Ontario Court of Appeals
R. v. Dick
Date: 1947-01-21

Rex

and

Dick

9th, 10th, 13th and 14th January 1947. The appeal was heard by ROBERTSON C.J.O. and HENDERSON, LAIDLAW, HOGG and AYLESWORTH JJ.A.

[1] *J.J. Robinette, K.C. (J.J. Sullivan, with him), for the accused, appellant*: Three accused were charged jointly, and none of their counsel asked for separate trials. It was the Crown's decision to try this appellant alone, and this course had the unfortunate result that some evidence might have come out, on a joint trial, which would have put the appellant's part in the affair in its proper light. [ROBERTSON C.J.O.: Has it not been the accepted practice to have separate trials where an important part of the Crown's case consists of statements made by one of the accused, which would not be evidence against the others?] That may be, but the practice is based upon fairness to the other accused, and I mention the matter here because it has resulted in unfairness to this appellant. It is mentioned merely as a circumstance, and not as a ground of appeal.

[2] The learned trial judge's charge to the jury was "sketchy". It did not bring home to the jury the real problem they had to face. The accused was entitled to have any theory of the defence which appeared from the evidence (whether or not it was raised by her counsel) put to the jury by the judge. Practically all the circumstantial evidence (that is, the evidence other than the accused's statements to the police) was consistent with the appellant having been only an accessory after the fact, but that issue was not only not put to the jury, but was in effect withdrawn from their consideration. I refer to ss. 71 and 267 of The Criminal Code, R.S.C. 1927, c. 36. The trial judge should have told the jury that if they had a reasonable doubt whether the accused was merely an accessory after the fact, it was their duty to acquit her on this indictment. I rely on *Rex v. Levy,* [1912] 1 K.B. 158; *Reg. v. Smith* (1876), 38 U.C.Q.B. 218; *Rex v. West* (1925), 57 O.L.R. 446, 44 C.C.C. 109; *Wu (alias Wu Chuck) v. The King,* [1934] S.C.R. 609, 62 C.C.C. 90, [1934] 4 D.L.R. 459; *Rex v. Hislop,* 21 Alta. L.R. 486, 43 C.C.C. 384, [1925] 1 W.W.R. 887; *Woolmington v. Director of Public*

Prosecutions, [1935] A.C. 462; *Kwaku Mensah v. The King,* [1946] A.C. 83, 2 C.R. 113, [1946] 2 W.W.R. 455.

[3] [AYLESWORTH J.A.: If there is no proper or discernible "theory" of the defence in evidence, but a proper marshalling of the evidence would support a possible view which would lead to acquittal, is it the duty of the trial judge to put that view to the jury?] Yes: *Rex v. Hislop, supra; Kwaku Mensah v. The King, supra.*

[4] A substantial part of the circumstantial evidence pointed to the appellant's father, Donald MacLean, as the person who killed Dick—particularly some of the things found in MacLean's house by the police. [HENDERSON J.A.: How was the finding of those articles evidence in this trial?] It was not, but since the Crown elected to prove it, I am entitled to any benefit to be derived from it. The trial judge should have pointed out the incriminating nature of this evidence as against MacLean, and also that there was no evidence that the accused was an accessory before the fact to a killing by MacLean. If MacLean killed Dick, then at the worst the appellant was an accessory after the fact, and not guilty of murder.

[5] The statement of 12th April is capable of being interpreted as showing that the appellant was a mere spectator in the killing of Dick by Bohozuk, and that her part therein involved no more than passive acquiescence. The trial judge did not point out that passive acquiescence does not constitute aiding or abetting or procuring, so as to make the accused a party under s. 69: *Rex v. Dumont* (1921), 49 O.L.R. 222, 37 C.C.C. 166, 64 D.L.R. 128; *Rex v. Dutchak,* 43 C.C.C. 74, [1924] 4 D.L.R. 973; *Reg. v. Curtley* (1868),27 U.C.Q.B. 613.

[6] It was of the utmost importance that the jury should have been called on to test and decide upon the truth of the accused's statements, assuming them to have been properly admitted in evidence against her. They should have been told that they could reject the statements because of their inherent inconsistencies, and also that they should carefully consider whether a later statement should be believed when it appeared that the accused had previously told the police something entirely different, and untrue.

[7] The trial judge told the jury that even though the statements were not voluntary they might act upon them if they were satisfied from the other evidence that they were true. This was clearly wrong, and was inconsistent with his previous direction that they might determine that

the statements were untrue because they were not made voluntarily, and could only confuse them.

[8] The trial judge failed to tell the jury that anything in the statements which was favourable to the accused's position was evidence in her favour: *Rex v. Harris,* [1946] O.R. 407, 86 C.C.C. 1, 1 C.R. 509, [1946] 3 D.L.R. 520.

[9] There were many respects in which the last statement, of 12th April, was wholly at variance with the facts sworn to by other witnesses. The trial judge did not draw any of these matters to the attention of the jury, but told them that "slight discrepancies" tended to strengthen, rather than to weaken, evidence. This may be true of accounts given by different eye-witnesses of an occurrence, but it is quite wrong to say it, as the trial judge did here, in connection with this last statement of the accused to the police. This was the only statement to which the trial judge particularly directed the jury's attention.

[10] The trial judge told the jury that they might believe all the statements, or only some of them, but he failed to point out that they might disbelieve them all.

