CRIMINAL LAW AND THE SUPREME COURT: 1923–1947

C. H. O'HALLORAN
Victoria

The present article is concentrated upon the subject of the proper direction of juries, as examined and rationalized by the Supreme Court of Canada in some of the reported decisions since the first publication of the Canadian Bar Review twenty-five years ago. A great number of criminal cases do not go before juries, it is true. But judges and magistrates who, as judges of fact as well as law, are required to perform jury functions govern themselves according to the principles that a judge sitting with a jury must explain to the jury.

The most frequent point of attack on appeal is the judge's charge. Has he told the jury something he ought not, or has he failed to tell them something he ought, with which so often are allied questions involving alleged improper admission or rejection of testimony? If the judge is sitting without a jury, do his reasons show, or in the absence of properly stated reasons, does his conclusion disclose upon examination of the whole case, that he has misconceived the evidence, misapprehended its weight, or misdirected himself upon the law applicable to findings of fact which properly admitted evidence can support?

Much depends upon what can stand the test as legal evidence. Much depends also upon the probative force of the evidence as to the particular facts viewed in the light of the whole case. The courts are governed by the necessity for a fair trial of the accused, in which he is not required to prove his innocence, and in which the prosecution must prove its case against him on the merits, without interjecting matters or issues that tend to prejudice his fair trial. It may be in point perhaps to add that the great bulk of appellate court decisions do not reach the Supreme Court of Canada, but considerations of space and the scope of this article require that they be left untouched.

For convenience the decisions referred to have been divided into three groups: (1) Misdirection, or non-direction amounting thereto, considered apart from misreception of evidence; (2) Misdirection, or non-direction amounting thereto, arising from misreception of evidence; and (3), if (1) or (2) has occurred, the principles surrounding the application or non-application of section 1014 (2) of the Criminal Code of Canada.

I

Misdirection, or Non-direction Amounting Thereto, Considered Apart from Misreception of Evidence

(a) *Alternative defences.* In *Wu* v. *The King*[1] (wounding with intent to commit murder), the defence was an alibi. The accused did not give evidence at his trial. In answer to objections that the trial judge did not put other defences to the jury, the Supreme Court of Canada held that, while the accused may rely upon any defence for which a foundation of fact appears in the record, whether the evidence upon which it is based was given by witnesses for the Crown or the accused, a defence of alibi is an exception to the rule, if it negatives the alternative defence upon which he seeks a new trial.

(b) *Defence of drunkenness.* In *MacAskill* v. *The King*[2] (murder), the issue was whether the accused's mind was so incapacitated from liquor that he was incapable of the intent essential to constitute murder. The trial judge instructed the jury that they could not accept this defence unless they were satisfied that the Crown witnesses, who had described the prisoner's act in striking the fatal blow and who had given an account of his conduct and reported the expressions used by him before and after that act, were not worthy of credit. Applying *Director of Public Prosecutions* v. *Beard*,[3] the Supreme Court directed a new trial because the issue of incapacity from liquor was not submitted to the jury as a question of fact. After observing that there may be cases in which the trial judge may be justified in directing the jury that there is no legal evidence of incapacity, the court said that this was not such a case and there still remained the question for the jury:

> Given the existence of some degree of capacity, and assuming the facts deposed to by the witnesses for the Crown, whether the appellant was so affected by drink as to be incapable of having the intent to kill or of meaning to cause an injury which he knew was likely to result in death.

(c) *Defence of accident.* In *The King* v. *Hughes et al.*[4] (murder), Hughes shot and killed the deceased in the course of a struggle while carrying out the common plan of robbery. The trial judge charged the jury that it was murder or nothing for all four. The Court of Appeal set the convictions aside because

[1] [1934] S.C.R. 609.
[2] [1931] S.C.R. 330.
[3] [1920] A.C. 479, at pp. 501-2.
[4] [1942] S.C.R. 517.

the jury were not charged that upon the evidence the revolver might have gone off by accident. This view was upheld in the Supreme Court of Canada. But the Supreme Court added that, if this question had been put to the jury, it would have been necessary to put to them also that, if they found the revolver went off by accident (or were not satisfied that it did not go off by accident), they might still find a verdict of murder under sections 252 (2) and 259 (d) of the Criminal Code, if they were satisfied that the conduct of Hughes was such that he ought to have known it to be likely to induce such a struggle as occurred, that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle. The court held that the evidence of accident in the *Hughes* case ruled out the application of *Beard's* case (*supra*) and *Rex* v. *Elnick*.[5] It is to be noted that Code section 260 has since been amended by sections 6 and 7 of the 1947 amendment.[6]

(d) *Putting before the jury observations as to the guilt of the accused made by a member of the Court of Appeal on a previous trial.* In the second trial of *The King* v. *Manchuk*[7] (murder), the trial judge put before the jury a sentence from the reasons for judgment of a member of the Court of Appeal, which had set aside the conviction on the first trial. The sentence was: "In the case in hand I am far from suggesting that the conduct of the accused would not justify a verdict of wilful murder". The Supreme Court held that this was an error of sufficient gravity to vitiate the verdict:

> . . . we can have no doubt that it was inadmissible to present to the jury the opinion of any one that on the former trial the evidenc was sufficient to justify a conviction of the accused of the murder. . .[8]

In the second trial of *MacDonald* v. *The King*[9] (armed robbery and forcible imprisonment of the driver of a truck), counsel for the Crown in his address to the jury read part of the reasons for judgment of a member of the Court of Appeal relating to the evidence of a Crown witness at the first trial. It was argued that counsel's action caused a mistrial because the excerpt read dealt with the credibility of an important witness. The Supreme Court rejected the submission. While not condoning what was done, the court said it could not find anything in the remarks that praised the credibility of the witness.

[5] (1920), 33 C.C.C. 174.
[6] 11 Geo. VI, c. 55.
[7] [1938] S.C.R. 341.
[8] *Ibid.*, at pp. 347-8.
[9] [1947] S.C.R. 90.

For this reason the court held that no miscarriage of justice had occurred, but added that the question would be different if the extract from the appellate judge's reasons had tended to create a favourable impression of the credibility of the witness.

(e) *Onus upon the Crown to prove guilt.* In the second trial of *The King* v. *Manchuk*[10] (murder), the jury had asked the trial judge if, in order to reduce murder to manslaughter, it was "necessary to establish the fact that the person killed committed the act of provocation". The Supreme Court held that the form of the question clearly implied the jury's understanding that, if the Crown proved the killing, it thereby disposed of the presumption of the prisoner's innocence; and consequently that the jury believed they must find the prisoner guilty of murder unless he established provocation affirmatively to their satisfaction. The court said the trial judge ought to have removed this patent error from the minds of the jury when answering their question. His failure to do so was regarded as sufficient ground in itself to set aside the conviction for murder.

