revolver?

A. Yes.

THE COURT: And that is as far as any man can go?

A. Yes.

It is argued from this that the witness actually gave his opinion, and that all he could say was that these two bullets, both of ·38 calibre, might have come from the same revolver. It would hardly take an expert of Dr. Fontaine's experience and capacity, with his microscopes and experiments, to be able to say that two bullets of ·38 calibre might have been fired from the same revolver of ·38 calibre. Under these circumstances, it can hardly be said that the original ruling out of his opinion had much effect.

The fourth ground upon which the setting aside of the acquittal is based is therefore the serious one.

The learned trial judge, in instructing the jury in his charge as to what they should do with regard to the uncorroborated evidence of the accomplice, many times gave them misdirection. At p. 159 he says:

* * * although you may convict upon Wallace Pitre's evidence alone uncorroborated you should not do so. I am warning you that Wallace Pitre being an accomplice his evidence should be corroborated by other testimony implicating Rufus in some of the material particulars of the offence, and I am repeating it to you because it is important and I want you to understand it—that a jury although they may convict on the uncorroborated evidence of an accomplice, they ought not to do so and it

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is the duty of the trial judge to warn you not to convict on the uncorroborated evidence of an accomplice, in this case, Wallace Pitre is an accomplice of Rufus Pitre, and you should not convict on his evidence alone unless you find it is corroborated in some material particular by independent evidence implicating Rufus Pitre.

At p. 168, he says:

* * * I have explained to you how although you may convict on his uncorroborated evidence, that you should not unless it was corroborated by independent evidence of witnesses testifying as to independent particulars implicating the accused.

At p. 169, he says:

If you find the evidence of Wallace Pitre has not been corroborated in the way which I have marked out then your duty is clear to acquit him.

Again, on the same page, he says:

* * * although you may convict on the uncorroborated evidence of Wallace Pitre who is an accomplice, you should not do so unless his evidence is corroborated in some material particular by evidence implicating the accused * * *.

The rule as to what direction should be given to a jury concerning the uncorroborated testimony of an accomplice was settled in *The King* v. *Baskerville* (1).

In the subsequent case of *Rex* v. *Beebe* (2), Lord Hewart C.J., gives in a few words the rule laid down in the *Baskerville* case (1), as follows:

[The jury should be told] that it is within their legal province to convice; they are to be warned in all such cases that it is dangerous to convict; and they may be advised not to convict.

He further points out that a direction in such a case to the jury that they ought to convict would not be according to the law laid down in the *Baskerville* case (1).

These judgments have been referred to and acted upon in a number of cases in this Court, particularly *Gouin* v. *The King* (3); *Brunet* v. *The King* (4); and *Vigeant* v. *The King* (5).

In the *Baskerville* case (1) Lord Reading quotes from *Rex* v. *Everest* (6), as follows:

The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused;

and, commenting on this quotation, says:

"Tell the jury to acquit" should read "Warn the jury of the danger of convicting."

(1) [1916] 2 K.B. 658.
(2) (1925) 19 Cr. App. R. 22.
(3) [1926] Can. S.C.R. 539.
(4) [1928] Can. S.C.R. 375.
(5) [1930] Can. S.C.R. 396.
(6) (1909) 2 Cr. App. R. 130.

Again he says, on the same page, that the *Everest* case statement quoted above goes too far in saying that the judge should direct the jury to acquit.

In the present case, it will be seen that the learned trial judge, in the quotations set out above, misdirected the jury in telling them on these various occasions throughout the charge that they should not convict on the uncorroborated evidence of the accomplice, and that it was their duty to acquit.

In the reasons of the Court of Appeal, one of the passages from the learned trial judge's charge, quoted above, is set out, as follows:

> * * * a jury although they may convict on the uncorroborated evidence of an accomplice, they ought not to do so and it is the duty of the trial judge to warn you not to convict on the uncorroborated evidence of an accomplice;

and the following comment is made on it:

> The latter sentence is correct; the former is an error.

I am of opinion that the latter sentence is not correct. The learned trial judge was entitled to *advise* the jury not to convict on the uncorroborated evidence of an accomplice, or to warn them that it was dangerous to convict.

There was, of course, evidence before the jury corroborating the evidence of the accomplice and implicating the accused; and it was only in the event of the jury disbelieving or discarding such corroborative evidence that they were called upon to make a finding upon the uncorroborated evidence of the accomplice; and it becomes difficult to understand why the learned judge kept impressing upon the jury so many times their duty to acquit on the uncorroborated evidence of an accomplice. In addition to the fact that these repeated directions were wrong, they probably had the effect of leading the jury to believe that the case must be disposed of on the theory that there was no evidence corroborating the accomplice. Under all the circumstances, the repeated misdirections of the learned trial judge probably had a material effect upon the minds of the jury.

The appeal therefore should be dismissed.

CROCKET J.—I am of opinion that the learned trial judge in his directions to the jury regarding the corroboration of the testimony of the accomplice, Wallace Pitre, went

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beyond the rule laid down in *Rex* v. *Baskerville* (1), and adopted by this Court in *Gouin* v. *The King* (2) and *Vigeant* v. *The King* (3). While he had the right, if in his discretion he deemed it wise to do so, to advise the jury not to convict in the absence of independent evidence corroborating the testimony of the accomplice in some material particular implicating the accused, the effect of the several passages quoted from the judge's charge by my brother Smith is such that the jury might well have supposed that, no matter how fully they may have believed in the truth of the testimony of the accomplice, they could not convict upon it alone. The statement "If you find the evidence of Wallace Pitre has not been corroborated in the way which I have marked out then *your duty is clear to acquit him*" could leave no other impression than that of an imperative and positive direction to acquit in the absence of corroboration. Such a direction cannot, I think, be justified within the rule, as now recognized in the Court of Criminal Appeal in England and in this Court, that a trial judge may in his discretion advise the jury not to convict upon the uncorroborated evidence of an accomplice. Whatever formula judges may adopt in giving such advice, when they deem it proper to do so, it ought not to be given in language which may convey to the jury the impression that they cannot convict upon the uncorroborated testimony of an accomplice if they are convinced beyond all reasonable doubt that the testimony of the accomplice is in fact true, and see fit thus to act upon it.

Upon this ground as well as upon the ground of the refusal of the learned trial judge to allow Dr. Fontaine, the ballistic expert, to state his opinion as to whether or not the mortal bullet was fired from the revolver which was produced in court—a question to which the Crown was entitled to have a definite answer—I think the Appeal Division of the Supreme Court of New Brunswick was fully justified under the law, as it now stands in this country, in setting aside the verdict of acquittal and ordering a new trial, and for these reasons would dismiss the appeal.

(1) [1916] 2 K.B. 658. (2) [1926] Can. S.C.R. 539.
(3) [1930] Can. S.C.R. 396.

ST. JACQUES J. (*ad hoc*).—The appeal should be dismissed. 1932

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Appeal dismissed.

Solicitor for the appellant: *C. T. Richard.*
Solicitor for the respondent: *R. P. Hartley.*