[11] The trial judge drew a distinction between the position of Crown counsel and that of defence counsel, in a way that was disapproved by this Court in *Rex v. Ferguson,* [1945] O.W.N. 1, 83 C.C.C. 23, [1945] 1 D.L.R, 767. The effect of such a direction is to neutralize the effect of anything defence counsel may have said to the jury.

[12] Much of the evidence was inadmissible against the accused (*e.g.,* the articles seized at MacLean's house), and was prejudicial, and there should therefore be a new trial on the ground of misreception of this evidence, particularly because the trial judge failed to instruct the jury that they should entirely disregard it. He expressly directed their attention to evidence that Dick had told a witness, on the day of his disappearance, that he was going to meet his wife that afternoon. This evidence was obviously inadmissible, and it is immaterial that it was brought out in the cross-examination of the witnesses.

[13] The several statements made by the accused should not have been admitted in evidence against her. I refer to the English "Judges' Rules", printed in Archbold, Criminal Pleading, Evidence & Practice, 31st ed. 1943, p. 371, particularly no. 7. These rules have not the force of law, but they accurately state the effect of the cases. The cases lay down a

general rule that a person in custody, even if a caution has been given, may not be cross-examined by a police officer, and that if he is his examination is not admissible in evidence against him. [HENDERSON J.A.: Is the rule limited to cross-examination? Does it not apply equally to any examination in the form of questions and answers?] Yes, except where questions are asked merely as an introduction, or to obtain an explanation of something said by the person in custody: *Rex v. Brown and Bruce* (1931), 23 Cr. App. R. 56; *Rex v. Dwyer* (1932), 23 Cr. App. R. 156; *Ibrahim v. The King,* [1914] A.C. 599 at 611. At least the trial judge, if he does admit such a statement, should warn the jury as to the weight to be given to it. The cases are most usefully summarized in Taylor on Evidence, 12th ed. 1931, vol. 1, pp. 556-7; there is also a valuable article in the Journal of Criminal Law, vol.8 (1944), p. 148.

[14] The Canadian cases, such as *Sankey v. The King,* [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245, and *Gach v. The King,* [1943] S.C.R. 250, 79 C.C.C. 221, [1943] 2 D.L.R. 417, are none of them cases of prolonged questioning of an accused person by the police, but come rather within the rule laid down in the *Ibrahim* case, that one or two preliminary questions will not invalidate a statement. In the *Gach* case the majority state the rule a little less strictly, but Taschereau J. lays it down quite definitely that a caution is essential before any questioning by the police, if the answers are to be admitted in evidence.

[15] If any of the earlier statements are inadmissible, because of the absence of a warning, or for any other reason, the subsequent ones are also inadmissible unless it is shown that, in addition to the usual caution, the accused has been told that the earlier statements cannot be used in evidence: *Reg. v. Finkle* (1865), 15 U.C.C.P. 453 at 458; *Rex v. Kong* (1914), 20 B.C.R. 71, 24 C.C.C. 142.

[16] The last statement is in the worst position, because no caution at all was given before the questioning at the gaol, and the accused was not told she was under no compulsion to accompany the officers on the drive, and there is some evidence that she did not think that she was making a “statement” on that occasion. At no time after she was charged with murder did she sign any written statement.

[17] To sum up, the appellant is entitled at least to a new trial because of (a) misdirection and non-direction; (b) the wrongful admission of evidence other than the statements; and (c) the wrongful admission of the statements.

[18] Further than this, however, if all of the statements are held to be inadmissible, the conviction should be quashed without ordering a new trial, because there is no evidence on which a jury, properly directed, could convict of murder. The circumstantial evidence is consistent with her being only an accessory after the fact, and a jury, properly instructed, would be bound to give her the benefit of a reasonable doubt on this point, and to acquit on this indictment.

[19] The position is the same if only the last statement is held to be inadmissible. The only thing in the other statements which could make the appellant an accessory before the fact is her statement that she lent money to Bohozuk to give to a "gang" to murder Dick. This money, according to the statement, was repaid by Bohozuk before Dick's death. Further, the Crown did not proceed on the theory that the accused was party to murder by a "gang", but contended that she was a party to murder by Bohozuk. The Crown is not entitled to a new trial based upon an entirely different theory: *Savard and Lizotte v. The King,* [1946] S.C.R. 20, 85 C.C.C. 254, 1 C.R. 105, [1946] 3 D.L.R. 468.

[20] *C.L. Snyder, K.C., for the Attorney-General, respondent*: The statements were properly admitted as voluntary. They are within the rules laid down in *Prosko v. The King* (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340, followed by this Court in 1943 in *Rex v. Ogrodowski and Kisieliewski* (*unreported*). *Gach v. The King, supra,* does not depart from the established principle that the strict rules as to proof apply only to confessions properly so called, and not to other statements. For the distinction, see Tremeear's Criminal Code, 5th ed. 1943, p. 757. *Rex v. Scory,* [1945] 1 W.W.R. 15, 83 C.C.C. 306, [1945] 2 D.L.R. 248, was a case where there had been no caution at all. *Rex v. Mandzuk,* 62 B.C.R. 16, 85 C.C.C. 158, [1945] 3 W.W.R. 280, [1946] 1 D.L.R. 521, is authority for the proposition that an exculpatory statement does not come within the rules as to the admissibility of confessions.

