ROYAL COMMISSION ON THE
DONALD MARSHALL, JR. PROSECUTION

BOOK OF AUTHORITIES USED BY THE ROYAL CANADIAN MOUNTED POLICE, CORRECTIONAL SERVICE OF CANADA, AND THE NATIONAL PAROLE BOARD

APPENDIX "A"

LIST OF AUTHORITIES

Paragraph

" thereby have vested in others a right which might become incon-
" sistent with the rights of the inhabitants at some future time."
That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links from one public place to another for an uninterrupted period of 40 years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and accordingly it is not possible, in my opinion, to build up on the case of *Paterson* [119] any argument favourable to the appellants.

On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd.* v. *Southport Corporation*,[120] though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour; Sharpe, Pritchard & Co. for Clerks to Worcester and Westmorland County Councils.*

F. C.

[119] 6 App.Cas. 833.

[120] [1926] A.C. 355.

MOHAMED FIAZ BAKSH . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.*
1958
Feb. 13;
Mar. 11.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA.

Criminal Law—Appeal—Fresh evidence—Statements by prosecution witnesses to police—Not available at trial—Material discrepancies when compared with oral evidence—Whether new trial should have been ordered—Murder—British Guiana.

British Guiana.

The appellant and his co-accused (who had each relied on an alibi) having been convicted of murder, both appealed to the Court of Criminal Appeal of British Guiana, who permitted to be produced and proved on the hearing of the appeal statements, which had not been available at the trial, made to the police by the three main witnesses for the prosecution. The Court of Criminal Appeal found that a comparison of the statements with the oral evidence given by those witnesses at the trial disclosed material discrepancies. They said in respect of the appellant's co-accused that in the interests of justice the value and weight of the new evidence should be determined by a jury and not by that court, and they quashed his conviction and ordered a new trial. In the case of the appellant, however, they were of opinion that different considerations applied; they considered that nothing favourable to him could have been obtained from the statements which was not obtained at the trial, and held that the jury's verdict in respect of him could not be disturbed on that ground:—

Held, that if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis. Their credibility could not be treated as divisible and accepted against one and rejected against the other. A new trial should have been ordered in both cases.

The case would be remitted to the Court of Criminal Appeal with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they considered proper in the interests of justice in the existing circumstances.

APPEAL (No. 26 of 1957), by special leave, from a judgment of the Court of Criminal Appeal of British Guiana (June 7, 1957), dismissing the appellant's appeal from a judgment of the Supreme Court of British Guiana (Clare J. and a jury) (December 5, 1956).

* *Present*: LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW,

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whereby the appellant was convicted of murder and sentenced to death.

The following facts are taken from the judgment of the Judicial Committee: The appellant had been charged jointly with one Nabi Baksh with the murder of Mohamed Saffie on June 12, 1956. Nabi Baksh was also found guilty.

Both prisoners appealed to the Court of Criminal Appeal of British Guiana (Holder C.J., Stoby and Date JJ.), and on June 7, 1957, that court dismissed the appellant's appeal but quashed the conviction of Nabi Baksh and ordered a new trial in his case.

The appellant appealed by special leave to Her Majesty in Council and his appeal was heard by the Board on February 13, 1958.

The case for the prosecution was that the deceased man was killed shortly after 3 a.m. on June 12, 1956, by shots from a gun fired by one or other of the two accused men acting together with the common design of killing or doing grievous bodily harm to the deceased. The case rested largely on the identification of the accused by three prosecution witnesses named Mohamed Haniff, the deceased's brother-in-law, Mohamed Nazir, brother-in-law of Haniff, and Bebe Mariam, who had been living with the deceased. Haniff at the trial swore that on June 12 he was living with the deceased at a house at Clonbrook, East Bank, Demerara. Also living in the house were Nazir and his wife and Bebe Mariam. He woke about 3 a.m. and helped the deceased and Nazir load a boat with vegetable produce, and then returned to the house with the deceased. Nazir and his wife and Bebe Mariam went away with the boat. He went to lie on his bed, and before Nazir returned with the boat he heard gun-fire from the kitchen direction and went to the window with his torch. He saw two men whom he could identify. He shouted to them: " Alright Fiaz and Jacoob " no use run any more I see you already." Nabi Baksh was known as Jacoob. He saw a gun in the appellant's right hand. He ran downstairs and saw deceased lying at the top of the step leading from the kitchen. Nazir was there, and they lifted the deceased and placed him on his back.

He said that he had been acquainted with both accused for three or four weeks before June 12.

Nazir swore that after he had taken his wife and Bebe Mariam with the vegetable produce to the bus when he reached the spot where he usually tied his boat he heard a shot. He ran underneath his house and from there saw the appellant and Nabi Baksh crossing a trench near the house. He heard Haniff shout

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to them " Alright Fiaz and Jacoob, don't run I see you." He turned his torch on them and saw the appellant had a gun.

Bebe Mariam swore that she and the deceased were awakened about 2.30 a.m. on June 12 by the barking of dogs and that by a torchlight she saw the appellant and Nabi Baksh about 48 yards away from the house. She said that she had known them for about two years.

Neither of the accused gave evidence, but in statements from the dock denied that they were anywhere near the scene of the murder. They gave an account of their movements and said that the statements they had given to the police were true. They both called a number of witnesses in support of their alibis.

Both prisoners appealed, and on May 13, 1957, counsel who had appeared on behalf of Nabi Baksh at the trial swore an affidavit stating that at his request the Solicitor-General had allowed him to inspect the statements made to the police by the witnesses Haniff, Nazir and Bebe Mariam on the morning of June 12, 1956, which had not been available to him at the trial, and that these statements showed serious discrepancies and contradictions in vital matters when compared with the evidence given by them at the trial. The Court of Criminal Appeal accordingly allowed these statements to be produced and proved. They were found to contain the following discrepancies—Haniff in his statement had said that after he heard the gunshot he looked out of the window and shone his torch and saw the appellant and another man whom he did not know by name on the parapet of the trench dividing the yard and the rice field; that he ran on the bridge and was all the time shouting " all right " Fiaz, all you run, me see all you two."

Nazir had said that neither he nor Haniff had shouted at the men who were escaping because they were afraid of being shot.

Bebe Mariam had said that when she was awakened by the barking of dogs she saw the appellant by the light of her husband's flashlight running away in the rice field south of her home.

After examining the statements and comparing them with the sworn testimony at the trial the Court of Criminal Appeal in their judgment delivered on June 7, 1957, said: " From an examina- " tion of the additional evidence it will be seen that Bebe Mariam " made no mention of seeing Nabi Baksh on the morning of " June 12 shortly before the shooting; Mohamed Haniff did not " know the name of the man he saw with Fiaz Baksh and there- " fore could not have called it out. Had the jury known these " facts we are unable to say that inevitably they would have

"arrived at the same conclusion. They may have done so "because they may have accepted Mohamed Nazir's evidence "that he saw the two appellants, or the two witnesses already "mentioned may have been able to explain or amplify their "original statements."

They went on to say that in their view, in respect of Nabi Baksh, in the interests of justice the value and weight of the evidence should be determined by a jury and not by that court. They accordingly quashed the conviction in his case and ordered a new trial.

With regard, however, to the present appellant, they considered entirely different considerations applied. They could find a good deal unfavourable and nothing favourable to him in the statements and considered that nothing favourable to him could have been obtained therefrom which was not obtained at the trial. They accordingly held that the jury's verdict in respect of this appellant could not be disturbed on this ground.

1958. Feb. 13. *Bernard Gillis Q.C.* and *J. Lloyd-Elcy* for the appellant. The statements having been admitted, at the hearing before the Court of Criminal Appeal the Chief Justice said that the court were of opinion that the discrepancies between the statements and the oral evidence given by those witnesses at the trial were so startling that they struck at the root of the case for the prosecution and justice demanded that they should have been disclosed to the defence. Having quashed the conviction of, and ordered a new trial of, Nabi Baksh, the court said that different considerations applied in the case of the appellant, and pointed out that in each of the three statements the appellant had been positively identified, and they dismissed his appeal. Subsequently the Crown entered a nolle prosequi in respect of Nabi Baksh on the ground that in the opinion of the Law Officers it would be dangerous to ask the jury to accept the evidence of identification, and he was freed. The submission is that the discrepancies disclosed that those witnesses were wholly discredited. They were fundamental discrepancies. That being so, one cannot sever the credit of a witness, and if he has given perjured evidence —which is the consequence of the observations of the Court of Criminal Appeal—the case for the prosecution cannot be allowed to stand as regards another appellant with regard to whom those witnesses have also given incriminating evidence. Had the jury had before them the false information of those witnesses with

regard to one of the accused, it cannot be said that they must inevitably have convicted in the case of the other—they may not necessarily have returned the same verdict.

The appellant has been denied the substance of a fair trial. There was in the possession of the prosecution at the time of his trial evidence of a most cogent character to the effect that the witnesses had given false evidence; he was therefore deprived of the strongest possible weapon when he was seeking to challenge the honesty of the witnesses for the prosecution. It must be admitted that as soon as counsel and the authorities were aware of the discrepancies proper facilities were given for the production of the statements. If material is in the prosecution's possession which will destroy their case, it is their duty to disclose it. A further ground of appeal is that there was misdirection by the trial judge in directing the jury that the onus of proof was on the accused to establish the alibi.

There is a paucity of authority on the main submission, but see *Reg.* v. *Puddick*.[1] The whole of the material is before the Board, and in all the circumstances it is submitted that the conviction should be quashed or that the appellant should be placed in the same position as his co-accused and a new trial ordered. [Reference was also made to *Reg.* v. *Collister*.[2]]

J. G. Le Quesne for the Crown. It was the duty of the Criminal Appeal Court to say: "Would this new evidence affect "the decision of reasonable men in this case?" That is the correct test. For the Crown to succeed, the Board must be satisfied that the Court of Criminal Appeal must with justification have taken the view that no reasonable jury would have returned a different verdict in respect of the appellant if this new material had been used at the trial. The fact that the jury might be affected by these statements as regards Nabi Baksh does not necessarily involve the proposition that a reasonable jury would similarly have been affected in the case of this appellant. The effect of the new evidence was quite different in the case of Nabi Baksh from that of the appellant; the three statements left the appellant implicated by those three witnesses just as he was implicated by the evidence of the Crown. In his case there was no contradiction but consistent testimony of identification all the way through. The Court of Appeal were entitled to say, as they did, that if those statements had been before the jury they would not have been affected in their view of the guilt of the appellant.

[1] (1865) 4 F. & F. 497.

[2] (1955) 39 Cr.App.R. 100.

There is no rule to say that this conviction should be quashed merely because material has been withheld. Further, it would not be the right course for the Board to quash the conviction at this stage.

Feb. 13. LORD REID said: "The appeal will be allowed and "the case remitted to the Court of Criminal Appeal of British "Guiana with a direction that they should quash the conviction "and either enter a verdict of acquittal or order a new trial, "whichever course they may consider proper in the interests of "justice in the existing circumstances. Their Lordships will "give their reasons for their decision at a later date."

March 11. Their Lordships' reasons for allowing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: Their Lordships are unable to accept the reasoning of the Court of Criminal Appeal on this matter. If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the prosecution it follows that by cross-examination—or by proof of the statements if the witnesses denied making them—the defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis. Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and re-open it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases.

It remains only to say that their Lordships are in complete agreement with the view expressed by the Court of Criminal Appeal with regard to the criticisms which were made, and which have been repeated before the Board, of the trial judge's summing-up with respect to the onus of proof in connexion with the defence of alibi. Taking the summing-up as a whole, the jury could have been left in no doubt that the onus remained on the prosecution throughout to establish the guilt of the accused.

For the reasons stated above, their Lordships have humbly advised Her Majesty that the appeal should be allowed and the case remitted to the Court of Criminal Appeal of British Guiana with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

C. C.

MARY NG . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF THE COLONY OF SINGAPORE.

Burden of Proof—Criminal case—Facts especially within knowledge of accused—No burden on accused to prove that no crime has been committed—Onus on prosecution to prove commission of offence—Evidence Ordinance (Laws of Singapore, 1955, c. 4), ss. 107, 115. Singapore. Ceylon—Ceylon Evidence Ordinance, s. 106.

By section 107 of the Singapore Evidence Ordinance: "When "any fact is especially within the knowledge of any person, the "burden of proving that fact is upon him."

The appellant was charged with and convicted of attempting to cheat a man and thereby attempting dishonestly to obtain money from him by representing to him that she was able to induce the magistrate before whom the man was to be charged with a criminal offence to show favour to him. The trial judge held that whether or not the appellant could induce the magistrate to show favour to the accused man was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance the onus was on her to prove that she could induce the magistrate to show favour:—

Held, that by reason of section 107 no burden was placed on the appellant to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the magistrate, and that had not been done. There was in fact no evidence against the appellant on a principal ingredient of the charge, namely, deceit, and the case therefore came within the range of cases in which the Board would interfere.

Dictum in *Attygalle* v. *The King* [1936] A.C. 338, 341; 52 T.L.R. 390; [1936] 2 All E.R. 116, that "It is not the law of

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* *Present*: LORD REID, LORD TUCKER, the RT. HON. L. M. D. DE SILVA.

ntil it was inevitable. In the result I think that both the crew of " Rockabill " and the employees of the Dock Board were negligent that their negligence contributed to the collision and that through i their employers are both liable to the owners of the " King Orry " he damage sustained by her in the collision that resulted from their gence.

ie last question is whether the owners of the " Rockabill " can ver their damages from the second defendants, the Mersey Docks Harbour Board. In my judgment they cannot do so, for as between i and the Dock Board the rule of the common law and not the rule ie maritime law as embodied in the Maritime Conventions Act, 1911, applies. The rule of the common law, as I understand it, is that in a case as this, where the claimants have themselves been guilty of gence contributing to their own damage, the loss lies where it and they cannot recover from their co-tortfeasors.

herefore give judgment for the plaintiffs against both the defendants, I dismiss the counterclaim of the first defendants against the second idants.

licitors : *Pritchard, Sons, Partington & Holland*, agents for *Batesons* o., Liverpool (for the plaintiffs); *Botterell & Roche*, agents for *hitman, Pedder & Co.*, Liverpool (for the first defendants, the owners he " Rockabill "); *Gregory, Rowcliff & Co.*, agents for *E. A. rhouse* (for the second defendants, the Mersey Docks and Harbour d).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

MAHADEO *v.* R.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Russell of Killowen, Sir Lancelot Sanderson, Sir George Lowndes, Sir Sidney Rowlatt), **April 30, May 1, June 11, 1936.**]

Privy Council—Fiji—Criminal Law—Manslaughter—Conviction of murder—Exclusion of statements—Corroboration.

The appellant, a lad of 16, in separating two boys who were fighting, caused the death of one of them. The only witness was one Sukraj, who was present at the time and was charged as accessory after the fact. At the trial a letter was read from the solicitors acting for the defendants asking for the production of all statements made by the defendants and Sukraj. This was characterised as improper and production was refused. Also at the trial counsel for the defendants agreed that the medical aspect of the case should be argued by one counsel only, and it was agreed that this should be done by counsel for an accessory. This counsel was not allowed to deal with this subject, and was told to confine himself to the question whether his client was an accessory:—

HELD: (i) in the circumstances the killing only amounted to manslaughter, there being no presumption of malice.

(ii) the letter asking for production of the statements was quite a proper one and the statements should have been produced.

(iii) counsel for the accessory was quite entitled to argue whether there had been a murder or not, and this would be so even if the prisoner had pleaded guilty. He was, therefore, fully entitled to discuss the medical aspect of the case.

(iv) Sukraj being an accomplice, his evidence required corroboration. The fact that he kept silence as to the death of the boy was not corroboration.

[EDITORIAL NOTE. There is an application here of the qualification of the doctrine of the presumption of malice given in *Woolmington* v. *Director of Public Prosecutions* (2), and applicable to cases of homicide. The restriction of speeches of counsel is another important matter here dealt with, and it is shown that counsel for an accomplice or accessory may argue that the crime was never committed, even though the prisoner has pleaded guilty. It was not necessary to go as far as that here. The counsel for the accessory here only desired to deal with the medical evidence for the prosecution.

AS TO MANSLAUGHTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 438-440, paras. 752-756; and FOR CASES, see DIGEST, Vol. 15, pp. 782, 783, Nos. 8385-8435.]

Cases referred to:

(1) *R.* v. *Baskerville*, [1916] 2 K.B. 658; 14 Digest 463, *4934*.

