PROSKO v. THE KING.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. March 15, 1922.

Alleyn Taschereau, K.C., for appellant.
Lucien Cannon, K.C., for respondent.

DAVIES, C.J.:—Prosko had been tried jointly with another man named Janousky before Lemieux, C.J., and a jury. Both were found guilty by the jury but on appeal to the Court of King's Bench the conviction against Janousky was unanimously quashed and a new trial granted to him, while the conviction against the appellant Prosko was by a majority of that Court upheld, Lamothe, C.J. and Greenshields, J. dissenting.

The reasons of the Court for quashing the conviction against Janousky substantially were that certain statements or admissions or confessions made to the police officers of the City of Detroit by Prosko when he was in custody there, as to his own and Janousky's connection with the murder for which they were being jointly tried were inadmissible as against Janousky, and calculated to prejudice his receiving a fair and impartial trial,

and this notwithstanding that the trial Judge in charging the jury had fully and explicitly told them they were not to consider or give any weight to these alleged admissions or statements or confessions, as they were called, of Prosko as against his co-prisoner Janousky.

The Court was unanimous on this point of granting a new trial to Janousky but a majority, as I have stated, held, and in my opinion, properly that these statements, admissions or confessions of Prosko were admissible against himself in the circumstances and under the conditions in which they were made, and that they would not interfere, in Prosko's case, with the judicial discretion exercised by the trial Judge in refusing to grant the application of counsel for a separate trial of each of the prisoners.

The questions reserved for the consideration of the Court of Appeal were as follows:—

"(1) Was there error in refusing a separate trial to the accused? (2) Was there error in admitting the testimony of the two witnesses, Heig and Mitte, as to certain statements or so-called admissions made by one of the accused, Prosko? (a) as to the accused Prosko? (b) as to the other accused Janousky? (c) seeing the admissions made by Prosko were so made in the absence of Janousky, were the instructions of the trial Judge to the jury that statements made by one of the prisoners did not make evidence against the other, sufficient? (3) Was there error in admitting the testimony of the witness Roussin with respect to certain statements made by Prosko either before or after his arrest? (4) Was there error in permitting the Crown to produce before and exhibit to the jury as exhibits certain objects which were found in the possession of one or other of the accused, on or in the premises occupied by one or other of them?"

So far as Janousky is concerned, the questions are finally disposed of and we need not concern ourselves with them. As to the other accused, Prosko, question (3) was abandoned at the hearing before us, leaving the three questions to be considered by us on this appeal:—

(1) The refusal of a separate trial to him; (2) the admission in evidence of the statements or confessions sworn to by Heig and Mitte as having been made to them by Prosko; and (3) the production as exhibits of clothing and other articles such as a mask, a false moustache and an electric torch, said to have been found in a valise or parcel in Prosko's room in his boarding house in Montreal.

With regard to the first of these questions, I have no difficulty

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in declining to interfere with the judicial discretion exercised by the trial Judge in refusing to grant the application for such separate trial for Prosko. It is true the application was made twice; once, when the trial began and, afterwards, when it was proposed to put in Heig and Mitte's evidence respecting Prosko's statements or confessions (so-called) to them. But I am quite unable to find any possible prejudice which could arise to Prosko from this refusal. There might be and in fact the King's Bench (criminal side) held it to be quite possible that a joint trial coupled with the admission of such evidence, notwithstanding the Judge's charge to the jury that they were not to consider or give any weight to these alleged admissions or statements of Prosko as against his co-prisoner, might prejudice Janousky, and that it was impossible to say what effect they might have had on the minds of the jurymen. But as regards Prosko, admitting for the moment the admissibility of such evidence, I cannot find any possible prejudice which its admission would cause to him.