[21] *Rex v. Van Horst* (1914), 20 B.C.R. 81, 24 C.C.C. 157, is authority for the admission on one charge of a statement made by an accused when charged with a different offence. [ROBERTSON C.J.O.: The warning given to the appellant after the charge of vagrancy was laid referred expressly to that charge and asked her if she wanted to say anything "in answer to the charge". The police immediately started to ask questions relating to an entirely different charge] The manner of taking the accused into custody may have been irregular, but it was justified by the unusual circumstances: *Rex v. Cook* (1918), 34 T.L.R. 515. Regardless of

that, the facts surrounding these statements were fully disclosed to the jury, and they, acting on their best judgment, found the accused guilty.

[22] The evidence clearly shows that the accused, on the last occasion, was anxious to see the police—they did not seek her out. Her actions and statements on that occasion were entirely voluntary, and were taken on her own initiative. If the statement of 12th April is accepted, there can be no doubt that the accused was a party to the offence under s. 69. [ROBERTSON C.J.O.: There is nothing in that story to indicate that she had any control over Bohozuk.] She knew that Bohozuk had a revolver, and they got Dick and took him for a drive. [ROBERTSON C.J.O.: There is no evidence that she knew that Bohozuk had the revolver with him, or even that she knew that he had already obtained it.]

[23] The charge is not lengthy, but it does adequately cover all necessary matters. The trial judge's remarks about the jury disbelieving the statements if they concluded that they were not voluntary are based upon Wigmore on Evidence, 3rd ed. 1940, vol. 3, s. 861, pp. 345 *et seq.* [ROBERTSON C.J.O.: Were the jury properly instructed as to parties to offences? The trial judge read s. 69, but should there not have been something further, in view of the evidence in this case?] That is answered in part by *Rex v. Newell,* [1941] O.W.N. 465, 77 C.C.C. 81 at 85-6, [1942] 1 D.L.R. 747. I submit he did all that was required of him.

[24] I concede that the circumstantial evidence, apart from the appellant's statements, is not sufficient to support a conviction for murder. Even if the statements should have been excluded, however, I ask for a new trial. The position has changed since this trial, and other knowledge has come to the Crown. [HENDERSON J.A.: You should not refer to anything not in this record.]

[25] On the evidence now before the Court, the jury were fully justified in believing the appellant's final statement, and finding her guilty as charged, and this Court should not interfere: *Rex v. Grondkowski and Malinowski* (1946), 31 Cr. App. R. 116 at 120.

[26] *T.J. Rigney, K.C.,* for the Attorney-General, respondent: I do not agree that the evidence other than the appellant's statements was not sufficient for a conviction for murder.

[27] Statements may be admitted without proof of any warning at all, that being merely one of the elements from which their voluntary nature can be determined. Throughout this whole

series of statements, there is an overwhelming preponderance of evidence showing that they were all voluntary in the accepted sense of that term.

[28] The trial judge could not put "the theory of the defence" to the jury, because no defence had been adduced at the trial.

[29] [ROBERTSON C.J.O.: Where a material part of the Crown's case consists of statements made by the accused, and those statements suggest a possible defence, *e.g.,* that the accused was not an actual participant in the crime, is it not the duty of the trial judge to draw that to the jury's attention?] It may be, but a failure to work out such a defence and submit it to the jury is not fatal. Where the attitude of the defence is merely that the accused is not guilty, and that the Crown has not proved its case, surely the trial judge is not required to consider all possible defences and submit them to the jury. [ROBERTSON C.J.O.: My point is that the Crown proved by the statement, if it was accepted, that Dick was killed by Bohozuk, not by the appellant. The burden was on the Crown to show additional facts that made her a party. How could the jury be properly instructed without drawing that important feature to their attention?] The judge read s. 69, and explained it adequately.

[30] The question of separate rather than joint trials was decided only after the most careful consideration. In any case, it cannot be successfully argued that this course put the appellant at any disadvantage.

[31] *J.J. Robinette, K.C.,* in reply: As to the trial judge's failure to correlate his instructions as to the law (s. 69) with the evidence, I refer to *Rex v. Stephen, Allen and Douglas,* [1944] O.R. 339 at 352, 81 C.C.C. 283, [1944] 3 D.L.R. 656.

[32] Any incriminatory statement or remark is within the rules as to confessions; it need not be a "plenary" confession, but may be any admission of a subordinate fact going to establish the accused's guilt. *Rex v. Scory, supra,* and *Rex v. Mandzuk, supra,* both support this proposition rather than the reverse.

Cur. adv. vult.

[33] 21st January 1947. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of Evelyn Dick, the appellant, on a charge of murder, on her trial before Barlow J. and a jury, at the assizes at Hamilton on the 16th October 1946. The appellant was indicted along with William Bohozuk and her father, Donald MacLean, and charged with the murder of John. Dick, the husband of the appellant, on the 6th March 1946. On the application of counsel for the Crown, the trial judge directed that the appellant should be tried first upon the indictment, separately from the other two accused. The jury found her guilty of murder, with a recommendation to mercy.

[34] Speaking broadly, the appeal is taken on two grounds, (1) that the learned trial judge made errors of non-direction and misdirection in his charge to the jury, and (2) that certain statements alleged to have been made by the appellant to police officers, while in custody, had been wrongly admitted in evidence against her. In view of the disposition to be made of this appeal, it is not desirable that there should be an exhaustive discussion of the evidence on the record, but only such statement of it as may be necessary to make intelligible the grounds upon which this Court proceeds.

