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*Dec. 15.

EUGENE BIGAOUETTE .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Murder—Trial judge—Charge to jury—Indirect comment on failure of accused to testify—Canada Evidence Act, R.S.C. (1906), c. 145, s. 4, subs. 5.

The appellant was charged with the murder of his mother. The trial judge, in instructing the jury, made the following remarks: "The doctor who made the autopsy has declared that the death must have occurred at

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

seven o'clock in the morning or even before. The accused was at that time in the house according to his own declaration to police officers. The accused was then alone with his mother when she was killed; and if so, the defence should have been able to explain by whom the murder has been committed, because such a brutal murder could not have been committed without the knowledge of the accused."

Held that, although the language of the charge might be understood as relating to a failure of the accused to give an explanation to police officers or others, it is also easily and naturally capable of being understood as relating to the failure of the accused to testify upon that subject at the trial; and therefore such language is obnoxious to the imperative direction of subs. 5 of s. 4 of the Canada *Evidence Act* which requires the trial judge to abstain from any comment upon the failure of an accused to take advantage of the privilege which the law gives him to be a witness at the trial in his own behalf. The accused is entitled to a new trial.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant for murder.

The material facts of the case and the question at issue are stated in the above head-note and in the judgment now reported.

Alleyn Taschereau K.C. and *J. E. Bédard K.C.* for the appellant.

Arthur Fitzpatrick K.C. and *V. Bienvenu K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—As a new trial is necessary, and since the crime with which the accused is charged is one of the greatest gravity, it is important to adhere rigorously to the practice of refraining from any comment on the circumstances of the case, beyond that which is strictly necessary in order to elucidate the point upon which the decision of the appeal turns.

It should be said at the outset that the jurisdiction of this court rests upon the dissent of Mr. Justice Allard, and in particular upon his view, in which he was not in agreement with his colleagues, that the learned trial judge, in instructing the jury, had failed to observe the imperative direction of subs. 5 of s. 4 of the Canada *Evidence Act*, which, in effect, requires the trial judge to abstain from any comment upon the failure of the accused to take ad-

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vantage of the privilege which the law gives him to be a witness at the trial in his own behalf.

The learned trial judge said:

> Le docteur Marois a fait l'autopsie à trois heures et quart, et si vous croyez son témoignage (c'est un homme dont le témoignage a du poids), il a déclaré que la mort avait dû arriver à sept heures, ou à six heures et même avant, du matin.
>
> Voilà les circonstances qui enveloppent la mort de la défunte.
>
> Si la mort, mes amis, remonte à six heures ou à sept heures du matin, où était l'accusé à ce moment-là, vers sept heures ou six heures du matin, même plus à bonne heure? A la maison. A la maison. Car, d'après sa propre déclaration, il n'est sorti qu'à huit heures du matin.
>
> Il était donc seul avec sa mère à la maison quand la mort est arrivée et si l'accusé était seul avec sa mère quand elle a été tuée et égorgée, la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis. Car une pareille boucherie n'a pas dû se faire, sans que l'accusé en eut connaissance.

It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145. The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex* v. *Gallagher* (1), in these words:

> * * * it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.

There must be a new trial.

Appeal allowed.

(1) (1922) 37 Can. Cr. C. 83.