Then as to the admissibility of this evidence as against Prosko, I think the statement of Lord Sumner, when delivering the reasons for the conclusions of the Judicial Committee of the Privy Council, in the case of *Ibrahim* v. *The King*, [1914] A.C. 599 at pp. 609, 610, 83 L.J. (P.C.) 185, correctly states the rule in that regard:—

" . . . . It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale . . . ." See also *R.* v. *Colpus*, [1917] 1 K.B. 574, 86 L.J. (K.B.) 459; *R.* v. *Voisin*, [1918] 1 K.B. 531, 87 L.J. (K.B.) 574; *R.* v. *Cook* (1918), 34 Times L.R. 515.

I have read the evidence of each of these witnesses Heig and Mitte most carefully.

I concede that they were persons in authority having at the time Prosko in their custody with the intention of bringing him before the United States Immigration Board to be examined whether or not he was an undesirable immigrant to the United States, and with a view to his deportation being ordered if he was found undesirable.

I fail to find the slightest evidence that Prosko's statements or confessions were induced or obtained from him either "by

fear of prejudice or hope of advantage exercised or held out'' by either Mitte or Heig to him. On the contrary I conclude that Prosko's statements were absolutely voluntary ones.

After having been told by these witnesses in Detroit that they were going to take up his case with the United States Immigration officials and have him deported to Canada, Prosko replied:— ''I am as good as dead if you send me over there.''

The officers in reply to this naturally asked, ''Why''? Whereupon Prosko proceeded to give his statement as given in evidence by these two witnesses. (It must be remembered that the time when he made these statements or confessions was before he was brought before the Immigration Board, and that later, when he was brought before that Board he repeated under oath, as Heig and Mitte say in evidence, the statement he had already made to them. The Immigration Board on hearing his statement or confession made the necessary order for his deportation). Under these circumstances I feel bound to answer the second question in the negative.

As regards the third question to be considered by us on this appeal, I feel bound to say that I cannot see any reason why the Crown, having by its officer, Roussin, visited the boarding house in Montreal of Prosko, and having there been shewn the rooms said to have been occupied by Prosko and one Yvasko, should not have produced the articles found there and put them in as exhibits.

If the Crown produced any of these articles found in this room of Prosko's it was bound, in my opinion, to produce all articles found there.

I do not attach any great importance to the production of these articles. They consisted in part of an electric flashlight, a false moustache, several photos of Prosko, a cap and other articles.

The question of their being improperly admitted as exhibits was not strongly pressed at Bar, and even if they were improperly given in evidence as exhibits, which I do not at all concede, I cannot think it possible that ''any substantial wrong or miscarriage'' was thereby occasioned on the trial as regards Prosko.

Unless there was in our opinion such substantial wrong or miscarriage occasioned, we are forbidden by sec. 1019 of the Criminal Code to set aside the conviction or direct a new trial.

Under all these circumstances and on my findings with respect to the questions submitted to us, I am of the opinion that the appeal must be dismissed.

IDINGTON, J.:—Four men entered, during the night of July

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27, 1918, a lumber camp in the Province of Quebec, for the purpose of robbing the men therein, and, in the course of such pursuit, shot and killed one of the men there.

Two of the said four were convicted of the murder and were executed in July, 1920.

Thereafter the appellant and another named Janousky were placed on trial in Quebec. In their defence they were represented by the same counsel who asked the Court to direct that they be tried separately, but this privilege was denied them.

The trial resulted in the conviction of both. Thereupon a stated case was directed by the Court of King's Bench and, upon the hearing thereof, a new trial was granted Janousky but, by a majority of the Court, denied the appellant.

The Chief Justice and Greenshields, J. dissented from the said denial of a new trial to the appellant. Hence this appeal here based on some of the grounds taken in such dissent.

The first question so raised is as follows:—(1) Was there error in refusing a separate trial to the accused?

The Court of King's Bench having unanimously arrived at the conclusion that as to Janousky there was error, we have nothing to say as to that aspect of the case except to make clear the reason for so distinguishing.