[35] The appellant and those charged with her are all residents of the city of Hamilton. She was married to John Dick on 4th October 1945. She was then twenty-five years of age. John Dick was approximately forty years of age. He was born in Russia, but had lived in Canada since 1924. At the time of his marriage, and for some time prior thereto, he had been in the employ of the Hamilton Street Railway as a motorman. The marriage was not a happy one. There were frequent quarrels from the beginning. Early in the following February (1946) there was a separation, and John Dick went to board with Mrs. Kammerer, with whom he had boarded some years before. The appellant continued to live in the house on Carrick Avenue, which, it is said, she had purchased. Her mother, Mrs. MacLean, who had separated from her husband, Donald MacLean, some months earlier, lived with her. Donald MacLean, who was also an employee of the Hamilton Street Railway, had had frequent quarrels with Dick, and there is evidence that he and Dick were on bad terms in the fall of 1945. Bohozuk, the third person indicted, was also on bad terms with John Dick, who accused him of paying too much attention to the appellant.

[36] Other than the several differences and animosities that I have indicated, there does not appear in evidence anything to indicate any motive on the part of the appellant for desiring to bring about the death of John Dick. The trial courts of the Province are kept busy with divorce cases that commonly reveal quite as much as the evidence in this case discloses, of quarrels and jealousies and marital misconduct, but divorce, and not murder, is the usual outcome. It is difficult to see anything in the relations between the appellant and John Dick, as disclosed in evidence, to explain his murder only five months after their marriage.

[37] On 6th March 1946 John Dick was to report for duty as a motorman, at 4 o'clock in the afternoon. On that morning he left his boarding place and went to the office of the street railway company, where he left his motorman's cap and some other small equipment. Later, he called for these things and left in their place a hat he was wearing. He did not, however, report for duty. He had a brief and hurried luncheon at a restaurant where he was accustomed to go, and left there between 2 and 2.30 p.m. No witness was called who saw him later alive. On 16th March some children at play found the torso of a man on the side of what is called "the Mountain" on the outskirts of Hamilton, and the police were notified. This torso was, on 18th March, identified as that of John Dick. An examination of the torso did not disclose the cause of death. There were two holes at one side of the chest which indicated that a bullet had passed through the flesh on that side. The wound was not, however, of a serious character. Nothing else that could be identified by a physical examination as any part of the remains of John Dick has been found. Neither does the evidence establish, with any certainty, where or by what means John Dick came to his death, nor where or by whom his body was dismembered, except in so far as any of these matters may appear in statements obtained by the police from the appellant while in custody.

[38] It is in evidence that about 2 o'clock on the afternoon of 6th March 1946 the appellant borrowed a Packard motor car from William Landeg, an acquaintance of hers, who kept a garage. Again putting aside anything that may appear by the statements obtained by the police from the appellant, the next occasion on which this motor car was seen, as disclosed by the evidence, was at 5 or 5.30 o'clock on the same afternoon. At that time, according to the evidence of several witnesses, the appellant was seen in the motor car trying to drive it into a garage at the rear of her residence. It was a large car, and she was not able to get it through the door of the garage, and after several attempts she backed it out to the street and

drove away. The evidence is that she was alone in the car at this time. The motor car is not spoken of again in evidence until it was left by the appellant outside the door of the garage where she had borrowed it, at about 8 o'clock in the evening. When the owner of the car, later that evening, went to drive the car into his garage he discovered blood on the front seat. Still later, he found a sweater in the car, that was identified as the sweater of John Dick. A necktie, knotted as it would be when worn, was also found in the car, and was identified as the necktie of John Dick. Both of these articles were stained with blood. The slip-cover of the front seat was missing, as was also a rug that had been spread on the front seat.

[39] The owner of the motor car was not at the garage when the appellant returned it. She left a note for him expressing regret at being late, as her little girl had cut her face and she had to take her to the hospital for some stitches, and got blood on the seat cover and cushion, which she would replace later. In fact the statement about the little girl cutting her face and having to go to the hospital was quite untrue. The little girl had not been in the car.

[40] On the morning of 7th March some men going to work on the Mountain found on the roadway, at a point not far from the place where the torso was found later, a striped shirt, which was identified as that worn by John Dick on the 6th March. This shirt was completely buttoned up as it would be when worn, and both arms of the shirt were cut off. The shirt was stained with blood. It was thrown to the side of the road by the workmen who found it, but after the finding of the torso, the shirt was found lying where the workmen had thrown it.

[41] After the identification of the torso a search warrant was issued, and the residence of the appellant on Carrick Avenue, as well as Donald MacLean's residence on Roslyn Avenue and the room where Bohozuk lived, were searched by the police. At the Carrick Avenue residence there was found in the pocket of Mrs. MacLean's fur coat a ticket punch, identified as that issued to John Dick. In a trunk in the attic, which was opened with a key found in the bedroom occupied jointly by the appellant and Mrs. MacLean, were found a conductor's change-holder and street-car tickets and a small tin box, such as John Dick used to hold tickets. A silver watch was found in a dresser drawer in another bedroom, and a watch-chain was found in a purse in the front bedroom. A gold watch was also found in the back bedroom. There was evidence that John Dick had both a gold watch and a silver watch. A pair of ladies' rubber boots, blood-stained, were found, and were identified as a pair worn at times by the appellant, and at times by her mother. There is no evidence that either of them wore them on

the 6th March. A blanket, or rug, cleaned and folded, was found and was identified as one that had been on the front seat of the borrowed motor car. Buttons from a uniform such as was worn by John Dick—and also such as had been worn by Donald MacLean—were found in a work-basket said to belong to the appellant. Ashes, evidently from the furnace in the Carrick Avenue house, were found, some in containers and others spread on the ground near the garage door, and in these ashes, upon examination, were found particles of bone from a human head and limbs. There is evidence that the appellant had carried out, and spread on the ground, the ashes at the garage door, and that it was not usual for her to carry out the ashes.