(2) *Woolmington* v. *Public Prosecutions Director*, [1935] A.C. 462; Digest Supp.

(3) *Re Dillet* (1887), 12 App. Cas. 459; 17 Digest 490, *542*.

APPEAL by special leave in a criminal case from the Supreme Court of Fiji. The facts are fully stated in the judgment.

J. M. Pringle for the appellant.

Kenelm Preedy for the respondent.

The judgment of their Lordships was delivered by SIR SIDNEY ROWLATT.

SIDNEY ROWLATT : This is an appeal *in forma pauperis* by special
on the judgment of the Supreme Court of Fiji sitting at the
Circuit Court dated May 17, 1934, by which the appellant
d guilty of the murder of a boy named Ramautar, and being a
rson within the meaning of the Fiji Ordinance No. 37 of 1932
suant to sect. 12, sentenced to be detained as the Governor
irect. The appellant is in fact about sixteen years old.
r, the boy alleged to have been murdered, was about thirteen
l. Pursuant to Ordinance No. 6 of 1875 the trial was held
e Chief Justice of Fiji, who is the only judge in the Island,
ith assessors, and by sect. 29 of the same Ordinance the decision
d solely in the judge. By virtue of sect. 36 of Ordinance No. 4
he trial, for all purposes material to the present appeal, fell to
ed by the English common law.

aterials before their Lordships on the hearing of the appeal
of the official note (not taking questions and answers verbatim),
's own somewhat abbreviated notes, a resumé of the remarks of
Justice to the assessors at the close of the case, in the nature
ning up, which resumé was handed by the then Chief Justice to
Attorney-General after the institution of this appeal and brought
eir Lordships as an exhibit to an affidavit by the Attorney-
or Fiji, and lastly a note of the summing up in longhand made
f the counsel for the defence at the trial and exhibited to an
y him. Certain incidents in the trial to which it will be neces-
efer appear from affidavits made by counsel for the defence
hen Attorney-General In substance there is no conflict as to
dents.

e was tried upon information by the Attorney-General pursuant
ocedure in force in the colony, by which the appellant was
ith murder, and one Mathura his step-father and another boy,
were charged, Sarandas with aiding and abetting and Mathura
g an accessory after the fact. In the result Sarandas was
l at the close of the case for the prosecution and Mathura, like
ant, was convicted. The history of the case can be stated
vely briefly. The only evidence as to the actual homicide
by one Sukraj, a labourer about twenty-five years of age.
of this was as follows : On the morning of Jan. 18, 1934, the
the witness Sukraj, the dead boy Ramautar who was
rteen years of age, and Sarandas, about the same age as
, namely thirteen years of age, were weeding in a field belonging
a. A quarrel resulting in a struggle arose between Ramautar
das, who was the stronger boy. The appellant told Sukraj to
hem and on his refusal intervened himself. At this moment
d had hold of Sarandas's legs. The appellant released Sarandas

and caught Ramautar by the throat while he was on the ground. The witness and Sarandas were then cutting grass. The appellant called out in a short time and said, "Come and see what has happened to Ramautar." When the witness and Sarandas got up to him the deceased was quivering. That went on for three minutes, when he died. Sukraj then deposed that on the suggestion of the appellant they took the body and put it under a tree with the deceased's turban round his throat and leaving it there returned to Mathura's house. There was independent evidence that the four youths were working together in the field in question and the deceased's dead body was seen by independent witnesses under the tree. As regards what actually happened there is only the evidence of Sukraj. It appears that Sukraj arrived at Mathura's house before the other two and said nothing. The appellant, when he came, told the deceased's mother and her husband who apparently lived in Mathura's stable that Ramautar had hanged himself. Mathura was not then in. On his return he was told, according to Sukraj, everything. He then told the others to say nothing and went himself to Tavua Police Station some miles away from Tagi Tagi where these events happened and reported that a boy had taken his horses out to graze and had not returned. Subsequently Mathura, the appellant, and Sukraj removed the body from under the tree and hid it in broken ground in the bush. A search for the supposed lost boy was maintained in the neighbourhood till Jan. 24, that is for six days. Nothing more happened until Feb. 13 when Sarandas being at Tavua was sent for by a Mr. Powell who had apparently heard some rumours and in consequence of what he said took him to Mr. Probert the sub-inspector of police, where he repeated his statement which was taken down and put in evidence at the trial. This was to the effect that the deceased after the quarrel had left the others and that they had afterwards found him hanging dead. He also disclosed that Mathura had told him that they had since made away with the body.

In consequence of this, on Feb. 14, the police went to Tagi Tagi and saw the appellant under whose guidance they found some 36 human bones not including a head, which medical evidence given at the trial declared to be those of a person of either sex of about the deceased's age. The death of the person whose bones they were might according to the medical evidence have occurred at the time of the disappearance of Ramautar, the remains having been attacked by animals. Curiously enough there were also found at the same place a number of teeth, shown by expert evidence to be without question those of a person in middle life.

That evening the police took the appellant and Mathura to the Police Station and both made statements which were put in evidence. The appellant's statement concurred with Sarandas's previous statement that the deceased had left the others and that they had found him hanged.

He had described how he, Sukraj and his father had subsequently hidden the body in the bush. Mathura denied that he had been told that Ramautar was dead when he reported his alleged loss to the police and had joined in the search during the following days. On the next day Sarandas made another statement to the effect that it was Sukraj who had a quarrel with Ramautar but that the latter's actual death was caused by Mahadeo gripping him by the throat. This statement therefore corresponds with Sukraj's evidence, except that naturally Sukraj substituted Sarandas as the person who had the quarrel with the deceased. This statement was made after Sarandas was charged with being accessory after the fact.

Sukraj was then charged with being accessory after the fact and cautioned as the others had been. He then made a statement which was substantially in accordance with the evidence that he gave. On the previous day he had made a statement confirming the suicide story as up to that time put forward by the others. These statements were not admitted at the trial in circumstances to which it will be necessary to refer hereafter.

On the same day, Feb. 15, the appellant was charged with murder, apparently on the strength of statements of Sukraj, and after being cautioned made a statement in which he alleged that Ramautar had been killed by a stone thrown at him by Sarandas.

Some days after, namely, on Mar. 6, Sarandas being in custody asked to see the District Commissioner, before whom he made a further statement in all material respects so far as the appellant is concerned the same as his previous one. The appellant on that occasion declined to make a statement.

At the trial the prosecution was conducted by the Attorney-General, and Mathura and the appellant were separately defended. At the opening of the proceedings the Attorney-General stated that he had received a letter from the solicitors for the defendants requiring production of all statements made by the three accused and by Sukraj, other than those produced as exhibits in the proceedings. This letter has taken exception to by the Attorney-General as containing insinuations that the prosecution had suppressed documents. In point of fact the Attorney-General was not aware that there were two statements, namely, those by Sukraj, which had not been produced. The Chief Justice characterised the letter as being highly improper. In the result the statements of Sukraj were not produced but they were available at the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. [illegible]

true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.

Evidence having been given counsel addressed the court. Defending counsel had arranged between themselves that the counsel defending the appellant should leave to the counsel who appeared for Mathura that part of the defence which consisted in a criticism of the evidence of the death from a medical point of view. This arrangement was not known to the Chief Justice and when counsel for Mathura, counsel for the appellant having finished his address, was proceeding to deal with that part of the case, he was told by the Chief Justice that he must confine himself to the question of the implication of Mathura as accessory, the question as to the guilt of the appellant having already been exhausted by the address of the appellant's counsel. Unfortunately counsel did not then inform the Chief Justice of the arrangement or ask for an adjournment in order that the appellant's counsel might renew his speech on the subject omitted. In the result the court was never addressed on this part of the case on behalf of the appellant although counsel desired that it should be. The view of the Chief Justice was entirely ill-founded. Whether the deceased was murdered by the appellant was in issue as between each prisoner and the Crown, and Mathura's counsel would have been entitled to insist on proof of it and challenge the evidence of it even if the appellant had pleaded guilty.

After counsel had finished their addresses the Chief Justice addressed the assessors, apparently very shortly. He explained that he was not summing up to a jury but intimated that in a case of this kind corroboration was necessary but that he thought that there was corroboration, sufficient to support a conviction. He apparently considered that the circumstance that Sukraj, when he came back to Mathura's house before the others, had said nothing, was corroboration of his story in the witness box as to the manner in which the deceased came by his death, because his silence was due to a knowledge that the death was caused by the son of his master Mathura of whom he stood in fear. It is unnecessary to point out that this is no corroboration at all and in their Lordships' view there was absolutely no other corroboration.

It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material

long a rule of practice, is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance, the position being that there are three persons all implicated in a crime and one of them or two of them exculpates himself or themselves by fastening the guilt upon the other. In the present case, moreover, all the persons concerned had originally given false statements and belonged to a class of persons who are at the best not reliable witnesses.

In addition to the three comments which their Lordships have already felt bound to make on the conduct of this trial, there is a fourth, which is the most serious of all. The Attorney-General in his address, and the Chief Justice in his observations to the assessors, appear both of them to have treated this case as one of murder or nothing, on the footing that the homicide being proved malice was presumed. Upon the facts of this case as they appear from Sukraj's evidence, there is revealed affirmatively no more than a case of manslaughter. There is nothing to suggest that the appellant appreciated that he was applying a dangerous pressure to the throat of the deceased who was apparently a weakly boy. The view taken by the Chief Justice was based upon a statement of the law as to the presumption of malice long found in textbooks but recently explained and largely qualified by the decision of the House of Lords in *Woolmington's* case (2). But apart altogether from that case it never could be maintained that where the evidence for the prosecution points affirmatively no further than manslaughter the law would enlarge the proof and transform the case into one presumptively of murder.

Their Lordships have not overlooked the limits which the Board observes in dealing with criminal appeals. It is not necessary to repeat once more the rule set forth in *Re Dillet* (3), which has been recalled in several recent decisions. In the present case their Lordships are of opinion that there were really no materials here for a conviction for murder as opposed to manslaughter and in addition the trial was so conducted as in three separate respects, namely, the exclusion of the statements, restriction of the address by counsel, and the neglect of the rule requiring corroboration, to exhibit a neglect of fundamental rules of practice necessary for the due protection of prisoners and the safe administration of criminal justice.

In these circumstances their Lordships have humbly advised His Majesty that this appeal should be allowed and the conviction set aside.

Solicitors: *Barrow, Rogers & Nevill* (for the appellant); *Burchells* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

TIBBALS *v.* PORT OF LONDON AUTHORITY

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Eve, J.), **June 16, 17, 1936.**]

Public Authorities—Superannuation—War bonus—Whether included in calculation of pension.

By a pension scheme which was taken over on its incorporation by the Port of London Authority, it was provided that deductions should be made from the wages paid to a certain employee and for the purpose of computing the pension payable to the employee the wages were to be deemed at the rate of the actual wages paid to him at the time of his retirement "exclusive of any gratuities, allowances for house, or other additions." From 1915 onwards the employee received, in addition to his wages certain bonus payments. The bonus payments were increased from time to time, and in 1918 a part of the bonus was consolidated with the wages. In 1919 a document was left with the employee, which stated "War bonus 15*s.* per week added to wage, counting for pension, plus 11*s.* 6*d.* per week floating war bonus." In the same year the employee in asking for a reconsideration of his wages, added "Present conditions of annual leave, sick pay, and pensions." No deduction was made from the bonus payments in respect of pension. In Mar., 1925, a further revision took place and in a circular the wages were described as "68*s.* 6*d.* per week as a maximum, non-pensionable floating bonus 12*s.*" The employee then demanded that deductions should be made from the bonus payments. This was refused and the employee was informed that "the Authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular, and by accepting that bonus you must be deemed to have agreed to the condition upon which it is granted." The employee did not accept the view of the Authority, but continued to work and to receive the bonus payments. Upon his retirement the employee claimed that in calculating his pension regard should be had to the bonus payments:

HELD: (i) [ROMER, L.J., dissenting on this point] the words "exclusive of any gratuities, allowances for house, or other additions" did not exclude bonus payments from wages for the purpose of calculating the pension.

(ii) upon the evidence the bonus payments were at all times treated as non-pensionable and they should not be included in the wages for the purpose of calculating the pension.

[EDITORIAL NOTE. This case would seem to be of importance outside the particular circumstances of the Port of London Authority's superannuation scheme. Though schemes for superannuation vary, it would seem that the question of including war bonus in the calculation of pension will be of general interest.

AS TO SUPERANNUATION, see HALSBURY, 1st Edn., Vol. 24, Revenue, pp. 748-753, paras. 1605-1620; and FOR CASES, see DIGEST, Vol. 39, pp. 307, 308, Nos. 836-841.]

Cases referred to: -

(1) *Salford Union* v. *Dewhurst*, [1926] A.C. 619; 37 Digest 215, *105.*
(2) *Sutton* v. *A.-G.* (1923), 39 T.L.R. 294; 34 Digest 85, *629.*
(3) *Railway Clearing House* v. *Druce* (1926), 42 T.L.R. 663; 34 Digest 85, *630.*
(4) *James* v. *Tees Conservancy Comrs.* (Unreported).
(5) *Adams* v. *Liverpool Corpn.* (1927), 137 L.T. 396; Digest Supp.

Canadian Criminal Cases

Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada.

LEMAY v. THE KING

Supreme Court of Canada, Rinfret C.J.C., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ. December 17, 1951.

Evidence XI D — Trial I A — Whether Crown under duty to call all eye-witnesses—Discretion to decide on material witnesses—

There is no rule of law requiring the Crown in a criminal case to call as witnesses persons who were allegedly eye-witnesses to the events culminating in the charge or who are alleged to be able to give relevant and material evidence on accused's guilt or innocence. The prosecution has a discretion to determine who should be called or who are material witnesses and it will not be interfered with unless exercised with some oblique motive. Thus, the Crown must not hold back evidence because it would assist the accused. It is not, however, bound to present for cross-examination by accused all persons who may be able to offer some evidence in relation to the charge.

Cases Judicially Noted: *Seneviratne v. The King*, [1936], 3 All E.R. 36, 3 W.W.R. 360, expld; *Adel Muhammed El Dabbah v. A.-G. Palestine*, [1944] A.C. 156, apld.

Appeal I B — Crown's appeal from acquittal — Notice of appeal signed by agent of Attorney-General — Power of Court of Appeal to enter conviction—

Where an appeal against acquittal is taken by the Crown under *Cr. Code*, s. 1013(4) [re-enacted 1930, c. 11, s. 28] it is not necessary that the notice of appeal be signed by the Attorney-General personally. It is sufficient if his agent, authorized to lodge the appeal, signs the notice.

On an appeal against acquittal, the Court of Appeal may under s. 1013(5) [re-enacted 1930, c. 11, s. 28] set aside the acquittal and enter a conviction.

Cases Judicially Noted: *Belyea v. The King*, [1932], 2 D.L.R. 88, S.C.R. 279, 57 Can. C.C. 318, folld.

Statutes Considered: *Cr. Code*, s. 1013(4), (5).

APPEAL by accused from a judgment of the British Columbia

Court of Appeal, 100 Can. C.C. 365, setting aside an acquittal and entering a conviction on a narcotics charge. Affirmed.

J. S. Hall, for appellant.

Douglas McKay Brown, for respondent.

RINFRET C.J.C. concurs with KERWIN J.

KERWIN J.:—The appellant Lemay was charged with having sold a drug to Steven Bunyk, on September 21, 1950, at Vancouver contrary to the provisions of the *Opium and Narcotic Drug Act*, 1929 (Can.), c. 49, as amended. Lemay was tried on that charge and acquitted by His Honour Judge Sargent in the County Court Judges' Criminal Court. On an appeal by the Crown to the Court of Appeal for British Columbia [100 Can. C.C. 365] that acquittal was set aside, a conviction entered, and the case remitted to the trial Judge for sentence. Under s-s. (2) of s. 1023 of the *Cr. Code* as enacted by s. 30 of 1947, c. 55, Lemay now appeals to this Court alleging that his conviction was erroneous on two grounds (a) the Court of Appeal erred in finding that it was not essential that the Crown call as a witness one Henry Powell, a Royal Canadian Mounted Police informer, and one Art Lowes, both of whom it was alleged were present throughout the major part of the transaction of selling between the appellant and Bunyk; (b) the notice of appeal to the Court of Appeal, which was signed "Douglas McKay Brown, Agent for the Attorney General of British Columbia", was not proper in form or in accordance with s. 1013(4) of the *Code* as re-enacted by s. 28 of 1930, c. 11. These grounds will be considered in order.