There were many statements made by appellant which the trial Court admitted in evidence against him, and in some of these he had referred to Janousky, under his nickname of "little George" in such a way as to implicate him.

There was a possibility of the jury having been impressed thereby to the detriment of Janousky and, in that result, to have confused that and somewhat similar incidents in other features of the case as presented by the entire evidence; notwithstanding the clear and express direction of the trial Judge to the jury to apply the evidence in such a way as to avoid such possible error.

There was no such counterpart in the evidence against Janousky alone as would tend to the confusion thereof with the case made against the appellant alone.

In the broad salient features of the case demonstrating the actual perpetration of the crime there was nothing to confuse.

It is merely when the evidence of the identification of the accused, or either of them, came to be considered by the jury that there was a possibility of undesirable confusion of thought.

Whatever may have been possible in that regard relevant to Janousky, and to his detriment, I cannot see how appellant was likely to have suffered the like from anything in the evidence directed to Janousky's part, if any, in the matter in question.

Counsel for appellant indeed did not point to anything specific in that regard but seemed to rest upon and press the possibility of appellant having been able to call Janousky as a witness on his behalf if a separate trial had been granted.

There is nothing specific in way of fact presented to support this contention. Nor, so far as I can see, was such a pretension presented to the trial Judge.

I cannot see any good ground for the allowance of this appeal by way of answering this question in the affirmative.

The next question raised herein is as to the admissibility of the evidence of Heig and Mitte who swear that appellant, after having been presented with the decision of the authorities in Detroit that he was to be deported back to Canada as an undesirable citizen, said, "I am as good as dead," which naturally evoked the question, "How is that?" and he proceeded to tell a story which, as I read its introduction was not improperly induced within the meaning of the rule in that regard as set forth by Lord Sumner in the case cited to us, as follows:—

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

I refer to the case of *Ibrahim* v. *The King*, [1914] A.C. 599 at pp. 609 and 610. The dictum from which I quote was approved in the later case of *R.* v. *Voisin*, [1918] 1 K.B. 531.

As pointed out in argument the said case was decided on other grounds and the ruling only an incident, but nevertheless, this is a fair presentation of the rule invoked by the dissenting Judges in the Court of Appeal.

It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against.

And the evidence of each of these witnesses is introduced by a distant categorical denial of having exercised any of these practices which would bring the evidence given within the rule against its admission.

I think, therefore, the trial Judge's ruling was right and that the question raised anent same must be answered in the negative.

Then as to Roussin's evidence the appellant was distinctly warned by him upon his arrest that anything he said would be used against him and hence no ground for the contention set up.

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In truth it seems to have been assumed in argument here as hopeless to argue, if held that the evidence of the American detectives of statements made by accused, without express warning, was admissible, then Roussin's story in what he tells, so far as it was substantially the same as had been told by the said detectives, could not be rejected.

I am decidedly of the opinion that both were admissible.

The only other question upon which counsel for appellant rested his appeal was the fourth question of the stated case, which reads as follows:—

"Was there error in permitting the Crown to produce before and exhibit to the jury as exhibits certain objects which were found in the possession of one or other of the accused on or in the premises occupied by one or other of them?"

I, with great respect, find it difficult to treat such a question seriously. Some of the articles found were not worthy of serious consideration by the jury, but the false moustache and flashlight, for example, were important items well worthy of consideration in a case such as this dependent to so great an extent as it was, upon circumstantial evidence.

That which was incapable of being fitted into the chain of circumstances to be relied upon of course would be discarded by the jury; to whom we must attribute common sense.

It became the duty of the Crown officer to present the suitcase contents as found and let the jury determine what was relevant and what was not. And then not leave the impression that accused was so intent in pursuit of easy money that he could think of nothing else, and hence carried only false moustaches, flashlights or glass cutters.

The question should be answered, as it was by the majority of the Court below, in the negative.

The appeal herein should be dismissed.