[42] In the house on Roslyn Avenue where Donald MacLean lived, there were found a pair of black oxford shoes, bloodstained, identified as the shoes of John Dick, also an axe, a saw and a butcher-knife. A revolver and some other firearms, and a quantity of ammunition, were found in Donald MacLean's house. The revolver was said, by an expert, to be of the same calibre as the bullet that made the wound in John Dick's side. A spent bullet, that may have come from the same revolver, was found in the basement of Donald MacLean's house. This revolver had been recently fired, in the opinion of the expert. There were also found in Donald MacLean's house a haversack containing somewhat over $4,000 in bills, and a great number of street-car tickets that appeared to have been used. There is evidence also that Donald MacLean had some painting done about the furnace, and elsewhere, at the Carrick Avenue house, after 6th March, and also of Donald MacLean having broken into a trunk in the attic of the Carrick Avenue house after the appellant had been taken into custody.

[43] I have probably not listed here all the articles that were found, and there were bloodstains seen at one place and another that I have not referred to, but I have given enough to indicate the character of the evidence discovered on searching the premises of the appellant and of her father, and, as I have already stated, I do not deem it proper to do more than indicate in a somewhat general way the character of the evidence put in, in addition to the statements obtained by the police from the appellant.

[44] It may be well to note, however, that some evidence seems to have got into the record that was not brought home to the appellant in any way, as, for example, the evidence of what was found in Donald MacLean's house, and the evidence that Donald MacLean broke into a

trunk at the Carrick Avenue residence after the appellant was in custody. Donald MacLean was not taken into custody for some weeks after appellant's arrest.

[45] In addition to what may be classed generally as circumstantial evidence, there is evidence that a few days after 6th March, and before the discovery of the torso, the appellant, in answer to a question from her mother, had said: "John Dick is dead, and you keep your mouth shut." There is further evidence that on 12th March the appellant called at the central police station in Hamilton and inquired whether John Dick had been arrested. When asked what the charge would be, she said: "Running away with money and tickets belonging to the company—the Hamilton Street Railway."

[46] It is not difficult to reach the conclusion, free from all reasonable doubt, that John Dick was murdered by some person or persons, on the 6th March 1946, and that his body was then mutilated and disposed of in a most inhuman way. This much would seem to be clearly established by the evidence without resorting to the statements of the appellant, the admissibility of which in evidence is disputed. It is also a fair conclusion, upon the same evidence, that the appellant knows a good deal about these matters. The vital question is what, if any, part she had in the crime itself.

[47] Counsel for the appellant contended for the acquittal of the appellant, arguing that there was no case made out against her on the admissible evidence. Mr. Snyder, who led for the Crown on the argument of this appeal, stated definitely that, in his opinion, if the statements of the appellant—the admissibility of which was disputed—were wholly excluded, there was not sufficient evidence on the record to convict the appellant of the charge of murder. Mr. Rigney, who had been senior counsel at the trial and was associated with Mr. Snyder on the hearing of the appeal, said just as definitely that he did not subscribe to Mr. Snyder's view. I do not think this Court, in a criminal case, is entitled to take refuge behind the opinion expressed by any counsel as to the effect of the evidence, but must act upon its own opinion. After having given the question much consideration I am of the opinion that the case is not one that the trial judge should have withdrawn from the jury, even if he had rejected all the statements of the appellant that are objected to. What remains for consideration is, therefore, whether the appellant had a fair and proper trial, and, in particular, whether her statements to the police while in custody were properly admitted in evidence, and whether there was misdirection or non-direction of the jury in the charge of the learned trial judge.

[48] Dealing first with the question of the admissibility of appellant's statements: She was taken into custody by the police about noon of 19th March 1946, and was taken to police headquarters. She has been in custody ever since. Between 19th March and 12th April the police obtained from her, in all, seven statements, all of which were admitted in evidence. The statements were not all in writing signed by the appellant. Some of them were taken after a caution had been given; others were taken without a caution. I think it may be said with accuracy that while in none of the statements does the appellant expressly admit participation by her in the actual killing of John Dick, in all of them there are admissions tending, in some degree, to involve her in the crime. Counsel for the Crown, on the argument of the appeal, took the position that all the statements except that taken on 12th April were false, while that of 12th April was to be relied upon. It may be said at once that, in some material particulars, the statement of 12th April was also untrue, if the evidence of certain important witnesses for the Crown is to be relied upon. In fact, at the very climax of appellant's statement on this occasion Inspector Wood, one of the two officers to whom the statement was made, interjected the remark, "Oh, that don't add up", meaning that it could not be true. The trial judge, in his charge to the jury, cited admissions to be found in some of the earlier statements of the appellant as evidence against her that the jury should consider. In my opinion all the statements of the appellant to the police are to be regarded, in considering their admissibility, as subject to the rules of evidence applicable to confessions.

[49] The first statement was made in answer to questions put to the appellant by Inspector Wood on the arrival of the appellant at the police station in his custody. The questions and answers were noted then and there by Inspector Wood. No caution whatever was given to the appellant. No charge was then laid against her, but none the less she was then in custody, as Inspector Wood himself admits. Questions were asked and answered, particularly with reference to the borrowing of Landeg's car on the 6th March and appellant's use of it on that day, and the blood that was on the seat when it was returned.