Steve Bunyk, who is a member of the Royal Canadian Mounted Police, testified that he had known Lemay by sight for some time previous to September 21, 1950, having seen him on about twelve occasions and having seen his picture several times. He described Henry Powell as a coloured boy used by the Royal Canadian Mounted Police and paid by them as an informer. Powell had pointed Lemay out to Bunyk on the street, and on September 20th, the two of them went to see Lemay in room 10 in a rooming-house in Vancouver known as the Beacon Rooms. Failing to find Lemay there, Bunyk, still accompanied by Powell, proceeded to depart when he saw Lemay at the head of the stairs leading to the ground floor, whereupon Lemay said to Bunyk: "I thought you were coming

as I saw you pass the cafe several times." Nothing else was said upon that occasion.

On the next day, September 21st (the date of the alleged offence), Bunyk and Powell walked in a westerly direction, on the south side of Hastings St., towards the Malina Cafe. The door to the cafe is on the east side of the cafe with a window immediately to the west. Bunyk looked through that widow and saw Lemay sitting in a booth on the west side of the cafe. Bunyk could not say that Powell saw the accused. Bunyk entered the cafe and sat down near Lemay in the booth and there the transaction occurred, which is the basis of the charge. It is not denied that on that occasion Bunyk paid $3 and received the drug but Lemay denied that he was the man from whom the purchase was made and testified that he was not present. Also sitting in the booth was the other man referred to, known to Bunyk as Art Lowes. The accused denies any knowledge of such a person. He denies knowing Bunyk or seeing or speaking to him on September 20th or 21st. He admits that he lived in room 10 in the Beacon Rooms for some time prior to September 20th but states he moved from there on that date. While he says he was away from Vancouver during parts of August and September, he admits being in the city on September 20th and 21st and that on some occasions he had taken his meals at the Malina Cafe.

Neither Powell nor Lowes was called as a witness. For some time prior to September 20th, Bunyk was acting as an undercover agent and he stated that Powell came from the United States and that he did not know where he was. Then the following question and answer appear in the record:

"Q. Do you know of any inquiries which have been made to locate him? A. Inquiries were made to the Federal Bureau of Narcotics in Seattle but they have failed to locate him."

As to Lowes, Bunyk testified that he knew him to see him but that he had no idea how Lowes happened to be with Lemay on September 21st and that Lowes had no connection with the case as far as the Royal Canadian Mounted Police was concerned and that Lowes was not an operator for that organization.

Prior to the hearing before His Honour Judge Sargent, Lemay had been convicted on the same charge by His Honour Judge Boyd, but that conviction was set aside by the Court of Appeal,

consisting of O'Halloran J.A., Robertson J.A., and Sidney Smith J.A. (dissenting) [100 Can. C.C. at p. 367], on the ground that Powell had not been called as a witness. On the Crown's appeal from the acquittal on the new trial, Sidney Smith J.A. adhered to the view that he had expressed on the prior appeal, while Robertson J.A. decided that on the second trial it appeared that Powell had not looked through the window. As to Lowes, he considered that the fact that that individual was associated with a drug pedlar, as Lemay was found to be, probably convinced the Crown that his evidence would not be reliable. He pointed out that the fact that Lowes was present was made known at the preliminary hearing and, notwithstanding this, counsel for Lemay did not ask that Lowes be subpoenaed or for an adjournment to permit him to have him before the Court, and that the Court was not bound to discharge the functions of the defence. O'Halloran J.A. dissented. He retained the view he had held on the prior appeal as to Powell because he considered the explanation of Powell's absence was of a vague and general character. That view was to the effect that there is a rule whereby the Crown was bound to call Powell as a witness essential to the unfolding of the narrative. He also considered that it was difficult to avoid the reflection that if Lowes could have identified Lemay, the Crown would not have failed to call him, particularly since the Crown knew from the first trial that Lemay denied being in the cafe and, therefore, on the same basis, that the Crown was bound to call him as a witness. He proceeded further to deal with what he described as a fundamental aspect, *viz.*, the trial Judge's attitude towards Lemay's testimony. These views of the learned Justice of Appeal cannot be accepted since it is plain upon a reading of the reasons of the trial Judge that he believed the evidence of Bunyk and certainly he categorically stated that he did not believe the evidence of Lemay. The trial Judge had the witnesses before him and it was not necessary that he itemize the reasons which led him to conclude that Lemay's evidence was not to be believed.

While certain decisions in the British Columbia Courts are referred to in the reasons for judgment in the Court of Appeal, as well on the first appeal as on the second, all the arguments on behalf of Lemay in connection with the first ground of

appeal are garnered from the following statement in the judgment of Lord Roche, speaking on behalf of the Judicial Committee in *Seneviratne* v. *The King*, [1936] 3 All E.R. 36 at p. 49: "Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution." Now, in addition to this statement being *obiter* as Lord Roche clearly stated, it also appears from p. 48 that he was dealing with the case of the maid Alpina (and similar cases) whose good faith was not questioned by the Crown, and pointed out that what she had said was given apparently without previous cross-examination as to other and previous oral statements. It was pointed out that this was both undesirable and not permitted by any sections of the Ceylon Law of Evidence Ordinance. Lord Roche continued [pp. 48-9]: "It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Roy* v. *R.* ((1914), I.L.R. 42 Calc. 422: 14 Digest 273, *2816(ii)*) to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination."

Then follows the statement relied on. In truth Lord Roche was dealing with an entirely different matter, and reading the whole of his reasons it is clear that not only was he not laying down any such rule as that here asserted but one directly contrary to it.

It is made abundantly plain from the subsequent decision of the Judicial Committee in *Adel Muhammed El Dabbah* v. *A.-G. Palestine*, [1944] A.C. 156, delivered by Lord Thankerton (which was not brought to the attention of the Court of Appeal), that no such rule as has been contended for, and apparently applied by the majority of that Court on the first appeal and by the dissenting Judge on the second appeal, has ever been laid down. The earlier cases are referred to in the argument of counsel for the accused in the *Palestine* case but *Seneviratne* v. *The King* is not mentioned. At pp. 167-9 Lord Thankerton deals with the contention that the accused had a right to have the witnesses whose names were on the information but who were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence. Their Lordships agreed with the trial Judge and the Court of Criminal Appeal in Palestine that there was no obligation on the prosecution to tender these witnesses. However, while the Court of Criminal Appeal had held that that was the strict position in law, they expressed the opinion that the better practice was that the witnesses should be tendered at the close of the case for the prosecution so that the defence might cross-examine them if they wished, and the Court desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed. Their Lordships of the Judicial Committee doubted whether that rule of practice as expressed by the Court of Criminal Appeal sufficiently recognized that the prosecutor has a discretion and that the Court will not interfere with the exercise of that discretion unless perhaps it could be shown that the prosecutor had been influenced by some oblique motive. Lord Thankerton referred to the judgment of Baron Alderson in *Reg.* v. *Woodhead* (1847), 2 Car. & K. 520, 175 E.R. 216, that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment; that they should be in Court but that they were to be called by the party who wanted their evidence. Lord Thankerton also referred to *Reg.* v. *Cassidy* (1858), 1 F. & F. 79, 175 E.R. 634, where Parke B., after consultation with Cresswell J. stated the rule in similar terms. Lord Thankerton does go on to say that it is consistent with the discretion of counsel for the prosecutor, which is thus recog-

nized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, but it remains a matter for the prosecutor's discretion. Reference was also made to an interlocutory remark by Lord Hewart C.J. in *R.* v. *Harris*, [1927] 2 K.B. 587 at p. 590: "In criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury." Lord Thankerton said that in their Lordships' view, the Chief Justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are.

In the present case there did not appear on the back of the charge sheet the name of any witness but that fact is unimportant. Powell and Lowes did not give evidence at the preliminary inquiry. There was no obligation on the Crown to call either of them at the trial and we are therefore not concerned with the question whether the explanation of Powell's absence was satisfactory or not. Of course, the Crown must not hold back evidence because it would assist an accused but there is no suggestion that this was done in the present case or, to use the words of Lord Thankerton, "that the prosecutor had been influenced by some oblique motive". It is idle to rely upon such expressions as this or the one used by Lord Roche without relating them to the matters under discussion but the important thing is that unless there are some particular circumstances of the nature envisaged, the prosecutor is free to exercise his discretion to determine who are the material witnesses.

The second ground of appeal may be disposed of in a few words. Subsection (4) of s. 1013 of the *Code* enacts: "Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone."

It is not contended that Mr. Brown was not the agent of the Attorney-General of British Columbia or that he did not have the latter's authority to institute the appeal to the British

Columbia Court of Appeal but it is said that at least the Attorney-General personally should have signed the notice of appeal. It is sufficient to say that it is not so expressed in the subsection, either explicitly or inferentially, and that there is no substance to the objection.

In registering a conviction, the Court of Appeal had the authority of this Court in *Belyea* v. *The King*, [1932], 2 D.L.R. 88 at pp. 108-9, S.C.R. 279 at p. 297, 57 Can. C.C. 318 at pp. 339-40. It was there pointed out that by s. 1014 of the *Code*, the powers of a Court of Appeal on hearing an appeal by a person convicted are, under s-s. (3), in the event of the appeal being allowed, to "'(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or (*b*) direct a new trial; and in either case [it] may make such other order as justice requires'".

This section is made applicable on an appeal by the Attorney-General against an acquittal by the provisions of s-s. (5) of s. 1013 as re-enacted by s. 28 of 1930, c. 11, that *mutatis mutandis* on the appeal thereby given, the Court shall have the same powers as it has on an appeal by the accused. Chief Justice Anglin pointed out that while it seemed rather a strong thing to hold that the effect of the words *mutatis mutandis* is that that clause must be made to read "on an appeal by the Attorney-General . . . . to '(*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered';" yet that apparently was the construction put upon the provision by the Appellate Division of the Supreme Court of Ontario. Chief Justice Anglin continued by stating that while it had occurred to some members of this Court that the correct course would be to apply cl. (*b*) and to direct a new trial, the Court was merely affirming the facts found by the trial Judge and upon them reached the conclusion that the only course open to the Appellate Division was to allow the appeal and convict the accused.

Upon reading the reasons for judgment of His Honour Judge Sargent, I am convinced that not only did he not accept or believe the appellant's testimony but he believed and accepted the evidence of Bunyk and it was only because he considered himself bound by the previous decision of the Court

of Appeal for British Columbia that he dismissed the charge. The appeal should be dismissed.

TASCHEREAU J. concurs with KERWIN J.

RAND J.:—I think it clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal in the earlier proceeding held. Material witnesses in this context are those who can testify to material facts, but obviously that is not identical with being "essential to the unfolding of the narrative". The duty of the prosecutor to see that no unfairness is done the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed.

On the other two points also, I concur, and the appeal must be dismissed.

KELLOCK and ESTEY JJ. concur with KERWIN J.

LOCKE J.:—The appellant, Paul Lemay, was in the month of September, 1950, charged with having, at the City of Vancouver, sold a narcotic drug to one Stephen Bunyk, contrary to the provisions of the *Opium and Narcotic Drug Act*, and on that charge, after a preliminary enquiry, was committed for trial by the Deputy Police Magistrate on October 6, 1950.

At the preliminary hearing, evidence for the Crown was given by Bunyk, an officer in the Royal Canadian Mounted Police, to the effect that he had on September 21, 1950, proceeded to a restaurant on Hastings St. in Vancouver, in company with one Powell, and entering the restaurant alone purchased the drug from Lemay in the presence of one Art Lowes.

Thereafter, having elected to take a speedy trial before His Honour Judge Bruce Boyd, a Judge of the County Court at Vancouver, he was found guilty and sentenced to a term of imprisonment and a fine. Powell, an informer in the employ of the Mounted Police, who had not entered the restaurant with Bunyk, was not called by the Crown at the trial before the learned County Court Judge, though the fact that he had accompanied Bunyk to the restaurant was mentioned. I would infer from the reasons for judgment delivered upon this appeal that the name of Lowes was not mentioned at the trial and it is clear that he was not called as a witness. The present appellant appealed to the Court of Appeal for British Columbia and that Court, by a decision of the majority (Sidney Smith

J.A. dissenting), set the conviction aside upon the ground that as, apparently, Powell had seen the accused in the restaurant his evidence was material on the question of identification, and that there was an obligation on the prosecution to call him. Adopting an expression used by Lord Roche, in delivering the judgment of the Judicial Committee in *Seneviratne* v. *The King*, [1936] 3 All E.R. 36 at p. 49, that witnesses essential to the "unfolding of the narratives on which the prosecution is based" must be called by the prosecution, O'Halloran J.A., with whom Robertson J.A. agreed, said in part [100 Can. C.C. at p. 367]: "If all material witnesses are not called by the prosecution the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our Courts have long recognized as essential to a fair trial."

Lemay appeared for trial again before His Honour Judge R. A. Sargent of the County Court of Vancouver on February 8, 1951, and was represented by counsel. Bunyk gave evidence that Powell had accompanied him to the restaurant and had not entered and, while not mentioning in his evidence in chief the presence of Lowes, did so in cross-examination, saying that Lowes was sitting in a booth in the restaurant with Lemay when he had purchased the drug. Describing the transaction he said that Lemay had in his hand a fingerstall containing capsules wrapped in silver paper when he (Bunyk) sat down opposite him in the booth and asked if he could get one, whereupon Lemay took one of the capsules and placed it on the table in front of him and he thereupon paid Lemay $3. Some evidence was given at the hearing of efforts made by the Crown to locate Powell and of their failure but, in the view that I take of this matter, it is unnecessary to consider its sufficiency since if the Crown was under a legal obligation to call Powell or account for his absence, clearly there was the same obligation in respect of Lowes who saw the whole transaction, and no effort was made to account for the failure to call him.

It is of importance to note that while the appellant had known from the date of the preliminary hearing before the Deputy Police Magistrate that Bunyk had, according to his story, been accompanied by Powell to the restaurant and had

purchased the drug in the presence of Art Lowes, no request was made at the commencement of the trial before His Honour Judge Sargent or during the course of the trial for a direction that the Crown should either call them or assist the defence in locating them, or for an adjournment so that they could be located. The only evidence of identification was that of Constable Bunyk who, while a police officer, had been working under cover in Vancouver and who had during a period of weeks before the date of the purchase seen Lemay a number of times. Lemay's defence was simply a complete denial of the whole affair and he swore that he had never seen Bunyk before the latter appeared in the Police Court to give evidence. As to Lowes, he said that while he might know him he did not know him by that name. On the question of credibility, the learned trial Judge, in giving judgment, said in part: "The accused went into the box and categorically denied any sale of narcotics, and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony."

Then saying that he did not feel that there was sufficient evidence to make a finding as to whether Powell did or did not see the transaction, that the evidence had shown that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police and that no explanation had been given as to why he had not been called or what, if any, attempts had been made to find him, after quoting from the judgment of O'Halloran J.A. as to the obligation of the Crown to call all material witnesses, dismissed the charge against the prisoner.

The Attorney-General of the Province of British Columbia appealed to the Court of Appeal under the provisions of s-s. (4) of s. 1013 of the *Code* and that Court, by a decision of the majority (O'Halloran J.A. dissenting) allowed the appeal, set the acquittal aside and directed that a conviction be entered and the case remitted to the trial Judge for sentence.

The appellant alleges two errors in the judgment appealed from: the first, that the notice of appeal to the Court of Appeal which was signed by Douglas McKay Brown, agent for the Attorney-General of British Columbia, was an insufficient compliance with s. 1013(4) of the *Code*, and the second, in finding

that it was not essential to the Crown to call Powell and Lowes as witnesses at the trial.

As to the first of these points there was no disagreement in the Court of Appeal and I respectfully agree with Robertson J.A. that the signature by the agent of the Attorney-General was sufficient.

The contention of the appellant upon the second point is that, as stated by O'Halloran J.A., Lowes and Powell were material witnesses on the question of the identification of Lemay and there was an obligation in law upon the Crown to call them. For the Crown it is said that it is for the Crown prosecutor, as the representative of His Majesty, to decide what evidence is to be called for the prosecution and that, subject to something in the nature of bad faith on his part, such as endeavouring to obtain a conviction by suppressing the truth (in which event the trial Judge could properly intervene), his decision in the matter may not be interfered with. It is perhaps unnecessary to say that there is no suggestion of any such impropriety on the part of those representing the Crown at the preliminary hearing and the trial of this matter.