ANGLIN, J.:—The material facts are sufficiently stated in the judgments delivered in the Court of Appeal.

Of the three questions argued before us only one in my opinion called for consideration, viz. whether certain statements alleged to have been made by the appellant to two American detectives (Heig and Mitte) were admissible in evidence against him. To both the other grounds of appeal sec. 1019 Cr. Code appeared to me to afford a sufficient answer. But, having regard to the importance attached to the statements made to Heig and Mitte by the Chief Justice in charging the jury, the question of their admissibility cannot be thus disposed of.

My only reason for withholding concurrence in the judgment dismissing the appeal was that, owing to pressure of other work

of the Court, I had not had an opportunity of satisfying myself by a study of the record that the Crown had discharged the burden, which undoubtedly rested upon it, of establishing that the statements made by the appellant to Heig and Mitte were voluntary statements, in the sense that they had not been obained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority. *Ibrahim* v. *The King*, [1914] A.C. 599 at p. 609; *Reg.* v. *Thompson*, [1893] 2 K.B. 12, at p. 17; *R.* v. *Colpus*, [1917] 1 K.B. 574; *R.* v. *Voisin*, [1918] 1 K.B. 531, at p. 537.

The two detectives were persons in authority. The accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him.

While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *R.* v. *Kay* (1904), 9 Can. Cr. Cas. 403, they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinised. *R.* v. *Rodney* (1918), 43 D.L.R. 404, 30 Can. Cr. Cas. 259, 42 O.L.R. 645.

If I should have reached the conclusion that the burden on the prosecution of establishing the voluntary character of the alleged admissions had not been discharged, the proper result would have been to order not the discharge of the appellant (sec. 1018 (d) Cr. Code), but his remand for a new trial (sec. 1018 (b) Cr. Code). Since the majority of the Court was clearly of the opinion that the impugned evidence was properly received and the appeal therefore failed, I did not feel justified in delaying the judgment and shortening the time available for consideration of the case by the executive, merely to complete my own study of the evidence, especially in view of the fact that the case must in any event go before the Minister of Justice, who may, if he should entertain any doubt of the propriety of the conviction, grant the appellant the only relief to which he would in my opinion in any event have been entitled. (sec. 1022 Cr. Code.)

For these reasons, while not dissenting, I refrained from concurring in the judgment affirming the conviction.

Since the delivery of judgment, however, I have had an opportunity of considering the material evidence and I think I should state that I now see no reason to differ from the conclusion reached by the majority of the Court that the evidence in question was admissible. At all events the discretion exercised

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by the trial Judge in receiving it could not properly have been interfered with. *R.* v. *Voisin,* [1918] 1 K.B. 531.

BRODEUR, J.:—Three questions are raised.

The first is to determine if the accused Prosko was justified in demanding to be tried separately from Janousky.

The presiding Judge refused this request and both accused were tried and found guilty of murder at the same time.

The Court of Appeal decided that Janousky was justified in asking for a separate trial because the admissions made by his accomplice Prosko might have caused him a real prejudice and led to his condemnation. The Court of Appeal was of opinion that Prosko had suffered no prejudice by being tried at the same time as his accomplice. A new, separate trial was therefore granted to Janousky but not to Prosko.

The latter appealed from this decision.

The evidence at the trial was, generally speaking, common to both accused. They were both seen near the scene of the murder before and after. Articles were found in both their rooms such as persons who make theft their principal occupation are accustomed to make use of. In the case of Prosko this circumstantial evidence was strengthened by certain admissions which he made before and after his arrest for murder.

It is quite evident that Prosko's admissions might have damaged him considerably; but they could have been proved equally well whether Prosko was tried alone or with his accomplice. So a separate trial would not have been more favourable to him in this respect. Many articles were found in Janousky's rooms, mention of which at the trial of Prosko might have caused him prejudice. But similar articles were found in his rooms. So it seems to me that this evidence regarding articles found in Janousky's rooms cannot be regarded as having caused any real prejudice to Prosko. Section 1019 of the Criminal Code covers the case. I would therefore say that the Judge presiding in the Criminal Court was not in error in refusing to grant Prosko a separate trial.