(f) *Existence of common intention under Code section 69 (2).* In *Savard and Lizotte* v. *The King*[11] (manslaughter), the Supreme Court held that the question of fact as to the existence or non-existence of a common wrongful intention on the part of the appellants was completely taken away from the jury by the trial judge when he told them that the guilt of the appellants was dependent on a finding that they had exceeded the force recognized by Code section 43. The court quashed the convictions.

(g) *Appeal by Crown on grounds not considered or suggested at the trial.* In *Wexler* v. *The King*[12] (murder), the Crown's case was that the accused had intentionally shot the deceased with intent to kill her. The defence relied on the prisoner's own evidence that it was an accident. The trial judge instructed the jury that if they believed the accused he was entitled to be acquitted. Both counsel at the trial accepted this direction as correctly formulating the single issue before the jury. The jury acquitted. The Crown appealed under Code section 1013 (4) and the Court of Appeal directed a new trial on grounds not suggested or considered at the trial, namely, that the jury ought to have been instructed that (1) there was evidence to convict of murder under Code section 259 (c) and (d); and (2) the accused, being bound to take reasonable precautions with the

[10] [1938] S.C.R. 341.
[11] [1946] S.C.R. 20.
[12] [1939] S.C.R. 350.

loaded pistol to avoid danger to human life, might have been convicted of manslaughter under sections 247 and 252 (2). The Supreme Court of Canada allowed the appeal, holding that section 1013 (4) was not intended to confer jurisdiction upon an appellate court to set aside a verdict of acquittal on a trial for murder in the present circumstances, and so entitle the Crown to obtain a new trial in order to present an entirely new case against the accused.

(h) *Provocation.* In *The King* v. *Manchuk* [13] (murder), the accused killed Seabright by several blows with an axe in the course of vigorously protesting the latter's right to restore a line fence after the accused had removed it. Almost immediately the accused rushed over to Mrs. Seabright who was emerging from her house a short distance away, and struck her blows from which she died. The accused was convicted of manslaughter for the slaying of the husband. At a subsequent assize he was convicted of murder of the wife, but the Court of Appeal directed a new trial on the ground that the trial judge had directed the jury that provocation justifying reduction of murder to manslaughter must be given by the person who is killed; in short, since there was no evidence of provocation by the wife, the provocation by the husband could not be invoked.

The Supreme Court of Canada sustained the Court of Appeal, holding that acts of provocation committed by a third person, which might be sufficient to reduce the offence to manslaughter if the victim had in fact participated in them, may have the same effect where the offence against the victim is committed by the accused under the belief that the victim was a party to those acts, although not implicated in them in fact. The court considered it was a question for the jury

> whether (a) the acts relied upon as constituting provocation were calculated to deprive an ordinary man of self-control to such an extent as to cause an attack upon Mrs. Seabright of such a character as that delivered by the accused; and (b) whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack upon Mrs. Seabright was acting upon such provocation on a sudden and before his passion had time to coo[1], and under the assumption that she was involved therein.

In the new trial in *The King* v. *Manchuk*,[14] one of the grounds on which the conviction for murder was set aside by the Supreme Court of Canada arose out of the trial judge's reply to a question from the jury:

[13] [1938] S.C.R. 18.
[14] [1938] S.C.R. 341.

> In order to reduce a murder charge to a manslaughter charge, is it necessary to establish the fact that the person killed committed the act of provocation?

Instead of answering this question in precise and unambiguous terms, the trial judge read to the jury nearly the whole of the judgment of the Supreme Court of Canada in the previous trial in the same case, interlarded with comments of his own. The court held that his answer did not convey a correct conception of what might constitute provocation and noted that in the earlier part of his charge he had discussed provocation in a manner to lead the jury to believe that there were differences of opinion among Canadian judges on the very question the jury addressed to him.

In *The King* v. *Krawchuk*[15] (murder), the accused husband killed his wife who had been carrying on illicit relations with another man during his absence from home, despite being twice ejected. There was some evidence that a few hours before the shooting, the wife, while at home together with the other man and her husband, by her words and conduct had led the accused to believe she was about to leave him. The trial judge did not direct the jury's attention to this evidence, but told them that he could recollect no evidence of provocation and, even if there was "any insult or anything of that sort, wasn't there time in which his passion had time to cool?" The Court of Appeal by a majority held the jury were entitled to find provocation reducing the crime to manslaughter and directed a new trial. In the Supreme Court of Canada, three judges were of opinion that there was evidence of provocation, three judges were of opinion there was not, while the seventh member of the court said that "in all the circumstances of this case" he would not set aside the Court of Appeal's direction for a new trial.

In *Taylor* v. *The King*[16] (murder), the accused husband had been drinking. He testified he said to his wife, "You have been out with Harry Holmes", to which she replied "So what? Harry Holmes is alright", and walked over to him and slapped him hard on the side of the head. The trial judge instructed the jury that they could consider the slap as provocation but not the accompanying words. The Supreme Court distinguished *Holmes* v. *Director of Public Prosecutions*[17] as founded upon the common law and without force in Canada, where under Code section 261 "insult" includes language as distinct from acts.[18]

[15] [1941] 2 D.L.R. 353; 75 C.C.C. 219.
[16] [1947] S.C.R. 462.
[17] [1946] A.C. 588.
[18] In this connection see *Rex* v. *Krawchuk*, 1940-56, B.C. at pp. 26-7 and 75 C.C.C. 219.

Another point came up in *Taylor* v. *The King*. The accused being capable of forming an intent to kill, the question arose whether his condition from drinking liquor could be considered by the jury in relation to provocation, that is, whether he was actually deprived of the power of self-control by the provocation which the jury had found to be present. Rinfret C.J.C. and Kerwin J. held it could not be considered by the jury and disapproved of the decision of the Saskatchewan Court of Appeal in *Rex* v. *Harms*,[19] while Taschereau, Kellock and Estey JJ. approved *Rex* v. *Harms* in this respect.

(i) *Corroboration.* In *Steele* v. *The King*[20] (carnal knowledge), corroboration of the complainant's story was found in the evidence of a witness who saw the girl and the accused dancing together in a dance-hall, then leave the hall separately, meet outside and walk toward a public park. The witness did not see them enter the park, where the girl testified the assault took place. There was evidence also that the accused threatened this witness a week later. The Court of Appeal held the evidence corroborative quite apart from the threat. As I read the judgments in the Supreme Court of Canada, it was not held that the Court of Appeal erred in this respect.