Since the Criminal Code is silent on the matter, the obligation contended for by the appellant, if it exists, must be part of the common law of British Columbia. The question, or one closely allied to it, has been considered in a number of decisions in England. In *R.* v. *Simmonds* (1823), 1 Car. & P. 84, 171 E.R. 1111, where counsel for the Crown declined to call a witness whose name appeared on the back of the indictment, Hullock B. said that, though the prosecution were not bound to call every witness whose name was on the indictment, it was usual to do so and, if it was not done, he as the Judge would call the witness so that the prisoner's counsel might have an opportunity to cross-examine him. In a note to this case there is a reference to *R.* v. *Whitbread*, where on a trial for larceny the prosecution omitted to call an apprentice of the prosecutor who had been implicated in the theft and who had been examined at the police office and before the grand jury and whose name was on the back of the indictment. Counsel for the prisoner contended that the witness ought to be called but counsel for the prosecution declined, saying that the prisoner's

counsel might himself call him if he chose. Holroyd and Burrough J.J. held that the prosecutor's counsel was not bound to call all the witnesses whose names were on the indictment merely to let the other side cross-examine them. The note further reports, however, that in the case of *R.* v. *Taylor*, tried in the same year, Park J. called all the witnesses whose names appeared on the back of the indictment whom the prosecutor had not called, merely to allow the prisoner's counsel to cross-examine them. In *R.* v. *Beezley* (1830), 4 Car. & P. 220, 172 E.R. 678, Littledale J. said that counsel for the prosecution who had closed his case without calling all of the witnesses whose names were on the indictment should call all of them, in order to give the prisoner's counsel an opportunity of cross-examining them. In *R.* v. *Bodle* (1833), 6 Car. & P. 186, 172 E.R. 1200, where the charge was murder and counsel for the Crown declined to call the father of the prisoner whose name was on the back of the indictment, Gaselee J., having conferred with Mr. Baron Vaughan, said that they were both of the opinion that if counsel for the prosecution declined to call a witness whose name is on the back of the indictment it is in the discretion of the Judge who tries the case to say whether the witness should be called for the prisoner's counsel to examine him, before the prisoner is called on for his defence. In *Reg.* v. *Holden* (1838), 8 Car. & P. 606, 173 E.R. 638, the charge was murder. The Crown did not call the daughter of the deceased person who, apparently, had been present when the offence was committed, whose name was not on the back of the indictment and who was in Court. Patteson J. said that she should be called and that every witness who was present at a transaction of that kind, even if they give different accounts, should be heard by the jury so as to draw their own conclusion as to the real truth of the matter. There had been a post-mortem examination of the body of the deceased in the presence of three surgeons but, of these, only two were called to give evidence for the Crown, though the third was in Court. Patteson J. said that he was aware that the name of this person was not on the back of the indictment but that as he was in Court he would insist on his being examined and said [p. 610]: "He is

a material witness who is not called on the part of the prosecution, and as he is in Court, I shall call him for the furtherance of justice."

In *Reg.* v. *Bull* (1839), 9 Car. & P. 22, 173 E.R. 723, counsel for the Crown said that there was one witness examined before the grand jury whom, on account of information he had since received, it was not his intention to call as a witness for the prosecution; on counsel for the prisoner objecting that it was unfair not to examine all those whose names were on the back of the bill and Crown counsel saying that his intention was to put the witness into the box, Vaughan J. said that the proper course was to put the witness into the box and that "every witness ought to be examined. In cases of this kind counsel ought not to keep back a witness, because his evidence may weaken the case for the prosecution". [p. 23]

In *Reg.* v. *Stroner* (1845), 1 Car. & K. 650, 174 E.R. 976, Pollock C.B. directed the prosecution to call two persons as witnesses for the prosecution whose evidence he considered to be material and whose names were not on the back of the indictment but who were in Court as witnesses for the accused. In *Reg.* v. *Barley* (1847), 2 Cox C.C. 191, where the prosecution did not call two witnesses whose names were on the back of the indictment, Pollock C.B. after consulting with Coleridge J. intimated that the witnesses ought to be called by counsel for the prosecution, whereupon the witnesses were placed in the box and sworn on the part of the Crown and cross-examined on behalf of the prisoner.

The practice in the matter appears to have been clarified in 1847 when in *Reg.* v. *Woodhead*, 2 Car. & K. 520, where counsel for the Crown, after stating the case for the prosecution, had observed that he did not deem it necessary to call all the witnesses whose names were on the back of the indictment, unless counsel for the prisoner should desire it, Alderson B. said: "You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have

them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule."

Counsel for the prisoner then asked whether if he called these persons he would make them his own witnesses, to which Alderson B. replied: "Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to shew them unworthy of credit, however falsely the witnesses might have deposed."

In *Reg.* v. *Cassidy*, 1 F. & F. 79, where the prosecutor refused to call a witness whose name was on the back of the indictment and counsel for the prisoner contended that "according to the usual practice" he ought in fairness to do so, Baron Parke said that while the usual course was for the prosecutor to call the witness and, if he declined to examine, the prisoner might cross-examine him, he thought the practice did not stand upon any very clear or correct principle and was supported only on the authority of single Judges on criminal trials, and he should, therefore, follow what he considered the correct principle, that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them as his witnesses; for the prisoner, on seeing their names there, might have abstained from subpoenaing them. He then said that he would follow the course said to have been pursued by Campbell C.J. in a recent case, who ruled that the prosecutor was not bound to call such a witness and that, if the prisoner did so, the witness should be considered as his own. Upon counsel for the prisoner saying that he believed that Cresswell J. had acted differently, Parke B. consulted with the latter and then said that Cresswell J. had informed him that he had always allowed the prosecutor to take his own course in such circumstances, without compelling him to call the witness if he did not think fit to do so, and that he entirely agreed with what Parke B. proposed to do.

The judgment of Parke B. in *Cassidy's* case was delivered in March, 1858. Section 11 of the *Code* declares that the crim-

inal law of England as it existed on November 19, 1858, in so far as it has not been repealed by any ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the Province of British Columbia. Prior to the enactment of the Code the matter had been dealt with and the same date fixed by a proclamation issued under the public seal of the colony of British Columbia by Governor Douglas on November 19, 1858, and by *An Ordinance to assimilate the general application of English Law*, 1867 (Laws of B.C. 1871, No. 70) adopted by the Legislative Council of British Columbia on March 6, 1867. In substantially the same form, the provisions of the Ordinance are continued in the *English Law Act*, R.S.B.C. 1948, c. 111, s. 2. The matter we are considering has not been dealt with by statute. If, therefore, what appears to have been considered as a rule of practice prior to 1858 had become part of the common law of England, the principle was as stated by Alderson B. in *Reg.* v. *Woodhead* and Parke B. in *Reg.* v. *Cassidy*. That these decisions are to be regarded as correctly stating the law of England as it was in 1858 is settled by the decision of the Judicial Committee in *Adel Muhammed El Dabbah* v. *A.-G. Palestine*, [1944] A.C. 156 at p. 168. Lord Thankerton, it will be noted, in delivering the judgment of the Judicial Committee, said in part: "While their Lordships agree that there was no obligation on the prosecution to tender these witnesses, and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."

While the case was an appeal from the Court of Criminal Appeal of Palestine and the conviction had been made under the Criminal Code Ordinance 1936 of that state, it is apparent that the matter had not been dealt with by statute and that

the law of Palestine was in this respect the same as that of England.

In delivering the judgment in the appeal taken by Lemay to the Court of Appeal from his conviction, O'Halloran J.A. refers to two decisions of the Courts of British Columbia in which the matter was considered. In *R.* v. *Sing* [1936] 1 D.L.R. 36, 64 Can. C.C. 32, 50 B.C.R. 32, where the Crown did not call certain witnesses whose names were on the back of the indictment, Macdonald J., referring to *Reg.* v. *Woodhead* and *Reg.* v. *Cassidy* and to a more recent decision in *Reg.* v. *Wiggins* (1867), 10 Cox C.C. 562, ruled that, unless the Crown saw fit to do so, it was not necessary to call all of the witnesses whose names appeared. Counsel for the prisoner contended that there were two other witnesses called at the preliminary who should be called in order that he might cross-examine them, but the report of the matter does not indicate that any such order was made. In *R.* v. *Hop Lee*, [1941] 2 D.L.R. 229, 75 Can. C.C. 254, 56 B.C.R. 151, where the charge was selling narcotic drugs, the Crown did not call a Chinese witness who was in the employ of the police and who had been a witness to the sale. The accused was convicted and appealed to the Court of Appeal and the report shows that counsel for the Crown there took the attitude that the Crown was under no obligation to call all the witnesses and that this particular man was a "stool pigeon" whose evidence could not be relied upon. The Court unanimously dismissed the appeal and it may be noted that McDonald J.A. (afterwards C.J.B.C.) quoted at length from the judgment of Lord Roche in *Senevirathe* v. *The King*, [1936] 3 All E.R. 36, which has been so much discussed in the present matter, including that passage where it is said that their Lordships could not, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence.

In the present matter the prisoner, who was tried before His Honour Judge Sargent in February, 1951, had known since the previous September that Bunyk would give evidence that he had been accompanied to the restaurant by Powell and that Lowes was sitting in the booth with him when the sale was made to the constable. The proceedings following the

committal were, by reason of the election of the appellant, by way of speedy trial and there was thus no indictment upon which the names of the witnesses proposed to be called would be endorsed and there is no suggestion that any step was taken on the part of the prosecution which would lead counsel for the accused to expect that they would be in Court when the matter came up for hearing and thus available to give evidence, as was the case in *Reg.* v. *Woodhead*. Powell was an informer in the employ of the police and, even had he been available, counsel for the Crown might well have decided not to call him as a witness for the prosecution, as was done in the case of *Hop Lee*. As to Lowes, the only information concerning him in the record is that Constable Bunyk on re-examination said that he (Lowes) had no connection with the matter "as far as the R.C.M.P. is concerned" and that he was not an operator for the R.C.M.P. From the fact that Lowes was, according to Bunyk, sitting at the table in the restaurant with Lemay when the latter produced the fingerstall containing the small packages of the drug and made the sale to Bunyk, it might be inferred that Lowes was a confederate of the latter, since, otherwise, he would be unlikely to commit a criminal offence in his presence. If this be the proper inference to draw, is it to be said that, as a matter of law, the Crown was required to call Lowes as a witness for the prosecution and thus, assuming he should join with Lemay in denying that any such transaction had taken place, assist a guilty person to escape? From a practical viewpoint, if that was the law, far from furthering the due administration of justice it would, in my opinion, actively retard it. In the case of those engaged in the illicit drug traffic, by working in pairs, the one making the sale would be assured at all times of having a witness with him available, in the case of a prosecution, to join in denying that anything of the kind had taken place and whom the Crown would be bound to call. For the appellant, reliance is placed upon that portion of the judgment of Lord Roche, hereinbefore referred to, where it was said that the witnesses essential to the "unfolding of the narrative on which the prosecution is based" must be called. This language must, however, be read together with its context, as was done by McDonald J.A. in *Hop Lee's* case, and so read it does not, in my opinion, sustain the contention

of the appellant. If, indeed, there were any difference between what was said by Lord Roche in that case, which, as the report indicates, was *obiter*, and what was said by Lord Thankerton in the case of *Adel Muhammed* (and I think there is not), it is, in my opinion, the latter view that should be accepted.

The reasons for judgment delivered by His Honour Judge Sargent satisfy me that he believed the evidence of the witness Bunyk and that, had he not considered that he was bound to acquit the accused by reason of the failure of the Crown to call Lowes as a witness or account for his absence, he would have found the accused guilty.

As to the contention that there was error in the judgment appealed from, in that the appellant was found guilty and the case remitted to the trial Judge for sentence, the matter appears to me to be determined against the appellant by the decision of this Court in *Belyea* v. *The King*, [1932], 2 D.L.R. 88, S.C.R. 279, 57 Can. C.C. 318.

I would dismiss this appeal.

CARTWRIGHT J. (dissenting in part) :—This is an appeal from a judgment of the Court of Appeal for British Columbia (100 Can. C.C. 365) dated March 22, 1951, setting aside the judgment of acquittal of a charge of unlawfully selling a drug contrary to the provisions of the *Opium and Narcotic Drug Act* pronounced on February 27, 1951, by His Honour Judge Sargent, ordering a conviction to be entered and remitting the case to the trial Judge to impose sentence.

The respondent was first tried for the said offence before His Honour Judge Boyd and was convicted on November 2, 1950. On December 22, 1950, this conviction was set aside by the Court of Appeal for British Columbia (O'Halloran, Robertson and Sidney Smith JJ.A.) the last named learned Justice of Appeal dissenting, and a new trial was directed.

The evidence mainly relied on by the Crown at the trial with which we are concerned, before His Honour Judge Sargent, was that of Constable Bunyk of the Royal Canadian Mounted Police who testified in chief that on September 21, 1950, at about 9.15 a.m. accompanied by one Powell he approached the Malina Café in Vancouver; that he looked through the window and saw the appellant, who was already known to him, seated at a table in about the fifth booth on the west side

of the café; that he cannot tell whether Powell also looked through the window or saw the appellant; that he (Bunyk) entered the café alone and sat down beside the appellant; that the appellant had in his hand a grey fingerstall containing several capsules wrapped in silver paper and was trying to remove an elastic band from around the top of the fingerstall; that he said to the appellant—"Can I get one?" and the appellant replied "Yes"; that the appellant took one of the capsules from the fingerstall and placed it on the table in front of Bunyk; that he (Bunyk) picked it up and put it in his pocket and handed the appellant $3; that he left the café and rejoined Powell about two doors east of the café. In cross-examination and re-examination Bunyk testified that throughout the transaction which he had described in chief one Art Lowes was sitting in the booth with the appellant and that Lowes was known to him (Bunyk). The following questions and answers are found in the re-examination:

"Q. How did Lowes happen to be with Lemay at the time of this transaction? A. I have no idea. Q. Did the Art Lowes who was with Lemay at the time of the transaction have any connection with this case as far as the R.C.M.P. is concerned? A. None whatever. Q. Is Lowes an operator for the R.C.M.P.? A. No, he is not."

The Crown proved that the capsule purchased by Bunyk contained the drug mentioned in the charge.

The appellant gave evidence. He denied having had anything to do with the matter; stated that he had never seen Bunyk prior to the preliminary hearing; that he did not use drugs and that he had never sold a drug to Bunyk or to anyone else. The learned trial Judge reserved judgment and later dismissed the charge.

In examining the reasons for judgment of the learned trial Judge it is necessary to know something of the earlier trial of the appellant and of the reasons which moved the Court of Appeal to set aside that conviction and direct a new trial.

The only substantial differences between the evidence given at the first trial and that given at the second which were suggested to be relevant to the determination of this appeal appear to be: (i) At the first trial the evidence in the view of the Court of Appeal indicated that Powell was in a position

to see what occurred in the café at the time Bunyk purchased the drug, while the effect of the evidence in this regard at the second trial is summarized by the learned trial Judge as follows: "I do not feel that there is sufficient evidence before me upon which to make any finding, either that Powell did or did not see the transaction between the accused and Bunyk." (ii) At the first trial no evidence was given to show why counsel for the Crown did not call Powell as a witness, while at the second trial evidence was received to the effect that he had disappeared and that inquiries as to his whereabouts were unproductive of result. (It should be mentioned that Mr. Hall argued that the evidence as to the making of these inquiries was inadmissible on the ground that it was hearsay, but as, in my view, this evidence has no bearing on the result of the appeal I do not deal with this question.) (iii) At the first trial there was no evidence of the presence of Art Lowes at the time of the sale, indeed, Lowes was not mentioned at all.

The reasons for judgment of the Court of Appeal on the appeal from the conviction at the first trial are set out in full in the reasons of O'Halloran J.A. in the present case and are reported as Lemay (No. 1) in 100 Can. C.C. pp. 367-8. The question whether that judgment was right in the result is not before us and I express no opinion. That appeal was brought by the accused and under s. 1014(1)(*c*) of the *Code* it was the duty of the Court of Appeal to allow the appeal if of opinion that on any ground there was a miscarriage of justice.