[50] A second statement was taken on the same day, at the police station, the appellant being still in custody, although no charge had been laid against her. A shorthand reporter was present on this occasion, and his notes of what occurred were transcribed and put in evidence. Inspector Wood says that before beginning his questions he cautioned the appellant in the following terms: "Now Mrs. Dick, I must tell you that you are being detained in

connection with the death of your husband. You are not obliged to make any statement unless you wish to do so, but whatever you do say will be taken down in writing and may be used as evidence. Do you understand that?"—to which the answer was "Yes". An examination then followed, which lasted for about two hours. This statement contains a great deal with respect to the appellant's movements, particularly on the 6th March, and also as to the disposing of the torso by a man who was "a member of a gang from Windsor", and who telephoned her for some assistance.

[51] The third statement was also taken on 19th March and before a charge had been laid. The appellant was driven in a police car over the route referred to in the second statement, and further questions were asked and answers given, while in the police car. No caution was given her. Before going out in the police car the appellant asked Inspector Wood what time she would be going home and he said: "You won't be going home; you will be held in custody." He did not tell her why. On the return from the trip a charge of vagrancy was laid against the appellant, and she was placed in jail.

[52] Sgt. Preston had some former acquaintance with the appellant's family, and she seems to have regarded him as, in some measure, her friend. On the afternoon of 20th March the appellant said to Sgt. Preston that there were certain things that she wished to put in the statement she had made the day before, and asked him to see Inspector Wood. As the result of this a shorthand reporter was obtained, and the appellant was brought into the detectives' office, where she was further examined. The questioning by Inspector Wood began as follows:

> "Q. Now Mrs. Dick, I understand you have been talking to Detective-Sergeant Preston and some further information you want to give us in connection with the death of John Dick. Now go ahead and tell us so we can get it down here."

[53] No caution of any kind was given, and the examination was a lengthy one, and the subject matters of the examination were not, by any means, all introduced by the appellant. This was the first statement made after the charge of vagrancy was laid.

[54] The next statement was taken on 22nd March. The appellant was taken from the jail to the central police station for further questioning. Before she was questioned a caution was given her in these terms, "You are charged with vagrancy. Do you wish to say anything in

answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." An examination proceeded, but before the statement was completed Mr. Tuchtie, a solicitor retained for the appellant, arrived and prevented the continuance of the examination. This statement was taken down in long-hand by Det.-Sgt. Preston.

[55] On 26th March Inspector Wood informed the appellant that a charge of murder was laid against her, and a caution in the usual form was given. Inspector Wood said to her: "Now, you have given us three statements, do you remember the contents of them?"—to which she answered: "Yes". She further said that she washed to change the first two, but that the last statement taken was true, as far as it went. Presumably, the statements referred to as the first two were the statements that had been taken down by a shorthand reporter. The appellant declined to continue the statement that had been interrupted by Mr. Tuchtie, saying that she was told "to keep her mouth shut".

[56] The last statement—and no doubt, the most important of them all—was made on the afternoon of 12th April. The appellant had sent a message to Sgt. Preston that she wanted to see him. Preston went to the jail in the morning of 12th April and asked her what was on her mind. She said: "When are you going to bring the old man in?"—to which he replied:

"Who do you mean?" She said: "My father". Questions were then asked by Sgt. Preston and a conversation followed, particularly with regard to the connection of Bohozuk and Donald MacLean with the murder and with matters that led to it. In the course of this conversation the appellant said that Bohozuk had shot John Dick while the three of them were riding in the borrowed motor car on a side-road, on the afternoon of 6th March. No caution was given her on this occasion.

[57] In the afternoon of 12th April Preston returned to the jail in company with Inspector Wood, and asked the appellant if she would take them out to where she thought they might find certain bottles that appellant had said were thrown out of the car, and that might have Bohozuk's finger-prints on them. The appellant was willing to go, and the detectives thereupon took her over the route that she said had been travelled on the afternoon of the 6th March, when Bohozuk shot John Dick. There was much conversation about the murder during the drive, notes of which were made by one of the officers. No caution of any kind was

given to the appellant on this occasion, although at the conclusion of the trip she was warned that she need not make a statement, and was told that if she wanted to do so she could put it in writing.

[58] No further statement by her was put in evidence, and, so far as appears, no further statement was made by her.

[59] I do not think it is necessary to discuss the admissibility of these several statements individually. The last of the statements, that made on 12th April in the course of the drive taken by the detectives with the appellant in a motor car, is the one mainly relied upon by the Crown as containing an account of what really occurred, the earlier statements being regarded as mainly fiction. The learned trial judge did not make that distinction, however, in his charge, nor confine his references to that statement alone, in commenting upon the evidence tending to establish appellant's guilt.

[60] There are certain matters that particularly affect the admissibility in evidence of the last statement—that of 12th April. The taking of a statement on 22nd March had been interrupted by the intervention of the appellant's solicitor, Mr. Tuchtie, who advised her that she was not to give any statement unless he was present, or, as the appellant herself puts it, "that she was to keep her mouth shut". On 26th March, when the police endeavoured to obtain another statement from her, she told them very plainly that she intended to follow her solicitor's advice. In the light of this I am of the opinion that Sgt. Preston would, at least, have acted with more propriety if, when, on the morning of 12th April, the appellant asked her question about her father, he had refrained from himself asking her any questions, at least until he had cautioned her. But whatever may be the proper view to take of the morning interview on 12th April, I am strongly of the opinion that what was said in the course of the drive to which the police invited the appellant on the afternoon of that day was inadmissible in evidence. No caution whatever was given. The invitation to a drive, following upon the opening given by the morning's conversation, has the appearance of a shrewd device on the part of the police to get the appellant to make unguarded statements, contrary to the advice of her solicitor which she had told them plainly it was her intention to follow, and it may reasonably be concluded that she was induced to talk without any apprehension on her part that what she said might be used in evidence. That nothing had happened to remove the pressure that naturally arose from her arrest and custody, and to incline her to tell the truth, is evidenced by a number of

untrue statements made by her, and by Inspector Wood's interjection at the time, that her story of the murder did not "add up": *Markadonis v. The King,* [1935] S.C.R. 657, 64 C.C.C. 41, [1935] 3 D.L.R. 424.