In *Gouin* v. *The King*[21] (manslaughter, arising out of an abortion), the trial judge instructed the jury that, if they believed the evidence of the uncorroborated accomplice, they not only had the right to convict, but it was their duty to do so. The Supreme Court (Idington J. dissenting) held that this direction was not sanctioned by the *Baskerville* case.[22] Applying *The King* v. *Beebe*,[23] the court said that the learned judge in such circumstances ought to warn the jury of the danger of convicting on the uncorroborated testimony of an accomplice, although in his discretion he may advise them not to convict upon such evidence; but he should also point out to the jury that it is within their legal province to convict upon such uncorroborated evidence.

In *Hubin* v. *The King*[24] (carnally knowing a girl under 14 years of age), the court held that identification by the complainant of the appellant's car by its licence number and a certain cushion was not independent evidence to constitute corroboration. But the court directed a new trial on the ground (page 449) that,

[19] (1936), 66 C.C.C. 134.
[20] [1924] 4 D.L.R. 175; 42 C.C.C. 375.
[21] [1926] S.C.R. 539.
[22] [1916] 2 K.B. 658, at p. 669.
[23] (1925), 19 Cr. App. R. 22.
[24] [1927] S.C.R. 442.

if the conduct of the appellant when arrested and again when identified by the complainant, and in making two inconsistent statements, had been found by the trial judge to be corroborative of the story of the complainant, the conviction could not have been set aside. It is to be noted that the authority of *The King* v. *Feigenbaum* [25] cited in the *Hubin* case at page 449, regarding the corroborative effect of accused's failure to make any reply to a statement to him by a police officer, was doubted in *Rex* v. *Keeling*.[26]

In *Brunet* v. *The King* (manslaughter arising out of abortion) the Supreme Court held [27] that in fact there was no admissible corroborative evidence to be submitted to the jury and that it was the undoubted duty of the judge to warn the jury that it would be dangerous to convict on the uncorroborated evidence of an accomplice (which he had not done). But the court added that "it was not to be taken" that the warning would have been unnecessary if there had been admissible corroborative evidence, because:

> It is for the jury to say whether or not the corroborative evidence is to be believed, and if it is not believed by the jury, and yet they convict, no warning having been given, they are convicting on the uncorroborated evidence of the accomplice without having been warned of the danger of doing so.

In *Vigeant* v. *The King* [28] (conspiracy to commit an indictable offence), the appellant was convicted with two other men. The main ground of appeal was that Boulanger, a police spy and chief witness for the Crown, was an accomplice and that the trial judge had failed to instruct the jury upon the legal meaning of an accomplice and to warn them of the danger of convicting upon the uncorroborated testimony of an accomplice. The court directed a new trial. There was evidence that Boulanger, at some stage of the affair, had been an accomplice in the conspiracy and in his charge the trial judge stated this as a question of fact for the jury. The court held that in these circumstances the trial judge ought, first, to have instructed the jury upon what constituted an accomplice in law; secondly, he ought to have directed the jury's attention in particular to any evidence that would serve to indicate Boulanger's complicity in the conspiracy at any stage of it; thirdly, he ought to have submitted to them the issue whether that evidence made him

[25] (1919), 14 Cr. App. R. 1.
[26] (1942), 28 Cr. App. R. 121.
[27] [1928] S.C.R. 375, at p. 381.
[28] [1930] S.C.R. 396.

an accomplice; and, fourthly, he ought to have instructed them that, if they found Boulanger was an accomplice at any stage, he had to warn them of the danger of convicting upon his uncorroborated evidence, although the law did not preclude them doing so.

The court pointed to the incorrect statement in the third edition of Phipson on Evidence (1902), which had been cited in support of the proposition that the rule regarding corroboration does not apply "to the case of persons who have . . . continued in a conspiracy as agents of the police". It was noted that this statement had been corrected in the sixth edition (1921) at page 486, where the rule is stated to be inapplicable to persons "who have joined in or even provoked the crime as police agents". This distinction was stated to underlie the observation in Roscoe's Criminal Evidence (15th ed.) at page 156. To exclude the rule the police agent must have been connected with the matter from the very first only as a police spy, and not merely have "continued" as such.

In *Pitre* v. *The King* [29] (murder), the Supreme Court upheld the Appeal Division of New Brunswick, which had set aside a jury's verdict of acquittal on a charge of murder and directed a new trial. The trial judge had instructed the jury in such a manner as to give them the impression that they should not convict on the uncorroborated evidence of an accomplice and, unless they found corroborative evidence, that their duty was to acquit. The correct instructions were considered in *Gouin* v. *The King*, *Brunet* v. *The King* and *Vigeant* v. *The King*, *supra*. In *Canning* v. *The King* [30] (conspiracy to distribute morphine), Furumoto, who had been convicted previously as a co-conspirator, testified as to various conversations with the accused regarding the sale of morphine; and stated that on one occasion he met the accused in the house of one Ferraro and, while there, went out of a room where others were gathered and had a private conversation with the accused regarding the sale of morphine. A police agent then present testified that dealings in morphine were being carried on at the house by some of the parties involved in the conspiracy and that he had seen Furumoto there in conversation with the accused, who had left the room with Furumoto.

The accused testified in his own defence that he had been in the house at the time, but denied any private conversation

[29] [1933] S.C.R. 69.
[30] [1937] S.C.R. 421.

with Furumoto. The trial judge instructed the jury correctly upon corroboration in law and told them that the police agent's evidence, if they believed it, was corroborative of Furumoto's evidence. The learned judge told the jury:

> Fisher [the police agent] does not say he overheard the conversation. He does not know what the conversation was. It might have been as to the weather. All that amounts to is this: it is proof of a fact, if you accept what Furumoto tells you, that it did occur. If you accept that, then you have Fisher's corroboration of nothing more or less than that the conference which Furumoto says occurred, did occur. *That is all it corroborates, and the inference there is for you.* . . (my italics)

The Supreme Court of Canada upheld this direction, with the exception of Mr. Justice Kerwin who held that the police agent's testimony indicated merely an opportunity within the meaning of *Burbury* v. *Jackson*[31] to discuss things.

In *McIntyre* v. *The King*[32] (rape), a Crown witness R, who arrived at the scene shortly after the occurrence, testified that the grass was matted down in an area about 20 by 6 feet. The complainant had said nothing about it in her evidence. The accused, whose defence was consent, testified that the area was matted down before the occurrence. The trial judge instructed the jury that R's evidence in this respect corroborated the complainant. The Court of Appeal upheld the conviction, but the Supreme Court of Canada, by a majority, directed a new trial. Two members of the court held that, since the complainant had given no evidence regarding the matted-down condition of the area, R's evidence in respect thereto could not be corroborative. One member of the court held that the condition of the area could not furnish the slightest corroboration to the story of the complainant or to the case of the Crown. Two other members of the court (who would have quashed the appeal on the ground that no questions of law, but purely matters of fact, were involved in the dissent below) held there was corroboration. In their view, since the complainant had given evidence of a struggle, R's evidence regarding the matted-down area was consistent with a struggle having taken place at that point and was therefore corroborative of the evidence of the complainant, unless it were clearly established, as a matter of fact, that the struggle was of such limited character that it could not have caused the matted-down condition of an area of the extent described by R.