The learned Judge presiding at the second trial appears to me to have interpreted the reasons of the Court of Appeal in Lemay (No. 1) as laying down as a rule of law that the unexplained omission on the part of the Crown to call a witness shown by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal. The learned trial Judge appears to have inclined to the view that the failure to call Powell was sufficiently explained. He then proceeds:

"However, there is one other piece of evidence which came out in cross-examination, namely, that a third person, Lowes was present at the sale to Bunyk. Evidence was led by the Crown to show that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police, but no explanation was

given as to why he had not been called, or what, if any, attempts were made to find him.

"On these facts I am faced with the principle laid down by the Court of Appeal in *R.* v. *Lemay* [100 Can. C.C. at p. 367]. In that case, Mr. Justice O'Halloran said in the course of his judgment: 'If all material witnesses are not called by the prosecution the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our Courts have long recognized as essential to a fair trial.'

"The judgment is binding on me in this case. Therefore, the motion to dismiss will be allowed and the charge dismissed."

The right of appeal against a judgment of acquittal is given to the Attorney-General by s. 1013(4) and is, of course, restricted to grounds of appeal which involve a question of law alone.

In my respectful opinion the learned trial Judge erred in law in instructing himself that there is a rule of law such as he deduced from the judgment of the Court of Appeal in Lemay (No. 1) *viz*: That the unexplained omission on the part of the Crown to call a witness shown by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal.

I do not propose to examine the authorities at length. I think it sufficient to refer to the judgment of their Lordships of the Judicial Committee delivered by Lord Thankerton in *Adel Muhammed El Dabbah* v. *A.-G. Palestine*, [1944] A.C. 156 and particularly at pp. 167-9, where it is laid down that the Court will not interfere with the exercise of the discretion of the prosecutor as to what witnesses should be called for the prosecution unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. I find no conflict between this judgment and that pronounced by Lord Roche, also speaking for the Judicial Committee in *Seneviratne* v. *The King*, [1936] 3 All E.R. 36. Counsel for the appellant laid emphasis on the following passage at p. 49: "Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."

It must be remembered that *Seneviratne* v. *The King* was a case in which the accused had been convicted of murder on purely circumstantial evidence. In the passage just quoted it appears to me that Lord Roche was referring to the duty which clearly rests upon the prosecutor to place before the Court evidence of every material circumstance known to the prosecution including, of course, those circumstances which are favourable to the accused. It must also be remembered that Lord Roche was not dealing with an argument of counsel for the accused that the prosecutor had failed to call witnesses that he should have called, but with the reply of counsel for the Crown to the argument of counsel for the defence that the prosecutor had called a number of witnesses who gave irrelevant and inadmissible evidence and whose evidence ought not to have been received.

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise; nor do I intend to suggest that there may not be cases in which the failure of the prosecutor to call a witness will cause the tribunal of fact to come to the conclusion that it would be unsafe to convict. The principle stated by Avory J. in *R.* v. *Harris*, [1927] 2 K.B. 587 at p. 594, that in a criminal trial where the liberty of a subject is at stake, the sole object of the proceedings is to make certain that justice should be done between the subject and the state, is firmly established.

While it is the right of the prosecutor to exercise his discretion to determine who the material witnesses are, the failure on his part to place the whole of the story as known to the prosecution before the tribunal of fact may well be ground for quashing a conviction. Such a case is that of *R.* v. *Guerin* (1931), 23 Cr. App. R. 39.

For the above reasons I am of opinion that the learned trial Judge erred in directing himself that he was bound as a matter of law to acquit the appellant because of the fact that the Crown did not call Art Lowes as a witness; and that the Court of Appeal were right in deciding that the judgment of acquittal should be set aside.

As to the second ground of appeal argued before us—that the notice of appeal to the Court of Appeal was not in accordance with s. 1013(4) of the *Code*—I agree with what has been said by my brother Kerwin.

It remains to consider Mr. Hall's final argument that the Court of Appeal erred in directing a conviction to be entered and that if the setting aside of the acquittal is upheld a new trial should be directed.

We are bound by the judgment of this Court in *Belyea* v. *The King*, [1932] 2 D.L.R. 88, S.C.R. 279, 57 Can. C.C. 318, which decided that the wording of s. 1013(5) of the *Code* is apt to confer jurisdiction on the Court of Appeal in an appeal brought by the Attorney-General under s. 1013(4) not only to set aside the judgment of acquittal and to direct a new trial but, in a proper case, to direct a conviction to be entered, and it is irrelevant to inquire whether, if the matter were *res integra* I would have found the wording of the section sufficiently plain and unambiguous to effect so revolutionary a change in the pre-existing law.

In my opinion the power to direct that a conviction be entered after an acquittal by a trial Judge has been set aside can be exercised only if it appears to the Court of Appeal from the judgment of the trial Judge that he must have been satisfied of facts which proved the accused guilty of the offence charged. In the case at bar I do not think that this appears. It is quite true that the learned trial Judge says: "The accused went into the box and categorically denied any sale of narcotics, and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony." But he nowhere states expressly, or does it follow by irresistible inference from anything he does say, that he accepts the evidence of Bunyk. He does not say that, but for the supposed rule of law which he applied, he would have found the accused guilty. He does not indicate that he is left without any reasonable doubt as to his guilt. In the view he took of the law, it was, indeed, no more necessary for the learned trial Judge to express himself upon any of these vital matters than it would have been for a jury to do so after being directed that in view of a point of law taken by the defence they must

return a verdict of "not guilty". It is not, I think, sufficient that, from the reasons of the learned trial Judge, it should appear to the Court of Appeal in the highest degree probable that he would have convicted but for his erroneous ruling on the point of law; it must appear certain that he would have done so.

I would allow the appeal to the extent of setting that part of the order of the Court of Appeal which directs a conviction to be entered and would order a new trial.

FAUTEUX J. concurs with KERWIN J.

Appeal dismissed.

REGINA v. DOIRON

Nova Scotia Supreme Court, Appeal Division, Macdonald, Hart and Jones JJ.A.
March 13, 1985.

Evidence — Production — Statements to police — Crown witnesses having given statements to police — Defence counsel seeking production of such statements but Crown counsel refusing — Trial judge adopting procedure of reviewing statements after witness giving evidence-in-chief and only giving statement to defence counsel if found contradiction between statement and testimony — Procedure improper — Trial judge has general power to order production of statements in order to ensure fair trial and discretion should be exercised in favour of production in absence of any cogent reason to contrary — Inappropriate that decision as to value of statement be left solely to trial judge — Canada Evidence Act, R.S.C. 1970, c. E-10, s. 10.

There is an overriding obligation on the part of counsel for the Crown to inform the defence of any evidence which may be helpful to the accused. As well, the trial judge has a power at trial to require the production of statements made by Crown witnesses for use by the defence in order to ensure a fair trial and guarantee that an accused can make full answer and defence. The trial judge's discretion should be exercised in favour of production in the absence of any cogent reason to the contrary. There is also a power of production under s. 10(1) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, and where it is established that a statement has been made within the meaning of that section, then generally counsel for the accused is entitled to a copy of the statement. There is a broad right of cross-examination under s. 10(1), the exercise of which must be left in the hands of counsel for the accused. The statement given by a witness is important not only for purposes of cross-examination, but it may also disclose information which the witness has forgotten. While s. 10(1) seems to imply that the trial judge may examine the statement without disclosing it to counsel, it is not appropriate that the decision should be left solely to the trial judge to determine whether the statement is contradictory or of any use to the defence. The trial judge is not privy to information available to the defence. Thus, on the trial of the accused where it was shown that witnesses for the Crown had given statements to the police which were in the hands of Crown counsel, it was improper for the trial judge to examine the statements himself and only disclose them to defence counsel where he had determined, following their examination-in-chief, that there was a contradiction between the statement and the testimony given.

R. v. Savion and Mizrahi (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259, **apld**

R. v. Weigelt (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499; *R. v. Lantos*, [1964] 2 C.C.C. 52, 42 C.R. 273, 45 W.W.R. 409, **discd**

Mahadeo v. The King, [1936] 2 All E.R. 813; *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 9 D.L.R. (3d) 398, 10 C.R.N.S. 55, [1970] S.C.R. 409, 72 W.W.R.

35; *R. v. Cherpak* (1978), 42 C.C.C. (2d) 166, [1978] 5 W.W.R. 315, 9 A.R. 596; leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, consd

Other cases referred to

R. v. Tousigant et al. (1962), 133 C.C.C. 270, 38 C.R. 319, 39 W.W.R. 574; *Cormier v. The Queen* (1973), 25 C.R.N.S. 94; *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, 14 C.R.N.S. 34, [1971] 2 W.W.R. 266; leave to appeal to S.C.C. refused 4 C.C.C. (2d) 566*n*, [1971] S.C.R. x; *R. v. Sinclair* (1974), 19 C.C.C. (2d) 123, 16 C.L.Q. 452, 28 C.R.N.S. 107, [1974] 5 W.W.R. 719; *Re Cunliffe and Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560, 11 D.L.R. (4th) 280, 40 C.R. (3d) 67, [1984] 4 W.W.R. 451

Statutes referred to

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 10(1)
Criminal Code, s. 84(2)(*b*) (rep. & sub. 1976-77, c. 53, s. 3)

APPEAL by the accused from the dismissal of his appeal from conviction and sentence on a charge of using a firearm in a careless manner contrary to s. 84 of the *Criminal Code*.

M. F. Walden, for accused, appellant.
D. W. Giovannetti, for the Crown, respondent.

The judgment of the court was delivered by

JONES J.A.:—This is an application by Edmond James Doiron for leave to appeal his conviction and sentence on a charge of using a firearm in a careless manner contrary to s. 84(2)(*b*) of the *Criminal Code*.

On the evening of October 17, 1982, there was a dance in the parish hall at Charlos Cove, Guysborough County. Lionel David, Cecil Cashin, Philip Cashin, Roland Richard and Janet Levangie were in attendance at the dance. The appellant Edmond Doiron, his brother Frank, his brother-in-law Joseph Pettipas and Richard Murray were also at the dance. There was an altercation at the dance around midnight between Joseph Pettipas and Roland Richard in which Mr. Richard struck Mr. Pettipas in the mouth. As a result of this incident Edmond and Frank Doiron, Joseph Pettipas and Richard Murray left the dance in Frank Doiron's truck. As they were leaving the scene Cecil Cashin hit the truck with a stick. Shortly thereafter Lionel David, Cecil and Philip Cashin and Roland Richard left the center in Cecil Cashin's half-ton truck which was operated by Janet Levangie. They were allegedly proceeding home to Port Felix. They had to pass the Pettipas home which is a short distance from the parish hall and the place where the Doiron party had stopped.

Janet Levangie, Lionel David, the Cashin brothers and Roland Richard were witnesses on the trial before His Honour Judge

R. A. MacDonald. The proceedings were by way of summary conviction.

These individuals testified that they stopped on the road by the Pettipas residence as they heard shouts from persons standing in front of the residence apparently challenging them to fight. They denied that they stopped with the intention of fighting. Just as they were leaving the vehicle they heard shooting. There was a conflict in their evidence but, generally, there was testimony that there were several persons on or near the front steps of the house and that Edmond Doiron had a gun from which three or four shots were fired in quick succession. While there was evidence that the gun was pointed in the air, shot-gun pellets struck the side of the Cashin truck causing damage. The passengers ran from the scene back to the hall where they telephoned the police.

Constable Nymark received a call at approximately 1:00 a.m. and proceeded to the parish hall in Charlos Cove. After observing the damage to the truck he proceeded to the Pettipas reisdence where he asked that any weapons in the house be turned over to him. He testified that he received a .20-gauge shot-gun and a .30-.30 rifle. The shot-gun was taken to Halifax for examination by Staff Sergeant Swim, a firearms expert. The officer testified that it was 15 metres from the front of the house to the road. Edmond Doiron was arrested and when searched had nine .12-gauge shot-gun shells on his person. Constable Glendon Morash searched in front of the Pettipas residence at 2:15 a.m. and found three .20-gauge shot-gun shells: one on top of the front steps, one to the right of the steps and the third on the left-hand side of the steps. He did not find any shells at the side of the house. Staff Sergeant Swim testified that the gun received from Constable Nymark was a .12-gauge shot-gun in working order and that the three .20-gauge shells found by Constable Morash had been fired from the gun. No explanation was offered on the trial as to the varying descriptions of the shot-gun.

Edmond Doiron, Richard Murray, Shirley Pettipas and Joseph Pettipas testified on behalf of the defence. Again, there were conflicts in the evidence. When they arrived at the Pettipas residence the men were in the kitchen and the women were in the living-room. There were two children in the house and the lights were out. There was evidence that in the evening of September 4 or 5, 1982, a large crowd of people gathered outside the Pettipas residence, including Roland Richard, the Cashin brothers and Lionel David. Considerable damage was done to the Pettipas residence and as a result charges were laid. On October 17, 1982,

the occupants of the Pettipas residence were aware of the earlier incident.

Mrs. Pettipas observed the Cashin truck stop and heard the occupants hollering. Edmond Doiron and some of the other men went out the back door to the deck which extended some five feet to the side of the house. Edmond Doiron testified that he was handed a .12-gauge shot-gun by Mr. Pettipas and that he fired three shots from the back doorstep. He said it was not the gun exhibited in court. He fired twice in the air and once into the ground in a general direction parallel to the highway. He also testified that his brother Frank had a shot-gun which he fired. He denied that he fired from the front of the house or in the direction of the truck. The other witnesses also insisted that no one fired from the front of the house and that when the first shots were fired the passengers were approaching the front of the house and that the shooting was merely intended to scare them away and succeeded in doing so.

There was a conflict in the evidence as to where the guns were kept in the house. Mrs. Pettipas testified that there were only two guns kept in the house, including the exhibit shot-gun and her husband's rifle. Mr. Pettipas, when asked how many guns were in the house that evening, answered, "Probably four, four I think".

Carmen Casey was at the dance on October 17, 1982. he said that Richard Murray, who testified for the defence, was in the hall "sort of passed out" at 12:30 a.m. and that he saw Mr. Murray in the hall again after the Cashin vehicle had left the scene.

At the commencement of the trial defence counsel asked the court to direct the prosecutor to produce statements of the Crown witnesses. No particular reason was given except that they might be required for cross-examination. Counsel for the Crown opposed the motion. Argument took place regarding the power of the court to order the production during which reference was made to s. 10(1) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10. Counsel for the defence stated that his application was "based on the general principle that the accused is entitled to a fair trial". In the course of the argument, the trial judge stated:

> We're dealing with the more important area of criminal law and there should be the same kind of openness for the purposes of justice in general. I can't think of a reason why, if somebody said something or made a statement to a police officer, why it should be the option of the Crown to decide whether to have that introduced or not.

Apparently, based on this principle, as each of five Crown witnesses completed his or her evidence-in-chief, the trial judge

examined the witness's written statement as given to the police to determine whether it was in any way contradictory to their testimony. Where he was satisfied that it was not contradictory he simply stated that fact and the cross-examination proceeded. He showed a copy of a witness's statement to the defence in only one instance.

After reviewing the evidence at the end of the trial, the trial judge entered a conviction. In giving his reasons, the trial judge stated:

> I cannot find that a shot-gun shot at the back of a half-ton truck within which there was an occupant was a prudent and careful use of a firearm. There is a real question as to whether it was merely careless or whether there was something greater than that, that is, whether there was an intentional use but here we have an individual using that gun and the question is whether he or someone else shot at the back of the truck and that evidence essentially that it was Mr. Doiron that was doing the shooting and the weight of the Crown evidence as to what I have to accept in light of the fact that I am basically rejecting the defence evidence . . . the evidence is that Mr. Doiron was doing the shooting and that accordingly, I find, as a matter of fact, that he, in fact, did pull the trigger that unleashed the buckshot that hit the back of the half-ton truck and I cannot find that that is a legitimate defence of property.

The appellant was sentenced to serve a term of one month, to be served intermittently on week-ends.

An appeal was taken to the County Court of District Number Six and dismissed. Essentially, the learned county court judge found that there was no basis for disturbing the findings of fact of the trial judge and that there was no error of law which would warrant allowing the appeal. The present appeal is from that decision.

There were three issues raised on the argument of the appeal. I will deal with the second issue first, namely, that there was no evidence to support the conclusion that the appellant fired the shot which hit the truck. In view of the conflict in the evidence it was necessary to decide issues of credibility which the trial judge determined against the defence. That was a matter within his exclusive prerogative and there was ample evidence to support his conclusions. There was evidence by the Crown witnesses that the appellant fired three or four shots, one of which struck the truck. The appellant admitted firing three shots from a .12-gauge shot-gun. The police only recovered three shells which the firearms expert said were fired from the exhibit shot-gun which he described as a .12-gauge shot-gun. No other shot-gun was given to the police from the house and Mrs. Pettipas tetified that it was the only shot-gun in the house. Frank Doiron, whom the appellant

alleged was firing the shot-gun, never testified. As there was evidence to support the conclusions of the trial judge this ground of appeal cannot be sustained.