[61] This was not the first occasion upon which Sgt. Preston, knowing as he did that the appellant, from his acquaintance with her parents, regarded him as somewhat in the nature of a friend, had taken an unfair advantage of her. On an earlier occasion Mr. Evans, a solicitor of Hamilton, whose partner, Mr. Walsh, had, at that time, been retained for the appellant, had, on the afternoon of 20th March, at the request of Mr. Walsh, gone to see the appellant, the appellant having, on the previous day, expressed her desire to see her solicitor. When he arrived at the police station Mr. Evans was denied the right to see her, by Sgt. Preston, who said that she was speaking to her mother on the telephone. This statement was deliberately false. The fact was that at that moment the appellant, who had been asked by the police to sign the statement made the day before and since transcribed by the reporter, was engaged in reading the statement over, and Sgt, Preston—as he himself admits—intentionally prevented Mr. Evans from seeing the appellant until he had succeeded in getting her signature to the statement, apprehending that Mr. Evans would probably advise her not to sign it.

[62] A real burden rests upon the Crown when it proposes to introduce in evidence a statement of the accused made while in custody, to a police officer, and that is in the nature of a confession, to establish first that the statement is a voluntary statement in the sense in which that term is used in the rule. While it is not essential in all circumstances that the statement, to make it admissible, shall have been preceded by a caution in the usual form, neither is the giving of such a caution, or, indeed, any mere formality, in all cases adequate to satisfy the burden. In *Sankey v. The King,* [1927] S.C.R. 436 at 441, 48 C.C.C. 97, [1927] 4 D.L.R. 245, Anglin C.J., in delivering the judgment of the Court, said:

> "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,* [1927] S.C.R. 258 [48 C.C.C. 126, [1927] 3 D.L.R. 186]; *Prosko v. The King* (1922), 63 S.C.R. 226 [37 C.C.C. 199, 66 D.L.R. 340]. 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."

[63] This dictum was quoted by Duff C.J. in *Thiffault v. The King,* [1933] S.C.R. 509 at 515, 60 C.C.C. 97, [1933] 3 D.L.R. 591.

[64] As already stated, some of the statements of the appellant to the police were made without any caution whatever being given; others were made after a caution had been given in the usual form, but beginning with the statement that the appellant was charged with vagrancy. No statement was made by her after the charge of murder was laid which was preceded by a caution. If the caution is to amount to anything more than the idle recitation of a form of words, without regard to their true import, then it seems to me that it cannot fairly be regarded as a caution such as is proper to be given to establish the voluntary character of a statement of the accused on her trial for murder, when she is asked whether she has anything to say in answer to a charge of vagrancy. It is in relation to that charge, and to that charge only, that the person questioned is cautioned that whatever he may say may be used in evidence. Whatever uses may otherwise be made of a statement made after such a caution and no other, it cannot, in my opinion, be admitted as a voluntary statement on the trial of the accused person for an entirely different offence, merely on proof of a caution such as was given here. It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offence, upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid and made the subject of a caution, but in relation to a more serious and altogether different offence: *Rex v. Seabrooke,* [1932] O.R. 575 at 579, 58 C.C.C. 323, [1932] 4 D.L.R. 116. It is trifling with the long-established maxim *nemo tenetur seipsum accusare,* and has more than the mere appearance—but, in the intended result, it has at times the effect—of a trial by the police *in camera* before even the charge has been laid. In my opinion such of the statements admitted in evidence here as were taken without the giving of a preliminary caution (including therein the statement of 12th April), and any statements taken by the police before the laying of the charge of murder, were improperly admitted in evidence as voluntary statements.

[65] In dealing with the objection that there was non-direction and misdirection in the charge of the learned trial judge to the jury it is unnecessary to set out certain important parts

of the charge that were based on the statements of the appellant which, in my opinion, were not properly admitted in evidence. If I am right in my opinion as to the inadmissibility of these statements, then the charge, in so far as it had relation thereto, is open to objection as a matter of course—objection of so serious a character as to require a new trial. Even assuming, however, that the statements admitted in evidence were all properly admitted, I am, with great respect, still of the opinion that there was material error in the learned trial judge's charge. As I have said already, there is not, in any of the statements of the appellant, an admission that she murdered John Dick, in the sense that, by any act of her own, she caused him any physical injury. That is not to say, however, that she may not have made such admissions as, with other evidence on the record, would have warranted a jury in inferring such a relationship on her part to the active commission of the offence as would make her a party to and guilty of it.