The second question that is submitted to us refers to certain admissions made by Prosko to the witnesses Heig and Mitte.

Detective Roussin, who had been charged with the discovery of the murderers, had learnt that Prosko might be one of them and, about a year after the crime was committed, he traced him to Detroit in the United States. He then conferred with two detectives of that city, Heig and Mitte, and they decided, in order to avoid the costs of extradition proceedings, that Prosko should be brought before the immigration authorities, who, if

they found he was not a desirable citizen, might deport him from the United States to Canada.

He was arrested for violating the immigration laws. He was told that he was to be deported to Canada, whereupon he declared, in the presence of Heig and Mitte, that he did not wish to return to Canada, adding, "I am as good as dead." The detectives asked him why, and he then told them that he had been in a camp with certain men who had committed a murder while he was there. These statements were made voluntarily without threat or solicitation.

Recent decisions in England are to the effect that statements such as those made in the present case must be admitted by the Courts:—*Ibrahim* v. *The King*, [1914] A.C. 599; *R.* v. *Colpus*, [1917] 1 K.B. 574; and *R.* v. *Voisin*, [1918] 1 K.B. 531.

It remains to be noted that these statements were made by Prosko before he was arrested for murder. I do not think that the Court was in error in admitting the testimony of Heig and Mitte.

The third question is to decide if the articles found in the rooms of the two accused could be produced as exhibits in the case.

These articles were produced as in support of the accusation. It is in accordance with accepted rules, especially in the case of murder, to produce before the Court articles which the accused might have used in committing the crime with which he is charged. Things which might serve to identify him can also be produced.

It appears certain that theft was the motive for the crime in this case. I, therefore, can see no objection to producing before the Court articles which are generally used by thieves and which were found in the possession of the accused. It is possible that some of these articles may not have been used on the occasion when the crime was committed. But this circumstance would not be sufficient to constitute, in the case of Prosko, a denial of justice or a serious wrong. It would answer this third question in the negative.

The appeal should, therefore, be dismissed.

MIGNAULT, J:—The only question raised by this appeal which appeared to me at the hearing to have any substance was whether the evidence of some statements made by Prosko at Detroit to the American detectives Heig and Mitte should have been allowed.

When these statements were made Prosko was under arrest issued by the United States Immigration authorities, as an undesirable, which warrant was served on him by one Roussin, a

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Canadian detective, who was seeking to bring him to trial in Canada on a murder charge, and instead of instituting extradition proceedings, it was considered better to have Prosko deported as an undesirable when he would of course be arrested on the murder charge. Roussin brought Prosko before the immigration authorities in Detroit, and when informed by them that he would be deported, Prosko told them that he was as good as dead. Heig and Mitte then questioned him and it was under these circumstances that he made the statements which were given in evidence.

I have serious doubts whether this evidence should have been allowed. The American detectives were persons in authority and Prosko's exclamation when told that he would be deported shews that he understood that his deportation was sought in order to have him brought to trial in Canada on the charge of murder. He evidently made the statements he did with the hope to escape deportation and his consequent arrest for murder, and the American detectives were persons in authority. It is true that he subsequently made similar admissions in Canada to Roussin, but the trial Judge insisted in his charge on the evidence of Heig and Mitte as corroborating that of Roussin which otherwise the jury might have hesitated to accept as sufficient, so the introduction of this evidence may have caused a substantial wrong to the appellant.

A majority of the Court is, however, of the opinion, that the evidence of Heig and Mitte was admissible, so that Prosko's appeal cannot succeed.

Under these circumstances I have not entered a formal dissent, but I cannot do otherwise than express my serious doubts as to the admissibility of this evidence.

Appeal dismissed.