The first ground of appeal, which is the main issue, raises the question as to the entitlement of the defence to statements given to the Crown by witnesses testifying on a trial. There are two lines of authority in Canada: first, that there is a general power in a court to order the production of statements in order to ensure that the accused has a fair trial, and secondly, that s. 10(1) of the *Canada Evidence Act* provides for the production of previous statements for purposes of cross-examination. *R. v. Weigelt* (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499, is a decision of the Appeal Division of the Alberta Supreme Court. In that case defence counsel made reference in cross-examination to a statement made by Mrs. Weigelt to the police. The Crown did not produce the statement and no order was made for its production. Ford C.J.A., after reviewing the authorities, stated, at p. 220 C.C.C., p. 354 C.R.:

> However, I would hold — and this does not differ from anything said by the learned Judge in the above judgment about Crown practice — that, if the Crown prosecutor does not decide to produce a statement such as the one here to counsel for the defence, the latter is entitled to apply to the trial Judge during the trial for an order that it be produced for the purpose purely of cross-examination to test the credibility of the witness who made the statement. The trial Judge is, on such application, entitled to order that it be produced if, in his opinion, it is in the interests of justice to do so. With respect to this I refer with approval to the statement in *R. v. Bohozuk* (1947), 87 Can. C.C. 125 at pp. 126-7, made by Mckay J. as follows: "It is well to remember that in seeing to the interests of justice, it is the duty of the Court to see that all rights of the accused are safeguarded, but in considering the interests of the accused the interests of justice must not be overlooked — they are the interests of the proper administration of justice, and justice must be and remains paramount."
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> I have looked for further authority but have not been successful in finding anything bearing more nearly upon the question to be decided here than the cases to which I have referred.
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> At the hearing of this appeal, Crown counsel produced a copy of the statement, and the Court had the opportunity of reading it if the members so desired. From the nature of its contents, I concluded that no miscarriage of justice has resulted from its non-production. I am also strongly of opinion that an application for its production should have been made if non-production is now to be relied on as ground for a new trial. As stated before, no such application was made.

Johnson J.A., with Smith J.A. concurring, stated, at p. 221 C.C.C., p. 356 C.R.:

> While it is probably not necessary to decide the point, I am of the opinion

> that the statement not having been prepared, at least primarily, for counsel's brief at trial [I understand it was made to be used in proceedings under the *Child Welfare Act*] and a copy being in possession of Crown counsel, it should have been produced to defence counsel to make such use of in cross-examination as he saw fit.

No reference was made in the decision to the provisions of s. 10 of the *Canada Evidence Act*.

An annotation immediately following the *Weigelt* case in 33 C.R., by A. E. Popple, summarizes the Canadian and English cases to that point. Mr. Popple refers to s. 10(1) of the *Canada Evidence Act* as providing a means at the trial for the production and inspection of statements.

The decison of the Privy Council in *Mahadeo v. The King*, [1936] 2 All E.R. 813, was referred to by the Alberta Appellate Division in *Weigelt*. Sir Sidney Rowlatt, in delivering the judgment of the Privy Council, stated at pp. 816-7:

> At the trial the prosecution was conducted by the Attorney-General, and Mathura and the appellant were separately defended. At the opening of the proceedings the Attorney-General stated that he had received a letter from the solicitors for the defendants requiring production of all statements made by the three accused and by Sukraj, other than those produced as exhibits in the proceedings. This letter was taken exception to by the Attorney-General as containing insinuations that the prosecution had suppressed documents. In point of fact the Attorney-General was not aware that there were two statements, namely, those by Sukraj, which had not been produced. The Chief Justice characterised the letter as being highly improper. In the result the statements of Sukraj were not produced but they were available on the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.

In *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 9 D.L.R. (3d) 398, 10 C.R.N.S. 55, the defence on a preliminary inquiry sought the production of a statement given to the police by a witness for the prosecution. Judson J., in delivering the judgment for the majority in the Supreme Court of Canada, in referring to s. 10(1) of the *Canada Evidence Act*, stated, at p. 230 C.C.C., p. 57 C.R.N.S.:

> This power is given explicitly to a Judge "at any time during the trial". It is not given to a Magistrate during the conduct of a preliminary hearing. There

is a real distinction here. The purpose of a preliminary inquiry is clearly defined by the *Criminal Code* — to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial. We are not concerned here with the power of a trial Judge to compel production during the trial nor with the extent to which the prosecution, in fairness to an accused person, ought to make production after the preliminary hearing and before trial. This is a subject which received some comment in the British Columbia Court of Appeal in *R. v. Lantos*, [1964] 2 C.C.C. 52, 42 C.R. 273, 45 W.W.R. 409, and Archbold, *Criminal Pleading, Evidence and Practice*, 37th ed., para. 1393.

In *R. v. Lantos*, [1964] 2 C.C.C. 52, 42 C.R. 273, 45 W.W.R. 409, the British Columbia Court of Appeal held that an accused was not entitled under s. 512(*a*) of the *Code* to the production of statements taken from prospective witnesses. Tysoe J.A., in delivering the judgment of the court, went on to say at pp. 53-4:

> Nothing I have said is to be taken to mean that under no circumstances and at no time may an accused become entitled to inspect a statement in writing given by a Crown witness. Section 10(1) of the *Canada Evidence Act*, R.S.C. 1952, c. 307, is as follows:
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> > "10(1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit."
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> Apart altogether from this section the trial Judge or Magistrate has power to require the prosecution to produce to the accused for his inspection during the course of the trial any statement in writing made by a Crown witness who is giving, or who has given evidence, and to permit the accused to use the statement for cross-examination purposes. I do not doubt that power would be exercised if the interests of justice required it. It is, of course, the duty of the Court to see that all rights of the accused are safeguarded. I refer to *Mahadeo v. The King*, [1936] 2 All E.R. 813 at p. 816; *R. v. Finland* (1959), 125 C.C.C. 186, 31 C.R. 364, 29 W.W.R. 354; *R. v. Silvester and Trapp* (1959), 125 C.C.C. 190, 31 C.R. 190, 29 W.W.R. 361; *R. v. Weigelt* (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499; *R. v. Torrens*, [1963] 1 C.C.C. 383, 40 W.W.R. 75. Also see: *R. v. McNeil* (1960), 127 C.C.C. 343, 33 C.R. 346, 31 W.W.R. 232. I should point out that counsel for the accused did not, at any time during the course of the trial, request the learned Magistrate below to exercise the power given by s. 10(1) of the *Canada Evidence Act* nor the other power which I have mentioned above.
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> I would add only that, in my opinion, an accused is not entitled, as a matter of right, to have produced to him for his inspection before trial, statements or memoranda of evidence of Crown witnesses or prospective witnesses, whether signed or unsigned. That is a matter within the discretion of the Crown prosecutor who may be expected to exercise his discretion fairly, not only to the accused, but also to the Crown. What might be thought to be

proper in one set of circumstances may not be thought to be proper in another.

No reference was made to the views expressed earlier by the British Columbia Court of Appeal in *R. v. Tousigant et al.* (1962), 133 C.C.C. 270, 38 C.R. 319, 39 W.W.R. 574.

In *R. v. Cherpak* (1978), 42 C.C.C. (2d) 166, [1978] 5 W.W.R. 315, 9 A.R. 596, the court was concerned with the production of a police officer's report as to the witness's statement. Clement J., in delivering the judgment of the court, held that the report itself was not a statement subject to production. He went on to add, however, at p. 172:

> In a proper case and at an appropriate time in the cross-examination of a witness, I am of opinion that counsel can apply for an inquiry similar to a *voir dire* to establish whether or not the witness made a statement within the purview of s. 10, such as is recommended by Culliton, C.J.S., under s. 9(2). If such a statement is found to have been made, it is plain that counsel is not entitled to it in law. It is produced to the Judge for his inspection and to "make such use of it for the purpose of the trial as he sees fit". This is affirmed by Bird, J.A., speaking for the Court of Appeal of British Columbia in *R. v. Tousigant* (1962), 133 C.C.C. 270 at p. 274, 38 C.R. 319, 39 W.W.R. 574:
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> > "In my judgment the true effect and intent of the latter part of the section is to give the Judge power in his discretion to require production of the statement for inspection by himself. The section confers no right upon a party or his counsel to require production of such a statement."
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> It is well to note some judicial comment on the proper exercise of this discretion. In *R. v. Weigelt* (1960), 128 C.C.C. 217, 33 C.R. 351, 32 W.W.R. 499, Ford, C.J.A. with whom Macdonald, J.A., concurred, had this to say at p. 220:
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> > "The trial Judge is, on such application, entitled to order that it be produced if, in his opinion, it is in the interests of justice to do so. With respect to this I refer with approval to the statement in *R. v. Bohozuk* (1947), 87 Can. C.C. 125 at pp. 126-7, made by McKay, J., as follows: 'It is well to remember that in seeing to the interests of justice it is the duty of the Court to see that all rights of the accused are safeguarded, but in considering the interests of the accused, the interests of justice must not be overlooked — they are the interests of the proper administration of justice, and justice must be and remains paramount.' "
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> The passage from *R. v. Bohozuk* was also referred to with approval in this connection by Haines, J., in his wide-ranging and useful judgment in *R. v. Lalonde* (1971), 5 C.C.C. (2d) 168, [1972] 1 O.R. 376.

Clement J. would apply the same practice to both ss. 9 and 10 of the *Canada Evidence Act*. In *Cormier v. The Queen* (1973), 25 C.R.N.S. 94, the Quebec Court of Appeal held that the right of cross-examination under s. 10(1) of the Act is not limited and that the guidelines referred to in *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, 14 C.R.N.S. 34, [1972] 2 W.W.R. 266, have no application.

Kaufman J.A., in delivering the judgment of the court, stated at pp. 98-9:

> Apart from the fact that a voir dire is *not* the trial Judge's inquiry but rather a trial within the trial in the full sense of the word, I think, with respect, that the Judge erred in requiring counsel to obtain his permission before cross-examining a witness "as to previous statements made by him in writing or reduced to writing, relative to the subject-matter of the case".
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> As I see it, the only limitation to this type of cross-examination is that contained in s. 10(1), that is to say that, "if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him". That is a long way from saying that counsel must first satisfy the Judge that there are, in fact, contradictions.
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> In this respect s. 10(1) differs completely from s. 9, which deals with adverse witnesses, and which provides as follows:
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> > "9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony: but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.
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> > "(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse."
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> The great distinction is, of course, that s. 9 permits a party, under very strict conditions, to contradict *his own witness*, and one of the means of doing this is by proof "that the witness made at other times a statement inconsistent with his present testimony". But, before doing so, leave of the court must be obtained.
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> The trial Judge clearly took the view that the rules of s. 9 could be applied to cases falling within s. 10, and he therefore applied the guidelines set out by Culliton C.J.S. in *Regina v. Milgaard*, 14 C.R.N.S. 34, [1971] 2 W.W.R. 266, 2 C.C.C. (2d) 206 at 221 . . .

He continued at p. 100:

> Nothing that was said by the Chief Justice in *Milgaard* can in any way be construed so as to justify the application of these rules to s. 10 of the Canada Evidence Act, where the wording is quite different. In my view, the proper rule remains the one enunciated by this Court in *Abel v. The Queen* (1955), 23 C.R. 163, 115 C.C.C. 119, where Taschereau J. concluded as follows at p. 176:
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> "I am of the opinion that the judge illegally refused appellant's counsel the right to cross-examine a Crown witness, Captain Gelinas, as to a statement that he had made the day before on the *voir dire* which was inconsistent with

that which he made before the jury. Accused may have suffered very serious prejudice therefrom."

In *R. v. Sinclair* (1974), 19 C.C.C. (2d) 123, 16 C.L.Q. 452, 28 C.R.N.S. 107, Wilson J., of the Manitoba Queen's Bench, had to consider whether the Crown could be forced on a preliminary to produce a previous statement given by a Crown witness. In *Sinclair*, the Crown made an application to proceed under s. 9(2) of the *Canada Evidence Act* at which time the defence asked to see the statement. Wilson J., in the course of his judgment, stated [at pp. 127-8]:

> But here, the demand for production and perusal came after the Crown itself had disclosed the existence of the statements, and had tendered them for perusal by the Court. Of that, accused reasonably observes, his preliminary hearing, like the trial itself, may not be conducted, as it were, as if he was not present. Or, putting it another way, the outcome of the preliminary hearing is not to depend, in however minor a degree, upon a consideration of evidence (or proffered evidence) as to the relevance or significance of which he may not inquire, or may inquire subject only to the severe handicap of now knowing the language of the statements in question.
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> Without denying the right of the Crown, in its discretion, to present the case as it will, surely, the associated right to withhold statements, for whatever reason, does not extend to producing the statements, and inviting their use by the Court, without making them available for examination by the accused as well. The right of Crown counsel to contradict, or to treat as hostile, his own witness, is subject to the corresponding right of the accused to satisfy himself that such contradiction, or "hostile" examination, is in accord with the circumstances of the case, and to address the Court upon the point, if thought necessary. How may this be done, except in the light of full disclosure of the statement or statements from which, it is said, follows Crown's right to so proceed? Nor is the dilemma improved by the bargain proposed here, that should the Court agree with the contention of the Crown, its counsel would then — and only then — make the statements in question available to the accused.
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> To assent to that much would be to say that it is inconceivable that accused or his counsel could have any useful comment to offer upon a matter offered by way of evidence before the Court. Whether the accused wishes to offer comment, or lead evidence on the question, is another matter: the point is that, if he is indeed to be allowed the "full answer and defence" so proudly assured to every person accused, the case must proceed upon another basis.
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> The matter will be remitted to the learned Provincial Judge to continue the preliminary hearing in light of these observations.

The most recent decision dealing with the issue is the decision of the Ontario Court of Appeal in *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259. At issue in that case were statements by the accused. The court held that an accused was entitled to receive a copy of his own statement under s. 531 of the *Code*. In delivering the judgment of the court, Zuber J.A. stated at p. 283:

I turn now to the alternative argument respecting the production of the appellants' statements. It is the assertion of the appellants that, entirely apart from s. 531, there reposes in the trial Judge a discretionary power to order production by the Crown and that it ought to have been exercised in this case.

Zuber J.A. then referred to the decisions in *R.v. Lantos*, *R. v. Lalonde* and *R. v. Weigelt*, *supra*. He then continued at pp. 284-5:

I have not been referred to, nor have I been able to find a Canadian case dealing with the power of a Court to order production where what was sought was the accused's own statement. However, I cannot conceive that the power to compel the Crown to produce the statement of a witness is a narrow and isolated power; I conceive it to be but one facet of a wider power to order production that flows from the ability of the Court to control its process so as to manifestly ensure fundamental fairness and see that the adversarial process is consistent with the interests of justice. Such a power must include the power to order production of the statement of an accused.

The further question then is: should such discretionary power to order production have been exercised? I can think of no reason why production should not have been ordered.

As is often the case, when our own experience is slim or non-existent, one looks to American case law. Unfortunately in this instance the American case law is not particularly helpful. The cases differ procedurally, often turning on specific rules, and those that I have found deal with the pre-trial disclosure. It may be said as well that the results of those cases disclose a healthy difference of opinion. The cases do, however, underline the competing principles. The principle of fairness and the right of an accused to know the case he has to meet compete with a fear of fabricated defences, tailored to accommodate the statements.

When, however, as is the case here, the production sought is production at trial the danger of defences tailored to accommodate the statement must be substantially diminished and must be outweighed by the need for fundamental fairness in the trial process. Entirely apart from s. 531 of the *Criminal Code*, in the absence of any cogent reason to the contrary, a trial Judge should exercise his discretion and order production to an accused of his own statement. Thus, the appellants succeed on both of the foregoing arguments, either one of which entitled them to production of their statements.