[31] [1917] 1 K.B. 16.
[32] [1945] S.C.R. 134.

In *MacDonald* v. *The King* [33] (armed robbery and forcible imprisonment of the driver of a truck), a truck carrying liquor had been held up by several men, the liquor stolen and stored in the barn of one Shorting, who later the same day notified the police. After recovering the truck and the liquor the police visited the appellant's apartment in Toronto where they found him with the men who had committed the crime a few hours before. At appellant's trial Shorting and his employee, Wilkinson, identified him as one of the men who had assisted in unloading the liquor from the truck at the barn. The appellant's defence was an alibi and he testified in his own defence that the stolen liquor had not been mentioned in his apartment when the men were there. The trial judge instructed the jury that, if they found Shorting and Wilkinson were accomplices, they could find corroboration of their testimony in (a) the appellant's presence at the barn; (b) in the meeting at his apartment; and (c) in his denial that the stolen liquor was discussed at his apartment when the men were there.

The Supreme Court upheld the trial judge's directions. As to (a) and (b), Mr. Justice Taschereau (with whom Kerwin and Hudson JJ. concurred) said at page 98 (and see Rand and Kellock JJ. at page 101):

> The presence of the appellant with the perpetrators of the crime in his own apartment, and his association with them, a few hours after the robbery, was a circumstance from which the jury could reasonably draw the inference, that Shorting and Wilkinson were speaking the truth when they swore that MacDonald was in the barn helping to unload the stolen liquor. It was also for them to believe that MacDonald would not have been present at that meeting if he was not linked in some material way with the others who have been found guilty.

As to (c), Mr. Justice Taschereau said at page 98 that MacDonald's denial of any discussion in his apartment regarding the stolen liquor could be viewed by the jury as implausible and as not being an expression of the truth. After pointing out that the jury saw and heard MacDonald, and citing *The King* v. *Christie* [34] and *Mash* v. *Darley*,[35] Mr. Justice Taschereau said at page 99:

> The behaviour of a witness as well as his contradictory or untrue statements are questions of fact from which a jury may properly infer corroboration.

---

[33] [1947] S.C.R. 90.
[34] [1914] A.C. 545, at p. 560.
[35] [1914] 3 K.B. 1226, at p. 1234.

II

Misdirection, or Non-direction Amounting Thereto, Arising from Misreception of Evidence

(a) *Tender of evidence given at previous trial.* In *McDonald, Conter & O'Hearn* v. *The King*[36] (violation of section 193 of the Customs Act, R.S.C., 1927, c. 42) the testimony of one Wheeler, given in two previous trials (in which the juries had disagreed) was introduced under Code section 999 (he being absent from Canada) on admissions by counsel of "every fact essential to the admission of the evidence of Captain Wheeler under Section 999 of the Code". The Supreme Court held that the admission by counsel in those terms was sufficient to comply with section 999, but directed a new trial on the ground that the admission did not in any way identify the document which was read to the jury as the evidence given by Captain Wheeler on the former trials.

(b) *Evidence of child of tender years.* A conviction for murder was set aside in *Sankey* v. *The King*[37] on the ground that unsworn evidence was received from a ten-year old girl, without any inquiry as to the capacity or education of the girl in regard to her comprehension of the meaning, effect and sanction of an oath. Under section 16 of the Evidence Act it is quite as much the duty of the trial judge to ascertain by appropriate methods whether or not the child does or does not understand the nature of an oath, as it is to satisfy himself of the intelligence of the child and his appreciation of the duty of speaking the truth. On both points the trial judge has a statutory duty upon which his discretion is to be exercised judicially. It was pointed out that the term "child of tender years" is not defined, but the court added that in the case of no ordinary child over seven years of age can it be safely predicated, from mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime (and see Code sections 17–18).

(c) *Use of prior contradictory statements in writing made by a Crown witness at the trial.* In *Deacon* v. *The King*[38] (murder), one Helen Berard had written a statement of five pages, with which was a sketch drawn by her showing the back of the head of a taxi-driver with a bald spot. The taxi driver with whose murder the accused was charged did not have a bald spot. At the trial Berard, when called as a witness by the Crown,

[36] [1930] S.C.R. 569.
[37] [1927] S.C.R. 436.
[38] (1947), 89 C.C.C. 1 (Supreme Court of Canada).

was declared adverse by the trial judge and, by leave of the court, Crown counsel cross-examined her upon her written statement (but not the sketch) without making it an exhibit. She admitted having made the 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 separately and put it in as an exhibit. The court held that making an exhibit of the sketch had the effect of making the written statement an exhibit as well, but that the result was not to make either of them evidence of the truth of the statements contained in the writing. They extended merely to the credibility of the witness. Accordingly the court held that the trial judge erred in directing the jury that they could treat the written statement as evidence of the truth of what it stated. Nor should the jury be told that Berard's evidence was worthless; in this respect the court disapproved of *Rex* v. *Harris*[39] and *Rex* v. *Atkinson*[40] and observed that *Rex* v. *Williams*[41] must be read with care.

(d) *Failure of witness to claim the protection of section 5 of the Canada Evidence Act.* In *Tass* v. *The King*[42] (procuring abortion), the appellant appeared as a witness for the Crown at the preliminary inquiry of one Ford, charged with manslaughter of the woman on whom the abortion was performed. The appellant did not then claim the protection of section 5 of the Canada Evidence Act. Objection was taken to the admission of this evidence of the appellant on his own subsequent trial, but the Supreme Court held the evidence was properly admitted.