[66] After defining murder to the jury the learned trial judge read to the jury s. 69 of The Criminal Code, R.S.C. 1927, c. 36. He then proceeded as follows:

> "So I say to you, gentlemen, that every person who is present at and aids and abets another person in the commission of a criminal offence is a principal as well as the person who actually does the criminal act itself.
>
> "So let me say this to you, gentlemen, in order to assist you: If you conclude that the accused Evelyn Dick killed her husband intentionally, then she is guilty of murder. And further, gentlemen, if you conclude beyond a reasonable doubt that she did not actually shoot John Dick but that someone else shot him—that Bohozuk shot him—but conclude that she aided or abetted Bohozuk in the murder, then she is a principal and she is just as guilty as the person who fired the shot; she is equally guilty.
>
> "Aiders and abetters, gentlemen, in legal language, are persons who either actually or constructively are present at the commission of the offence aiding and abetting or counselling or procuring the same to be done. That is the law, gentlemen, and the question you must put to yourselves is, did Evelyn Dick aid in the killing of John Dick, or did she counsel or procure it to be done? If you find that she did, your course is clear, gentlemen; if you are satisfied beyond a reasonable doubt your course is clear.
>
> "Remember, gentlemen, Evelyn Dick is not being tried here for what she did after the killing. That evidence is merely helpful to you in aiding you from the circumstances surrounding it to come to a conclusion as to her guilt or innocence of the actual killing. So I say to you again, a person who before the offence is committed or at the time of its commission does something for the purpose of aiding any person to commit a criminal act, is a principal and is equally guilty with the person who committed the crime."

[67] In view of the evidence in this case, it was most important, in my opinion, not only to make these somewhat general observations to the jury, but further to define clearly to the jury

what “abetting” and “counselling” and “procuring” mean, as these terms are used in s. 69, and to instruct the jury how s. 69 might be applied in this case, according to the facts as the jury might find them to be on the evidence in this case. For example, in her statement of 12th April the appellant says that she met both John Dick and Bohozuk down-town on 6th March, and that both of them got in the borrowed motorcar with her, but there is no statement by her that this was by any prearrangement. There is no admission by her, nor any other evidence, of anything said between her and Bohozuk on that occasion with relation to murdering John Dick, or to any other design upon him. There is no admission by her that, as she drove through the country with Dick and Bohozuk as passengers, she knew that Bohozuk intended to shoot John Dick, or that she even knew he had any weapon with him. She says that as they rode along Dick and Bohozuk began to quarrel, and as they proceeded the quarrel became more bitter. The two of them were drinking and Dick drank a good deal—a fact supported by the evidence of Dr. Deadman, who performed the post-mortem examination. She says that in the quarrel Bohozuk, who was in the back seat of the car, shot Dick from behind, Dick being beside her in the front seat. Now, while it may be that a jury might infer from the evidence a good deal that is not expressly admitted, it is not at all certain that this jury did infer that the appellant knew more than she admits knowing of Bohozuk’s then present purpose. This jury should have been instructed that if they found that the appellant was no more than passively acquiescent at the time of the shooting, and that she had no reason to expect there would be any shooting until it actually occurred, then s. 69 did not apply: *Rex v. Dumont* (1921), 49 O.L.R. 222 at 230, 37 C.C.C. 166, 64 D.L.R. 128.

[68] Later in the charge appears the following:

> “Then, to show whether or not she was connected with this, what about the two hundred dollars that she gave to Bohozuk? You recollect the evidence in connection with that. She says that she lent the money to Bohozuk; she says he returned it. You are the sole judges, gentlemen, of what you believe and what you do not believe. As was said, I think, by one of the counsel, there is probably a thread of truth running through this, and you will have to try to pick that thread out and follow it through, from the circumstantial evidence and from the evidence which appears from her statements. You remember how she talked to Bohozuk about getting rid of Dick.”

[69] Now, the evidence with respect to the $200 transaction is only to be found in appellant’s statement, and according to that statement the $200 was given, not in connection with any intended killing of John Dick by Bohozuk, but for the purpose of being paid by him to

certain other persons who were to kill Dick. That plan, according to the statement, was abandoned, and the money was returned by Bohozuk to the appellant. However shocking an arrangement such as appellant's statement sets forth would be, it is almost incredible that the jury believed the statement, and the learned trial judge himself, earlier in his charge, had spoken of it in terms of incredulity. In any event, what it sets forth is not connected in any way in the evidence with the occurrence of 6th March. I venture the opinion that in view of the fact that the Crown had put in the several conflicting statements of the appellant as evidence of her guilt, and of the further fact that the evidence, apart from the appellant's statements, was of a character that caused the sharp difference of opinion, as to its value, displayed on the argument between the two counsel for the Crown, this case was one that particularly called for more definite instruction than was given the jury by the learned trial judge as to the application of s. 69 to the facts of this case.

[70] The principles that, in my opinion, are applicable in this appeal are among the fundamental principles of the administration of justice in criminal cases. Whatever may be the character of the appellant and the iniquity of her conduct, the presumption of innocence of the crime with which she is charged, until she is proved guilty by due process of law and after a fair trial, is applicable in her case as in any other. To deny her the same fair trial that every prisoner is entitled to is to make the right to a fair trial dependent upon the preconceived notions of the Court in the particular case. Nothing could be more foreign to the proper administration of justice, nor more destructive of the liberty of the subject, than to permit any such conception of its duty to determine the action of the Court in the cases that come before it. Whether the appellant is innocent or guilty of the crime with which she is charged is a matter to be determined by a jury. The duty of this Court is to see that there was a fair trial.

[71] Upon the grounds hereinbefore set forth the appeal should be allowed, and the conviction should be set aside and there should be a new trial.

New trial ordered.

Solicitor for the accused, appellant: John J. Sullivan, Hamilton.

Solicitor for the Attorney-General, respondent: C.L. Snyder, Toronto.