With reference to English practice, the following passage is from *Archbold, Pleading, Evidence and Practice in Criminal Cases*, 40th ed. (1979), p. 282, para. 443a:

Where a witness whom the prosecution call or tender gives evidence in the box on a material issue, and the prosecution have in their possession an earlier statement from that witness which is materially inconsistent with such evidence, the prosecution should, at any rate, inform the defence of that fact: *R. v. Howes*, March 27, 1950, C.C.A. (unreported). Although the discrepancy relates to that part of a witness's evidence which is evidence against one defendant only, the information should be supplied to any other co-defendant against whom the witness also gives evidence, as it goes to the credibility of the witness: *Baksh v. R.* [1958] A.C. 167. In certain cases, particularly where the discrepancy involves detail, as in identification by description, it may be

difficult effectively to give such information to the defence without handing to them a copy of the earlier statement: *R. v. Clarke* (1930) 22 Cr. App. R. 58; see also *Baksh v. R.*, *ante*. Once again the question arises as to whether the defence are entitled to see the statement in order to be able to judge for themselves whether there is a discrepancy, and if so whether it is material. Implicit in the observations of Humphreys J. and Avory J. in *R. v. Clarke* (1930) 22 Cr. App. R. 58, is the view that the defence are so entitled, but that case was concerned with a previous written description of the accused given by a police officer to his superior.

Further, there have been cases where, in view of their particular circumstances, judges have ruled that the defence should be allowed to see statements made to the police by witnesses for the prosecution: see *R. v. Hall* (1958) 43 Cr. App. R. 29, C.C.C.; *R. v. Xinaris* (1955) 43 Cr. App. R. 30n. (Byrne J.). In the absence of any authority to the contrary it is submitted that the practice of revealing to the defence the previous statements of prosecution witnesses which are relevant to their evidence is not only wholly unobjectionable but is very much in the interests of justice. This practice is eagerly followed at the Central Criminal Court. Oral as well as written inconsistent statements of witnesses can be both put in cross-examination and, if not admitted, proved by the opposing party under *Denman's Act*, *post*, §§528 *et seq*. It is submitted that it is wholly wrong for the Crown not to furnish the defence with such material and thus prevent them from exercising their rights under that Act. Quite apart from the "inconsistency" point there is the further consideration that a witness may have forgotten or omitted in evidence some part of his statement which may, unbeknown to the prosecution, be most material to the defence case. As to the duty of the prosecution with regard to a prison medical officer's report or statement on the question of insanity, see *post*, §1447i, and for the obligation to supply details of the defendant's previous convictions to his solicitor or counsel see *Practice Direction* [1966] 1 W.L.R. 1184; [1966] 2 All E.R. 929, *post*, §631.

The following passage is from *Phipson on Evidence*, 13th ed. (1982), p. 754:

(2) *Statement of prosecution witness.* A similar reluctance to reveal to the defence the previous statements of witnesses actually called for the prosecution is not infrequently displayed by prosecuting authorities, and by some prosecuting counsel. It is well settled that where such a witness gives evidence which is materially inconsistent with an oral or written statement made by him the prosecution should inform the defence. The difference of practice arises as to whether or not the defence should be entitled to see the written, or reports of oral, statements of prosecution witnesses in order to be able to judge for themselves whether there is a discrepancy and if so whether it is material.

There is the authority of Avory, Humphreys and Byrne JJ., all former senior prosecuting counsel for the Crown at the Central Criminal Court, that the defence are so entitled. *R. v. Clarke* (1931) 22 Cr. App. R. 58 was concerned with previous descriptions, but it is clear from their remarks during the course of argument that Avory and Humphreys JJ. considered that the defence had a right to see such statements in order to discover whether there was an inconsistency of any kind. The report of Byrne J.'s ruling in *R. v. Xinaris* (1959) 43 Cr. App. R. 30 note. See also *R. v. Hall* (1959) 43 Cr.

> App. R. 29 *per* Judge Maude at the C.C.C., is short, but the writer had the advantage of discussing the point with Byrne J. and can confirm that Byrne J. agreed with Avory and Humphreys JJ. on the general proposition.
>
> In the absence of any authority to the contrary it is submitted that the practice of revealing to the defence all previous statements of prosecution witnesses relevant to their evidence, already largely followed at the Central Criminal Court, is both correct and in the interests of justice.
>
> Indeed it is difficult to see why objection is never made to their production. If there is no material inconsistency no harm is done. If there is material inconsistency there is no question but that it must be disclosed to the defence. Moreover the prosecution often does not know the defence case and may not therefore be in a position to know that an inconsistency is material.
>
> Apart from inconsistency, there is the further point that a witness may have forgotten or omitted in his evidence some part of his statement which may be most material to the defence case, although the prosecution may not realise this.

The cases point out the overriding obligation on the part of counsel for the Crown to inform the defence of evidence which may be helpful to an accused: see *Re Cunliffe and Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560, 11 D.L.R. (4th) 280, 40 C.R. (3d) 67. In its report on disclosure by the prosecution the Law Reform Commission of Canada has recommended that the *Criminal Code* be amended to require the Crown to furnish a copy of any relevant statement made by a prospective witness at any stage of the proceedings unless the Crown can show that disclosure will probably endanger life or safety or interfere with the administration of justice.

It is clear from the authorities that a trial judge has the power at trial to require the production of statements made by Crown witnesses for use by the defence. With respect, I agree with the decision of the Ontario Court of Appeal in *R. v. Savion and Mizrahi*, *supra*, that a trial judge has the general power to order the production of statements in order to ensure a fair trial and guarantee that an accused can make full answer and defence. The discretion should be exercised in favour of production in the absence of any cogent reason to the contrary. The power of production also exists under s. 10(1) of the *Canada Evidence Act*. The only issue is whether the court can examine statements without showing them to counsel. While s. 10(1) seems to impart such discretion, a wider view has been taken of the exercise of the general power. In my view, under s. 10(1) of the *Canada Evidence Act*, while there may be a preliminary question as to whether a statement was made, when that issue has been determined in favour of the accused counsel is generally entitled to a copy of the statement. I agree with the decision of the Quebec

Court of Appeal in *Cormier v. The Queen*, *supra*, that ther broad right of cross-examination under s. 10(1) of the *Co Evidence Act* and, accordingly, the exercise of that right mu left in the hands of counsel for an accused; s. 10(1) doe prohibit giving a copy of the statement to counsel. The state is important, not only for purposes of cross-examination, may also disclose information which the witness has forgott is not appropriate that the decision should be left solely to th judge to determine whether the statement is contradictory any use to the defence. He is not privy to information availa the defence. Nor is it appropriate that the court and couns the Crown should have access to a statement to the exclus the accused or his solicitor.

It follows that I respectfully disagree with those decisions hold that a trial judge has a broad discretion on the trial to r counsel the right to see the statement of a Crown witnes noted by the author of *Phipson on Evidence*, if there is nc contradictory in the statement no harm is done to the Cr case. On the other hand, if the statement is contradicto contains evidence not disclosed then it is material to the de With respect, the trial judge was in error when he failed to all of the statements available to the defence in his case.

The court has requested and received copies of the state since the argument of the appeal. The court has also directe the statements be forwarded to appellant's counsel. An e nation of the statements shows no additional information could have materially affected the decision. In the circumst I am satisfied that no substantial wrong or miscarriage of j occurred. In the result, the appeal against conviction mu dismissed.

In so far as the appeal against sentence is concerned, I ca no error on the part of the trial judge. Needless to say, the a firearm in these circumstances must be viewed as a s matter, particularly where one shot was fired at the vehicle.

While I would grant leave to appeal, the appeal shou dismissed.

Appeal dism

CUNLIFFE v. LAW SOCIETY OF BRITISH COLUMBIA; BLEDSOE v. LAW SOCIETY OF BRITISH COLUMBIA

British Columbia Court of Appeal, Nemetz C.J.B.C., Hinkson and Macdonald JJ.A.

Judgment — March 7, 1984.

Procedure — Disclosure by Crown — Inspection of statements, evidence and exhibits — Crown having duty to advise defence in timely manner of witnesses whose evidence is deemed adverse to prosecution — In circumstances, Crown counsel taking over prosecution entitled to assume defence counsel knew of favourable witnesses.

Procedure — Disclosure by Crown — Inspection of statements, evidence and exhibits — Crown having discretion respecting giving to defence statements of witnesses favourable to defence — Crown acting properly in producing statements to court after defence applying for order for production.

Evidence — Calling witnesses — Crown having no duty to call witnesses favourable to defence — Trial judge erring in directing Crown to call such witnesses.

The appellants, B. and C., were Crown counsel at various times in charge of a murder prosecution. Prior to the trial it became known to B. that there were witnesses capable of providing the accused with an alibi defence. B. failed to inform defence counsel as to their existence. After the declaration of a mistrial C. took over the prosecution without knowing that the defence did not know

about these witnesses. C. thought that B. had disclosed the statements of the witnesses to counsel for the defence. When the defence counsel became aware of the possibility that the Crown was suppressing favourable evidence, he made an unsuccessful motion for adjournment to investigate the conduct of the Crown. He then made a second motion that the court direct the Crown to deliver the statements of all the alibi witnesses to him and that the Crown call them for cross-examination. Referring to s. 10 of the Canada Evidence Act, C. handed over the available statements of the alibi witnesses to the judge, who directed that they be delivered to the defence counsel. C. obtained the statements of additional alibi witnesses for the judge, who also ordered them to be delivered to the defence counsel. The trial judge further directed the Crown to call the alibi witnesses for cross-examination by defence counsel. Following the acquittal of the accused on the murder charge, the defence counsel lodged a complaint against B. and C. to the discipline committee of the benchers of the Law Society of British Columbia, who held that B. and C. were guilty of conduct unbecoming a member of the society and of professional misconduct. B. and C. appealed the verdicts of the committee.

Held — B.'s appeal dismissed; C.'s appeal allowed.

There is a duty on prosecuting counsel to advise the defence in a timely manner of the existence of witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. The prosecutor has a duty to see that all available legal proof is fairly presented. The committee had not erred in holding that the Crown had a duty to ensure that the defence counsel knew of the existence of the alibi witnesses and that those witnesses had made written statements to the police. The committee had not erred in finding that B., despite his limited experience at the bar, had breached his duty in not advising the defence counsel or the prosecutor that replaced him. However, the committee had erred in finding that C. had failed to fulfil his duty, as he was unaware of the ignorance of the defence about the witnesses until he was responding to defence motions in court, at which point it was proper to answer through the court.

There is no absolute duty on prosecuting counsel to give the defence statements of witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. Crown counsel must have some discretion. Here, the discipline committee had wrongly criticized C. for not immediately volunteering to turn over the statements in court to the defence. He had produced them to the court as soon as the defence had applied for them, and had not breached his duty.

There is no duty on prosecuting counsel to call witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. The prosecution has a discretion as to which witnesses it will call, and the court will not interfere with the exercise of its discretion unless it can be shown that the prosecution has been influenced by some oblique motive. Here, the committee had been satisfied that there was no such motive, and they had erred in holding that the Crown was under a duty to call the alibi witnesses. If the trial judge thought that it was unfair to the defence to leave it to the defence to call the witnesses, the proper course was for the trial judge to call the witnesses and to permit them to be cross-examined by both the Crown and the defence. The trial judge had erred in directing the Crown to call the witnesses.

There is a burden on defence counsel to gain a working knowledge of the charges and the evidence in support of them by ensuring that the defence knows

in broad outline the case to be made against the accused. Here, defence counsel had not made the kind of inquiry of the Crown which competent defence counsel should do.

Editor's note

For an argument that our courts should recognize that ss. 7 and 11(*d*) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, have enshrined a constitutional right to discovery, see David Finley, "Is There Now A Constitutional Right to Discovery?" (1984), 36 C.R. (3d) 41. However, in *R. v. Kristman*, [1984] A.W.L.D. 740, [1984] W.C.D. 197 (Q.B.), McBain J., 21st June 1984 (not yet reported), it was held that neither s. 7 nor s. 11(*d*) conferred upon an accused facing a summary conviction prosecution for driving offences the right to full pre-trial disclosure of all evidence available from the police officers involved in the investigation. Defence counsel had sought their names so that he could interview them. The Crown had provided "normal oral particulars". McBain J. held that he ought not to offer an opinion on whether the criminal law system should be changed to provide fuller discovery.

Publication of this judgment was delayed at the request of the court.

Cases considered

Adel Muhummed El Dabbah v. A.G. (Palestine), [1944] A.C. 156, [1944] 2 All E.R. 139 (P.C.) — referred to.

Boucher v. R., [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263 — considered.

Caccamo v. R., [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, 4 N.R. 133 — considered.

Lemay v. R., [1952] 1 S.C.R. 232, 14 C.R. 89, 102 C.C.C. 1 — considered.

R. v. Seneviratne, [1936] 3 W.W.R. 360, [1936] 3 All E.R. 36 (P.C.) — referred to.

Statutes considered

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 10.

Authorities considered

Canadian Bar Association, Code of Professional Conduct, p. 29.

[Note up with 4 Can. Abr. (2d) *Barristers and Solicitors*, IX, 2; R11A Can. Abr. (2d) *Criminal Law (Revised)*, IV, 46, a, i; 15 Can. Abr. (2d) *Evidence*, XV, 3.]

APPEALS from decision of discipline committee of British Columbia Law Society finding lawyers guilty of conduct unbecoming and professional misconduct.

J.D. McAlpine, Q.C., and *C.J. Ross*, for appellant Cunliffe.

L.T. Doust and *W.B. Smart*, for appellant Bledsoe.

E.D. Crossin, for respondent.

(Vancouver Nos. CA000829, CA000886)

7th March 1984. The judgment of the court was delivered by

HINKSON J.A.:— The two appeals in this matter were heard together. They involve appeals from verdicts of the discipline committee of the benchers of the Law Society of British Columbia.

Each of the appellants was found to be guilty of conduct unbecoming a member of the Law Society of British Columbia and of professional misconduct.

The citations issued in respect of each of the appellants were as follows:

"B. THAT Richard Carrol Bledsoe between on or about May 11, 1977 and on or about January 23rd, 1978 knew or ought to have known of the existence of all or some witnesses; namely, Shelley Henderson, Earl Wilkinson, Nancy Connelly, Peter Connelly, Joseph Richard, Thomas Arthur Pimlott, Tanya Henn, Trudy Froystad, Larry Welsh, Nora Welsh, May Winnig, Ann Hogue and Margaret Ritchie; which witnesses made certain statements to the police or Crown Counsel as specified, that the said Drake was or may have been seen alive on March 25th, 1976, all or some of which were not disclosed to Mr. Taylor and/or Mr. Ritchie and/or Mr. Libby.

"C. THAT Donald Moore Cunliffe, Q.C., and Christopher Gordon Green between on or about September 23, 1977 and on or about May 2nd, 1978 knew or ought to have known of the existence of all or some witnesses; namely, Shelley Henderson, Earl Wilkinson, Nancy Connelly, Peter Connelly, Joseph Richard, Thomas Arthur Pimlott, Tanya Henn, Trudy Froystad, Larry Welsh, Nora Welsh, May Winnig, Ann Hogue, and Margaret Ritchie; which witnesses made certain statements to the police or Crown Counsel as specified, that the said Drake was or may have been alive on March 25, 1976, all or some of which were not disclosed to Mr. Taylor and/or Mr. Ritchie and/or Mr. Libby.

"THAT Donald Moore Cunliffe, Q.C., at a time or times during the so-called 'third trial' of the herein matter failed in his duty as Crown Counsel by taking the position at trial that the Crown need not and will not call the above witnesses as Crown witnesses, such failure of duty, in the circumstances of this particular case, amounting to conduct unbecoming a member of the Law Society."

These citations arose out of the prosecution of a charge of murder following the death of one Owen Roy Drake on either Wednesday, 24th March 1976, or Thursday, 25th March 1976, at the city of Campbell River.

In order to appreciate the circumstances which gave rise to the citations it is necessary to understand the history of the events

with respect to the charges that flowed from the death of Drake.

On 28th March 1976 Alfred Lee McLemore was charged with the non-capital murder of Drake. The date of the offence on the information charging McLemore was Thursday, 25th March 1976.

At the outset of the police investigation into the death of Drake numerous statements were taken from various persons and several of them stated that the deceased was alive on Thursday, 25th March 1976. Initially, therefore, the police concluded that 25th March 1976 was the correct date to place on the information.

From the outset of their investigation the police were aware of an individual named James Harvey Ouelette. The police knew that Ouelette had been taken into custody as a result of certain unlawful actions which occurred on the evening of Wednesday, 24th March 1976. Therefore, if Drake was alive on 25th March 1976 Ouelette could not have caused the death.

The charge against McLemore was brought before the Provincial Court for a preliminary hearing at Campbell River on 16th August 1976. Mr. Sinnott appeared for the Crown and Mr. Young represented the accused. At the conclusion of the fifth day, the hearing was adjourned to December 1976 for continuation.