(e) *Questions to accused on cross-examination.* In *Markadonis* v. *The King*[43] (murder), the accused gave evidence on his own behalf and, on his cross-examination, he was repeatedly asked in effect to state his opinion regarding the veracity of several Crown witnesses. In addressing the jury, the learned judge said, referring to one of these Crown witnesses, that the accused was asking the jury to believe that this responsible man had committed perjury. Mellish J., dissenting in the Appellate Division, held this direction might reasonably lead the jury to

[39] (1927), 20 Cr. App. R. 144.
[40] (1934), 24 Cr. App. R. 123. See also: *Rex* v. *Darlyn* (1946), 88 C.C.C. 269, at p. 273; *Rex* v. *Gilmore and Waterfield* (1946), 88 C.C.C. at pp. 223-7.
[41] (1913), 8 Cr. App. R. 133.
[42] [1947] S.C.R. 103.
[43] [1935] S.C.R. 657.

conclude that, if they believed the accused, they must thereby find that this "responsible man" had committed perjury. The majority of the Supreme Court of Canada agreed with this view in granting a new trial, stating at page 661:

> We do not think, moreover, in considering the probable effect of the evidence, that the accused was imputing perjury to the witnesses against him as suggested by counsel for the Crown in his questions addressed to the accused, which suggestion was impressively commented upon by the learned trial judge in his charge.

It is to be observed also that Mellish J. said of these questions addressed to the accused (and the majority of the Supreme Court of Canada accepted his view at page 659):

> The questions were I think irrelevant and should not have been asked, and it appears surprising that they were not objected to. The answers to such questions might prejudice the accused before the jury, and I cannot conceive of any legitimate reason for asking them. It is a method of cross-examination which I think is unfair and should not be resorted to nor allowed especially in a case like the present: *Regina* v. *Bernard* (1858), 1 F. & F. 240, at 249; *McMillan* v. *Walker* (1881), 21 N.B. Rep. 31; *North Australian Territory Co.* v. *Goldsborough Mort. & Co.* (1893), 2 Ch. Div. 381, at 385.

In *Koufis* v. *The King*[44] (arson), the accused was asked in some detail on cross-examination about a fire in another building. The trial judge told the jury that the only reason the accused would be asked about another fire was to show he was likely to start the fire in the case as charged. The Supreme Court directed a new trial. Mr. Justice Kerwin (with whom Duff C. J.C. agreed) said (page 487):

> A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the Court, but when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial.

The court ruled that the questions could not be upheld on the grounds of credibility, system or intent. Mr. Justice Taschereau (with whom Rinfret and Crockett JJ. agreed) said at page 490:

> All these questions were obviously asked in order to convey to the jury the impression that the accused had set fire previously to another building, and to establish the possibility that he committed the offence for which he is now charged.

(f) *Evidence of statements made by others in presence of accused.* In *Stein* v. *The King*[45] (receiving and retaining), a

[44] [1941] S.C.R. 481.
[45] [1928] S.C.R. 553.

detective testified that after the accused was arrested he confronted him with two men (one after another) who had been charged with the theft of the goods and (after the customary warning to all three) he questioned them in accused's presence and took notes of what they said, which he gave in evidence although the accused had not assented to them. On objection to the judge's charge by prisoner's counsel, the jury were recalled and the judge told them:

> I have already warned you in this case it would be most dangerous for you to rely on their evidence against the prisoner without feeling it was corroborated in other respects because [of] what they said [when] the prisoner was there. He did not express any particular assent to it and you should reasonably be bound by what he did assent to and I think on the whole it is almost worthless evidence for you.

The Supreme Court directed a new trial on the ground that the trial judge ought to have told the jury that, in the absence of any assent by the accused either by word or conduct to the correctness of the statements made in his presence, they had no evidentiary value whatever as against him and should be entirely disregarded (*The King* v. *Christie*[46]). Instead, when the jury were recalled, he accentuated the prejudice by again referring to the statements as "evidence" susceptible of corroboration (page 556).

In *Chapdelaine* v. *The King*[47] (murder by poisoning), the deceased husband made a statement, incriminating his accused wife, in the presence of two witnesses four or five days before his death and nearly two weeks after the poisoning. The trial judge ruled it could not be received as a deposition *ante mortem*, but admitted it as a declaration by the victim in the presence of the accused. But he did not so restrict himself in his charge to the jury, for he emphasized the statement of the deceased that he was going to die and so gave more weight to the truth of the declarant's statement that he had been poisoned by his wife. Duff C.J.C. (with whom Cannon and Crockett JJ. agreed), after examination of *Rex* v. *Christie*[48] and *Rex* v. *Norton*,[49] said it was "not seriously open to dispute" that

> the learned trial judge's charge was calculated to convey to the jury the belief that they were entitled to weigh the evidential value of the statement as if the statement were evidence of the facts stated, apart from the behaviour of the prisoner.

[46] [1914] A.C. 545.
[47] [1935] S.C.R. 53.
[48] [1914] A.C. 545, at pp. 554 and 559.
[49] [1910] 2 K.B. 496, at p. 500.

(g) *Evidence of similar acts.* In *Baker* v. *The King* and *Sowash* v. *The King* [50] evidence by the Crown was admitted in rebuttal to establish that on one occasion recently within a month, and on another occasion several years before, Baker had employed the same ruse and similar weapons (*viz.*, posing as a revenue officer with arms and implements such officers might be expected to use). The Supreme Court held, applying the principles stated in *Thompson* v. *The King*,[51] *Brunet* v. *The King* [52] and *The King* v. *Armstrong*,[53] that it was relevant to the issue of design. It would have been competent (page 103) to the Crown to call evidence of a practice among criminals of Baker's class to use such implements in the way suggested as tending to show that the possession of them was not accidental or innocent. Evidence is admissible (quoting from *Thompson* v. *The King*),

> notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring, abortion, demanding by menaces, false pretences, and sundry species of frauds, such evidence is constantly and properly admitted.

In *Brunet* v. *The King* [54] (manslaughter by performance of abortion resulting in death), evidence of a previous performance of an abortion by the accused was introduced. The Supreme Court held it inadmissible (page 380) since this was a case of manslaughter where no question of intent arose.

In *The King* v. *Barbour* [55] (murder), the Crown's case was that the accused had killed the deceased in a fit of jealous passion aroused by her conduct with another man. Evidence was given of previous quarrels and assaults, but the evidence negatived any connection between this other man and the previous incidents. The court by a majority upheld the direction of the Court of Appeal for a new trial, on the ground that evidence of the previous assaults upon the deceased by the accused was inadmissible because it failed to show intent, the sole ground upon which Crown counsel before the Supreme Court sought to sustain its admissibility. Kerwin and Hudson JJ. dissented, the former on the ground that it related to intent and the latter because it related to malice.

---

[50] [1926] S.C.R. 92.
[51] [1918] A.C. 221.
[52] (1918), 57 S.C.R. 83.
[53] [1922] 2 K.B. 555.
[54] [1928] S.C.R. 375.
[55] [1938] S.C.R. 465.

This case requires careful study because (1) of the statement by the majority that Crown counsel expressly disclaimed the suggestion that the previous quarrels arose from hostility or enmity or tended to show existence of such feelings; and (2) the majority held there was no evidence which would have entitled the trial judge to instruct the jury to ascribe these quarrels to accused's objection to the girl going out with other men and his jealousy because of her doing so. While the majority doubted that "any question of general principle" was involved, *Thompson* v. *The King*[56] *Rex* v. *Bond*[57] and *Rex* v. *Ball*[58] were examined and this was said at page 469:

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, *but to prove the fact as well.* (my italics)

The italicized words carry an importance of their own, and see the examination of the decisions in *Rex* v. *Campbell.*[59]

(h) *Dying declarations.* In *Chapdelaine* v. *The King*[60] (murder by poisoning), the trial judge rejected the statement as a deposition *ante mortem* and admitted it as a statement by the victim in the presence of the accused. But in charging the jury he emphasized the deceased's statement that he was going to die, thereby giving greater weight to the statement by the accused that his wife had poisoned him. The Supreme Court directed a new trial on the ground that the jury were led to believe they were entitled to weigh the evidential value of the facts it stated, apart from the behaviour of the prisoner. But Duff C.J.C. (with whom Cannon and Crockett JJ. agreed) added at page 58 that, since a new trial was ordered, it was desirable to discuss the principles governing the admissibility of dying declarations:

> First of all, he must determine whether or not the declarant at the time of the declaration entertained a settled, hopeless expectation that he was about to die almost immediately. Then he must consider whether or not the statement would be evidence if the person making it were a witness. If it would not be so, it cannot properly be admitted as a dying declaration. Therefore, a declaration which is a mere accusation against the accused, or a mere expression of opinion, not founded on personal knowledge, as distinguished from a statement of fact, cannot be received.

---

[56] [1918] A.C. 221, at p. 226.
[57] [1906] 2 K.B. 389, at pp. 397 and 401.
[58] [1911] A.C. 47, at p. 68.
[59] (1946), 63 B.C.R. at pp. 285-7; 86 C.C.C. at p. 415.
[60] [1935] S.C.R. 53.

In *Schwartzenhauer* v. *The King* [61] death resulted from an abortion operation. Instead of charging the accused with murder or manslaughter, the Crown compounded a charge of counselling and procuring an abortion which did "kill and slay" the girl, whose dying declaration was admitted in evidence against the accused. The Supreme Court had grave doubts whether the charge was one of homicide, in which alone a dying declaration is competent evidence, but for purposes of its decision the court assumed it was and, being of opinion the declaration was inadmissible, quashed the conviction, since there was no other evidence against the accused. The declaration was a lengthy narrative related daily by the deceased to her mother, who wrote it down. It was read over to her shortly before her death and then adopted by her, when a number of questions were submitted to her by the police and her answers taken down. Her narrative, together with the two statements, one of questions by the police and the other containing her answers to them, were put before the jury. Lamont and Davis JJ. gave one judgment, Cannon and Crockett JJ. gave one judgment, and Dysart J., *ad hoc*, gave a separate judgment. Without attempting to point up the distinctions which may be found in the three judgments, it is sufficient for present purposes to say that all members of the court were of opinion that the dying declaration was inadmissible for failure to comply with the principles stated in *Chapdelaine* v. *The King* (*supra*).

A point arose in the *Schwartzenhauer* case as to the effect of a dying declaration admissible in part and inadmissible in other parts. Lamont and Davis JJ. were of opinion that in the case of a lengthy narrative, most of which was irrelevant and inadmissible, it would be difficult if not impossible to pick out certain sentences here and there and submit them to the jury without altering the relation such parts have to the inadmissible parts in their original context, and concluded that it was too dangerous to attempt. Cannon and Crockett JJ. did not find it necessary to consider the point. Dysart J., *ad hoc*, considered the declaration inadmissible, but that, if any part of it could be admissible, the admissible parts should have been placed before the jury separately and apart from the document. In the result there was no conclusive finding by a majority of the court on this question. This point was considered in respect to confessions in *Beatty* v. *The King* [62] (murder), where the Supreme Court said that if the confession was obtained in circumstances and in a manner

[61] [1935] S.C.R. 367.
[62] [1944] S.C.R. 73.

that made it otherwise unobjectionable, and if the statement of the irrelevant fact could be separated from the rest of the document without in any way affecting the tenor of it, then the trial judge in most cases "would probably be able" to effect the exclusion of the objectionable statement, while permitting the unobjectionable part of the document to go before the jury.

(i) *Statements by accused at the time of arrest.* In *the King* v. *Bellos*[63] (assault occasioning actual bodily harm), the constable testified that, after he had cautioned the accused at the time of arrest and the accused had stated that he had not been out since twelve o'clock that night, he called the accused's attention to the condition of his hat. The accused said he had not worn the hat that night. The constable also called accused's attention to a scrape on his arm, and the accused said it was an old mark, but the constable said it was fresh. The Court of Appeal set aside the conviction.[64] Macdonald C.J.A. considered that this statement of the constable was an intimation to the jury that the accused had lied at the time of his arrest and would influence the jury in the credence to be given his evidence in the witness-box. In a brief judgment the Supreme Court of Canada, without having heard argument by counsel for the appellant (and no one appearing for the respondent), re-instated the conviction, relying on *Prosko* v. *The King*.[65]

In *Sankey* v. *The King*[66] (murder), a statement to the police from the accused, a young Indian who could neither read nor write, was admitted in evidence. It was obtained only upon a fourth questioning to which he had been subjected on the day following his arrest. It was put in writing by a police officer. No particulars were given regarding what happened on the three previous questionings. The Supreme Court said at page 441:

> We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he 'interviewed' the prisoner: and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence.

Continuing, the court said that the judge should have formed his own opinion of the voluntary character of the statement, rather than have accepted the mere opinion of the police officer who obtained it that it was made voluntarily and freely. At page 441 the court enunciated a further important proposition:

[63] [1927] S.C.R. 258.
[64] (1926), 38 B.C.R. 89.
[65] (1922), 63 S.C.R. 226.
[66] [1927] S.C.R. 436.

> It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown: *The King* v. *Bellos; Prosko* v. *The King*.

And the court added:

> That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The *Sankey* case was applied in *Thiffault* v. *The King* (murder) and the above observations were further particularized:

> . . . the determination of any question raised as to the voluntary character of a statement by the accused elicited by interrogatories administered by the police is not a mere matter of discretion for the trial judge, as the court below appears to have thought.[67]

The Supreme Court proceeded to say that where the statement is elicited in the presence of several police officers, it ought "as a rule" not to be admitted unless (without some adequate explanation of their absence) those who were present at the time are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused, and:

> where the statement professes to give the substance of a report of oral answers given by the accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted in evidence, unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

The failure to produce two officers and a police clerk was considered of such weight in the *Thiffault* case that the Supreme Court refused to apply section 1014(2), although asked to do so on the ground that the document added nothing to the weight of evidence supplied from other sources (page 516).

In *Walker* v. *The King*[68] (manslaughter arising out of driving a motor-car), the trial court rejected evidence by a police officer of an admission by the accused that he was the driver of the motor-car, given to the officer while the latter was investigating the accident shortly after it occurred and when there was no charge against the accused and he was not under arrest. The accused

[67] [1933] S.C.R. 509, at p. 515. And see *Rex* v. *Byers* (1942), 57 B.C.R. at pp. 340-1.

[68] [1939] S.C.R. 214.

was acquitted when the trial judge held that there was no evidence as to who was the driver of the car. The ground of rejection was that the accused was presumed to know he was subject to penalty under the Ontario Highway Traffic Act if he refused to give this information to the officer. The Court of Appeal's direction for a new trial was upheld by the Supreme Court on the ground that such evidence was admissible. The court held that there is no rule of law that statements by the accused under compulsion of statute are, because of such compulsion alone, inadmissible in criminal proceedings; that generally speaking such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them.[69]

In *Gach* v. *The King* [70] (unlawfully receiving gasoline ration books knowing them to be stolen), two police officers, suspecting the accused had stolen gasoline ration books in his possession, searched his home under a search warrant. Questions were put to him by the police to which he made evasive replies and one of the officers told him it would be better for him to hand over the books because he could be prosecuted in any event. At the end of the conversation they told him to accompany them to the police station to talk to Inspector Anthony. The latter told him he would be charged in all probability. In answer to various questions the accused said, "what if I have them, it is his [a witness convicted of stealing ration books but who declined in the witness box to identify accused as the person to whom he had sold them] word against mine; he brought them here anyway". He added: "I have not any gasoline ration books, what is this all about?" "My mother just died last night, and I do not know where I am at"; "You have advised me that I would be charged, so if I returned them I would not have any chance". Inspector Anthony testified that he told accused he was perfectly right and the latter asked how the books could be returned. The Inspector said he could hand them over or return them by mail. Gach was allowed to go and shortly after the ration books were returned through the mail.

Gach had not been given the customary warning. Later he was arrested, charged and convicted by the Winnipeg Police Magistrate, mainly on the evidence of Inspector Anthony. The conviction was upheld by a majority of the Court of Appeal. The Supreme Court of Canada quashed the conviction. Three members of the court held he ought not to have been questioned

[69] *Reg.* v. *Scott* (1856), Dears. & Bell 47, and *Reg.* v. *Coote* (1873), L.R. 4 P.C. 599, at p. 607.

[70] [1943] S.C.R. 250.

without a proper warning because "he was a suspect threatened of being charged with the commission of a crime". The two other members of the court seemed to imply a distinction between the necessity of warning in cases of questioning before arrest and after arrest.[71]

With respect, the trouble in understanding the *Gach* decision springs in large part from the fact that the police magistrate did not hold a trial within a trial (a fact to which the Supreme Court of Canada did not refer in specific terms) to determine if the statements by Gach to the police officers in his home and later to Inspector Anthony, were voluntary. If I read the *Sankey* case correctly, the failure to hold a proper trial within a trial to determine whether the inculpatory statements were made voluntarily *would alone have demanded the setting aside* of the conviction in the absence of other incriminating evidence to invoke section 1014(2). This vital aspect of the case unfortunately was not developed in the Supreme Court of Canada.

In *Beatty* v. *The King*[72] (murder), two separate confessions of theft and murder were included in the one written statement prepared by the police and signed by the accused. The Supreme Court of Canada said, but without an analysis of the evidence, that the theft of the revolver was admissible "because it was relevant as showing how the accused obtained possession of the revolver". It was said by the dissenting judge in the Court of Appeal that (a) there was ample evidence of the accused's possession of the revolver without introducing the prejudicial evidence of theft, and (b) at the trial the case was conducted by the Crown on the basis that the source from which the gun was obtained was not material,[73] because there was no doubt about the accused's possession of it. The accused handed the revolver to the police when he made his confession of theft two days before he made his confession of murder. He stole the revolver two weeks before the murder, but the theft did not connect him with the murder.

If possession of the revolver could not have been proved without evidence of its theft, or if the theft were inseparably linked with other evidence tending to show intent in the appellant to commit the murder, then no doubt could exist regarding the admissibility of the evidence of its theft. If this view had been critically examined and accepted, the Supreme

[71] And see *Rex* v. *Weighill* (1945), 61 B.C.R. at pp. 145-6; 83 C.C.C. at p. 389.

[72] [1944] S.C.R. 73.

[73] And see (1943), 59 B.C.R. at pp. 217-222.

Court on the evidence could have held the theft of the revolver inadmissible in the circumstances, but that, despite this material error, the remaining evidence in the case was so conclusive that, invoking section 1014(2) as applied in *Baker* v. *The King* and *Sowash* v. *The King*,[74] *Boulianne* v. *The King*[75] and later decisions, no properly instructed jury acting rationally could have avoided the conclusion of guilt.

(j) *Irrelevant or prejudicial statements appearing in an otherwise admissible confession.* In *Thiffault* v. *The King*[76] (murder), it was said at page 514 that a document which includes an admission of fact that would be inadmissible against the accused, and which was calculated to prejudice him, could not properly be received in evidence. The court said it might be used in a proper case by a witness to refresh his memory, but the use of the document itself as evidence could not be justified. This view was modified in *Beatty* v. *The King*[77] (murder), where it was said that, if the irrelevant fact can be separated from the rest of the document "without in any way affecting the tenor of it", then the trial judge in most cases "would probably be able" to effect the exclusion of the objectionable statement while permitting the unobjectionable part of the document to go before the jury.

III

The Principles Surrounding the Application or Non-application of Section 1014(2)

Section 1014 (2) of the Criminal Code provides:

> The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned [in section 1014 (1)] the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

In *Baker* v. *The King* and *Sowash* v. *The King*[78] (murder), the trial judge did not (page 98) explain to the jury that corroboration is related not only to some fact tending to show that the crime was committed, but also to evidence implicating or tending to implicate the accused. On this and supplementary grounds counsel for the appellant submitted that the jury were insufficiently warned of the risk of finding a verdict against the

[74] [1926] S.C.R. 92.
[75] [1931] S.C.R. 621.
[76] [1933] S.C.R. 509.
[77] [1944] S.C.R. 73, at p. 76.
[78] [1926] S.C.R. 92.

accused on the uncorroborated testimony of an accomplice. The Supreme Court said (page 98) that, if the corroborative evidence before the jury had been either scanty or of questionable weight, the objection would have acquired an importance denied it because of the admissions of the appellants and other independent and unchallenged evidence. In the result it could not be said the accused suffered any substantial wrong. The effect of the decision must be that, notwithstanding a substantial misdirection to the jury upon what is meant in law by corroboration, the strong corroborative evidence, added to the evidence of Baker himself and other unchallenged evidence, pointed so conclusively to guilt that, if the jury had been instructed correctly, they could not rationally have reached any conclusion other than guilt.

In *Gouin* v. *The King*[79] (manslaughter upon an indictment for murder arising out of an abortion), the learned trial judge had in error instructed the jury that, if they believed the accomplice was telling the truth in his uncorroborated evidence, it was their duty to convict (instead of telling them it was within their legal province to do so). The Supreme Court directed a new trial on the ground that, in the circumstances, the jury may have been influenced by the improper direction to convict when otherwise they might not have convicted. Idington J., dissenting, did not think the jury were likely to have been so influenced. The court applied the dictum of Sir Charles Fitzpatrick C.J.C. in *Allen* v. *The King*[80] that the verdict may not be upheld unless "it may safely be assumed that the jury was not influenced" by the improper direction.

In *Brooks* v. *The King*[81] (abortion), misdirection occurred in a material matter and the Supreme Court said that the onus was on the Crown to satisfy the court that the jury, charged as it should have been, could not as reasonable men have done otherwise than find the appellant guilty. In *Boulianne* v. *The King*[82] (conversion), the trial judge, as in *Gouin* v. *The King* (*supra*), had instructed the jury that, if they believed the evidence of the accomplice, it was their duty to convict even if it were uncorroborated. While the Supreme Court found this to be a material misdirection, the appeal was dismissed (as in *Baker* v. *The King* and *Sowash* v. *The King*, *supra*) on the ground that if the jury had been properly directed they must

[79] [1926] S.C.R. 539.
[80] (1911), 44 S.C.R. 331, at p. 339.
[81] [1927] S.C.R. 633.
[82] [1931] S.C.R. 621.

rationally have reached the same conclusion of guilt and hence it could not be said that a miscarriage of justice had actually occurred. In *Pitre* v. *The King*[83] (murder), there was corroborative evidence before the jury, but the court held that the trial judge's repeated instructions to them upon their duty to acquit on the uncorroborated evidence of an accomplice not only was wrong but "probably" had the effect of leading them to believe the case must be disposed of on the theory that there was no evidence corroborating the accomplice.

In *Markadonis* v. *The King*[84] (murder), the accused was removed from his cell in the middle of the night, one day after the murder, and taken by three police officers in search of the revolver with which the shooting was done. The accused then made certain statements. The Crown did not seek to introduce them in evidence at the trial, but cross-examined the accused on them. He did not answer these questions directly, and a police officer called in rebuttal told what the accused said and did. It was not sought to establish that what the accused said was voluntary. It would appear that the Court of Appeal unanimously held the evidence to be inadmissible, but that the majority considered no substantial wrong occurred in admitting it. The Supreme Court of Canada came to a different view and directed a new trial on the ground that the trial judge emphasized evidence of that episode to the jury "with a good deal of vigour". There were in addition other circumstances that caused the court to regard the trial as unsatisfactory.

In *Brodie and Barrett* v. *The King*[85] (seditious conspiracy), the court held substantial wrong was done the appellants in compelling them to plead to an illegal indictment. In *Schmidt* v. *The King*[86] (murder), the court invoked section 1014(2) to cure a misleading illustration of the application of section 69(2) and a failure on the part of the trial judge to apply the law to the evidence as fully as he might have done. The court, in examining the qualification in section 1014(2) that "no substantial wrong or miscarriage of justice has actually occurred", pointed out that

> the onus rests on the Crown to satisfy the court that the verdict would necessarily have been the same if the charge had been correct *or if no evidence had been improperly admitted.* (my italics)[87]

---

[83] [1933] S.C.R. 69.
[84] [1935] S.C.R. 657.
[85] [1936] S.C.R. 188.
[86] [1945] S.C.R. 438.
[87] And see *Rex.* v. *Welch & Ackerman* (1946), 86 C.C.C. 88.

It adopted the statement of the law in *Stirland* v. *Director of Public Prosecutions*[88] that the proviso that a Court of Appeal may dismiss an appeal,

> if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would on the evidence properly admissible, without doubt convict.

In *White* v. *The King*[89] (indecent assault), the Court of Appeal had allowed an appeal by the Crown from an acquittal by the magistrate. The accused, a qualified dentist, contradicted the facts stated by the complainant. A workman, Black, testified that on two occasions when he passed the room in which the complainant was with the accused, the door was open and the accused was writing at a table. His evidence did not disclose the intervals of time between the two occasions. The magistrate acquitted the accused, observing in his judgment:

> The case is one that must be decided entirely on the credibility of witnesses. If the evidence of the complainant is accepted, there must be a conviction. On the other hand, if the evidence of the accused is accepted there must be a dismissal of the charge. Also, in my judgment, if the evidence of the witness Black is accepted there must be a dismissal.

The Supreme Court of Canada upheld the Court of Appeal's direction for a new trial. Mr. Justice Estey (with whom Rinfret C.J.C. and Kellock J. agreed) said the evidence of Black did not go so far as to contradict the evidence of the complainant nor corroborate the evidence of the accused; and if therefore Black's evidence was believed, it was still necessary for the magistrate to consider all the evidence, which clearly he had not done. In upholding a direction for a new trial, Mr. Justice Estey said at page 271:

> The appellate court, when there has been no decision arrived at upon a consideration of the evidence, particularly in a case where the evidence is so restricted to a few facts and where any adjudication must depend so largely upon the credibility and the weight to be given to the evidence of the respective parties, is unable to conclude that under S. 1014 (2) 'no substantial wrong or miscarriage of justice has actually occurred'.

The court also held that the magistrate misdirected himself relative to the determination of Black's credibility; credibility is a question of fact and it was the magistrate's duty, not only to determine it, but to indicate he had done so. *Rex* v. *Covert*[90]

[88] [1944] A.C. 315.
[89] [1947] S.C.R. 268.
[90] (1916), 28 C.C.C. 25.

was critically examined and *Raymond* v. *The Township of Bosanquet*,[91] describing credibility, applied:

> . . . by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory — in a word, the truthworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence.

* * *

The foregoing decisions of the Supreme Court of Canada, studied in the light of the facts in each case, furnish a progressive and notable clarification of the application of principles of the Criminal Law to a variety of situations, which in one form or another are constantly arising in the trial of criminal cases.

[91] (1919), 59 S.C.R. 452, at p. 460.