In the meantime the Crown reconsidered its position and laid a new information charging both Ouelette and McLemore with the murder of Drake. The date of the offence on the second information was Wednesday, 24th March 1976.

A second preliminary hearing was then conducted. It commenced on 14th March 1977. Mr. Sinnott appeared for the Crown, Mr. Brindle appeared for McLemore and Mr. Taylor appeared for Ouelette. At the conclusion of this preliminary hearing both accused were committed for trial before a Supreme Court of British Columbia judge and jury.

After the conclusion of the second preliminary hearing Mr. Sinnott passed the case for the Crown to the appellant Bledsoe. At that time Mr. Bledsoe was a member of the regional Crown counsel office for the province of British Columbia at Nanaimo. In May 1977 Mr. Sinnott sent his file of material to Mr. Bledsoe. A trial date was set for the hearing of the McLemore-Ouelette case for the Supreme Court assize to be held at Nanaimo in September 1977.

After Mr. Bledsoe took over the conduct of the case for the

Crown he decided that the charge against McLemore should be dropped and a charge of being an accessory after the fact should be preferred against him on the understanding that McLemore would appear as a witness for the Crown against Ouelette.

During July 1977 Mr. Taylor, representing Ouelette, had discussions with Mr. Bledsoe with respect to the possibility of the Crown accepting a plea of guilty to manslaughter. Ultimately Mr. Taylor was discharged by Ouelette because he was not prepared to make such a plea. On 17th August 1977 Mr. Taylor informed the court registry at Nanaimo that he was no longer acting for Ouelette.

When Mr. Bledsoe initially assumed the responsibility for the conduct of the prosecution it was not his intention to appear as counsel at trial. He had anticipated obtaining guilty pleas from Ouelette and McLemore. Mr. Bledsoe had arranged a holiday from 20th August to 5th September. Before leaving on his holiday he spoke to Mr. Sinnott's secretary and was under the impression that Mr. Sinnott would be able to prosecute the case at the Nanaimo assize which was scheduled to begin on 19th September 1977. On 15th August 1977 Mr. Bledsoe had his staff issue subpoenas to all witnesses called at the second preliminary hearing as a precaution because he had not then received a definite answer from Mr. Taylor.

Throughout the course of these proceedings the witnesses who gave statements to the effect that Drake was seen alive on Thursday, 25th March 1976, have been referred to as the "Thursday witnesses". Four of these witnesses testified at the first preliminary hearing. The Crown also had statements from other Thursday witnesses but they were not called at the first preliminary hearing. In August 1977 Mr. Bledsoe believed that both Mr. Brindle and Mr. Taylor were aware of all Thursday witnesses.

When Mr. Bledsoe returned to his office on 6th September 1977 he became aware for the first time that Mr. Sinnott would not be able to conduct the trial. He decided that he would prosecute the case himself.

Early in September Mr. Peter Ritchie had been retained to defend Ouelette. Mr. Taylor bundled up his material and mailed it to Mr. Ritchie's office in Vancouver. Mr. Taylor did not have a transcript from the first preliminary hearing. He sent Mr. Ritchie a copy of the transcript from the second preliminary hearing. The Crown had not called any of the Thursday witnesses at the second

preliminary hearing. Between 9th September and 12th September Mr. Bledsoe became aware that Mr. Ritchie was now acting for Ouelette. He received a note in his office which read:

"Dick, Jim Taylor advises Peter Ritchie is defending Ouelette. He has sent him transcripts and particulars."

Prior to the commencement of the trial on 19th September 1977 Mr. Bledsoe was not aware that Mr. Ritchie did not know of the Thursday witnesses. He thought that Mr. Ritchie would be aware of these witnesses from his discussions with Mr. Taylor but that was not the fact.

The evidence before the discipline committee showed that Mr. Ritchie had only a perfunctory discussion by telephone with Mr. Taylor after assuming the defence of Ouelette. In his discussion with Mr. Bledsoe before the commencement of the trial, again he sought no information from Mr. Bledsoe about the witnesses to be called by the Crown nor any information about what the witnesses might say. Indeed, before the discipline committee Mr. Ritchie conceded that before the commencement of the trial Mr. Bledsoe was entitled to assume that Mr. Ritchie was knowledgeable about the case for the defence.

During the trial which commenced on 19th September 1977 Mr. Ritchie's associate, Mr. Libby, discovered a transcript of the first preliminary hearing on the counsel table. As a result of perusing it defence counsel learned for the first time of the existence of witnesses who would say that Drake was alive on Thursday, 25th March 1976. At Mr. Ritchie's request two of those witnesses, Mrs. Ritchie and Trudy Froystad, were subpoenaed by the Crown on 22nd September. At that point in the trial, however, Mr. Bledsoe realized that Mr. Ritchie did not know that there were other Thursday witnesses in addition to the four that had testified at the first preliminary hearing.

Mr. Bledsoe did not immediately inform Mr. Ritchie of this fact. He was concerned about the problem but he decided to wait until the weekend to consult senior counsel as to what he should do in these circumstances. On Friday, 23rd September 1977, the presiding trial judge declared a mistrial.

Thereafter Mr. Bledsoe did not inform Mr. Ritchie of the existence of the additional Thursday witnesses. He decided to retain ad hoc Crown counsel to prosecute the next trial of the charges against Ouelette and refrained from disclosing the fact

that there were additional Thursday witnesses to Mr. Ritchie. Instead he decided to leave the decision to the next prosecutor.

In late November 1977 the appellant Cunliffe was retained by Mr. Bledsoe to act as Crown counsel at the second Ouelette trial, which was set for 23rd January 1978. On 16th December 1977 Mr. Bledsoe met with Mr. Cunliffe to discuss the cases which the appellant Cunliffe was to conduct at the January assize. At the meeting Mr. Cunliffe received only portions of the files and not all of the statements in the Ouelette case. Mr. Bledsoe brought the existence of the Thursday witnesses to Mr. Cunliffe's attention at that time.

Before the discipline committee it was the evidence of Mr. Cunliffe that at no time did Mr. Bledsoe bring to his attention the fact that counsel for Ouelette was unaware of the existence of the Thursday witnesses. Mr. Cunliffe testified that Mr. Bledsoe indicated to him that the Wednesday-Thursday defence was the obvious defence and that Mr. Ritchie was well aware of this. Mr. Cunliffe stated that he was left with the impression, as a result of his discussions with Mr. Bledsoe, that Mr. Ritchie was aware of the existence of the witnesses who could testify as to seeing Drake alive on Thursday, 25th March. On the other hand the discipline committee found that Mr. Bledsoe was uncertain as to whether or not he conveyed to Mr. Cunliffe the fact that the defence lawyers were unaware of the Thursday witnesses. The discipline committee preferred the evidence of Mr. Cunliffe on this point to that of Mr. Bledsoe.

The second trial commenced on 23rd January 1978. After four days of trial a mistrial was declared and the case was put over to 10th April 1978.

The third trial commenced on 10th April 1978. On the evening of 17th April 1978 Mr. Ritchie and Mr. Libby had occasion to be in the exhibit vault at the courthouse in Nanaimo and discovered by chance that there was an occurrence report written by a witness, Mr. Flebbe. Mr. Flebbe was the ambulance driver who was at the scene of the crime. He stated in his report that at the scene of the murder he had spoken to a person named Mrs. Ann Hogue, who indicated that the deceased was alive on Thursday. Mr. Ritchie immediately communicated with Mr. Bledsoe to obtain a copy of the Flebbe report as the registry officials in Nanaimo had declined to permit him to copy it. Mr. Bledsoe in turn communicated with Mr. Cunliffe, who agreed that Mr. Ritchie should

receive a copy of that report, and he did so.

Although Mr. Ritchie had become aware of four of the Thursday witnesses at the first trial in September 1977, he had never inquired of Crown counsel whether there were any other Thursday witnesses. After learning of the existence of Mrs. Hogue on 17th April 1978 Mr. Ritchie did not choose to make any inquiries of Mr. Bledsoe or Mr. Cunliffe with respect to the existence of any other Thursday witnesses.

Mr. Ritchie's suspicions had been aroused. He concluded that the Crown was deliberately suppressing evidence favourable to the defence. On 17th April 1978 the Crown had called one of the Thursday witnesses, Mrs. May Winnig. She was asked by Crown counsel to relate what she knew about the incident involving the death of Drake. In direct examination she recounted that she had seen two men jumping her fence from the deceased's yard. She was never asked by Crown counsel on what date this event occurred. With respect to the identification of either of the two persons she saw jumping the fence, she stated that "Ouelette looked like one of them".

Mr. Ritchie's first question in cross-examination to Mrs. Winnig was as to the day on which the events she described had taken place. She responded that it was "Thursday afternoon". On further cross-examination Mr. Ritchie elicited from her that she was asked to identify the men she had seen climbing the fence at a police line-up shortly after the murder and that she picked out someone who was neither Ouelette nor McLemore. McLemore, however, was one of the men in the line-up.

Prior to calling Mrs. Winnig Mr. Cunliffe did not make Mr. Ritchie aware of the fact of Mrs. Winnig's incorrect identification. Mr. Cunliffe was aware of the fact that Mrs. Winnig did appear at the line-up shortly after the murder and did identify a third person. The discipline committee concluded that Mr. Ritchie was not aware of this useful identification evidence from the defence perspective until his cross-examination of Mrs. Winnig. As I have indicated Mr. Ritchie did not seek any assistance from Crown counsel with respect to what witnesses might be available, nor seek any statements of such witnesses during the course of these proceedings. Something of the atmosphere in which the third trial proceeded may be gathered from the finding of the discipline committee. Its report said:

"It is clear that even before the discovery of the Flebbe report Mr. Cunliffe and Mr. Ritchie had not been exchanging the usual courtesies towards one another that one expects of members of the Bar."

Despite the developments on 17th April 1978 Mr. Ritchie refrained from discussing the matter with Mr. Cunliffe. He chose rather to make allegations in court on 18th April 1978 because, he testified, it was in the best interests of his client to do so. He appeared before the trial judge on 18th April and made a motion to adjourn the trial for a lengthy period in order that the Department of the Attorney General could investigate the conduct of the Crown up to that point in these lengthy proceedings. In the course of that motion, Mr. Ritchie brought to the attention of the trial judge his discovery of the existence of Mrs. Hogue. The trial judge dismissed the motion to adjourn the trial. Then Mr. Ritchie made a second motion seeking to have the Crown deliver to him the statements of all Thursday witnesses and a direction that the Crown call the Thursday witnesses for cross-examination by defence counsel. In response to that motion Mr. Cunliffe made reference to s. 10 of the Canada Evidence Act, R.S.C. 1970, c. E-10, and handed to the trial judge the statements of the Thursday witnesses then in his possession. After perusing these statements the trial judge directed that he deliver them to Mr. Ritchie. Mr. Cunliffe undertook to immediately obtain the statements of additional Thursday witnesses not in his possession and produce them to the trial judge. He did so over the course of the next day and after perusing them the trial judge directed that they also be delivered to Mr. Ritchie. Further, the trial judge directed that the Crown call the Thursday witnesses for cross-examination by defence counsel.

The trial proceeded and on 2nd May 1978 the jury acquitted Ouelette.

On 8th May 1978 Mr. Ritchie wrote to the law society lodging a complaint against the five prosecutors who had been involved in the Ouelette matter. Before the discipline committee Mr. Ritchie testified that, at the time of lodging his complaint and, indeed, at the time he testified before the discipline committee, he believed that the prosecutors had deliberately suppressed the evidence with respect to the existence of the Thursday witnesses.

The discipline committee stated that the following issues arose to be determined:

"1. Is there a duty on prosecuting counsel to advise the defence in a timely manner of the existence of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?

"2. Is there a duty on prosecuting counsel to give to the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?

"3. Is there a duty on prosecuting counsel to call witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence?"

In determining the first issue the discipline committee made reference to a number of authorities. It cited with approval the decision in *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1 at 8, 110 C.C.C. 263, where Rand J. stated:

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."

Among other references the discipline committee cited the Canadian Bar Association's Code of Professional Conduct, at p. 29, as follows:

"When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately . . . [H]e should make timely disclosure to the accused or his counsel (or to the court if the accused is not represented) of all the relevant facts and witnesses known to him, whether tending towards guilt or innocence."

The discipline committee concluded in respect of the first issue:

"For the purposes of a defence in such a serious charge as

this, and where the evidence of the 'Thursday' witnesses is so crucial, Crown counsel had a duty in our opinion to ensure that defence counsel knew of the existence of those witnesses and that the witnesses had made statements in writing shortly after the crime to members of the R.C.M.P."

The discipline committee concluded that both Mr. Bledsoe and Mr. Cunliffe failed to fulfil their duty in not disclosing the Thursday witnesses to the defence. The basis for that conclusion was the finding of the discipline committee that:

". . . Mr. Bledsoe knew of the existence of the 'Thursday witnesses' but did not ensure that counsel for the defence knew of them. In addition Mr. Bledsoe did not inform Mr. Cunliffe that counsel for the defence was unaware of the 'Thursday witnesses' Mr. Cunliffe knew of the [sic] them but did not ensure that counsel for the defence knew of them, did not make their statements available to counsel for the defence, and did not call them as witnesses until so ordered by the court."

Upon the basis of the findings of fact made by the discipline committee it is clear that Mr. Bledsoe failed in his duty to advise Mr. Ritchie in a timely manner of the existence of additional Thursday witnesses once he learned of Mr. Ritchie's ignorance of such witnesses. Mr. Bledsoe was clearly in breach of his duty because he never informed Mr. Ritchie that such witnesses existed. Upon becoming aware that Mr. Ritchie was ignorant that such witnesses existed, Mr. Bledsoe's first decision was to postpone performing his duty until the weekend, when he could consult senior counsel. When the mistrial occurred he then decided to leave it to the prosecutor who would take the second trial to inform Mr. Ritchie. By the time he instructed Mr. Cunliffe on 16th December 1977 he was clearly in breach of his duty but he could have remedied that breach by informing Mr. Cunliffe that Mr. Ritchie was unaware of the existence of the additional Thursday witnesses. Mr. Bledsoe failed to do so therefore he never performed his duty as Crown counsel.

Counsel for Mr. Bledsoe sought to contend that in view of his limited experience at the bar and the very complicated nature of the case it was understandable that Mr. Bledsoe deferred a decision to reveal the existence of the Thursday witnesses to Mr. Ritchie. Then it was contended that having decided to do so it was a mere oversight on Bledsoe's part that he did not bring home to Cunliffe the fact that Ritchie was unaware of the additional Thurs-

day witnesses. In this way counsel for Mr. Bledsoe sought to diminish the magnitude of his breach of duty to be fair. Based on that approach it was contended that the discipline committee had erred in reaching its verdict that Mr. Bledsoe was guilty of conduct unbecoming a member of the Law Society of British Columbia and of professional misconduct.

The discipline committee fully canvassed the authorities dealing with the type of conduct that would result in a finding of guilty of conduct unbecoming a member of the law society and of professional misconduct. Counsel for Mr. Bledsoe did not challenge the authorities relied upon by the discipline committee but rather sought to contend that the breach of duty in this case was not serious enough to attract the findings made by the discipline committee.

I am not persuaded that the discipline committee erred in treating Mr. Bledsoe's breach of duty in that way. It is extremely important to the proper administration of justice that Crown counsel be aware of and fulfil their duty to be fair. Therefore I would dismiss the appeal of Mr. Bledsoe.

In my opinion entirely different considerations apply to the appellant Cunliffe. Until the morning of 18th April 1978 he was not aware that Mr. Ritchie was ignorant of the existence of additional Thursday witnesses. The discipline committee held that "Mr. Cunliffe knew of them but did not ensure that counsel for the defence knew of them". In my opinion there was no duty on Mr. Cunliffe prior to 18th April 1978 to ensure that counsel for the defence knew of the additional Thursday witnesses. He had been left by Mr. Bledsoe with the impression that Mr. Ritchie was aware of them and Mr. Ritchie had not made any inquiries of Mr. Cunliffe as to whether there were any additional Thursday witnesses which might have alerted Mr. Cunliffe to the fact that he was ignorant of their existence.

When Mr. Cunliffe realized that Mr. Ritchie was unaware of the additional Thursday witnesses he was in the courtroom responding to motions being made by Mr. Ritchie to the presiding trial judge. It was Mr. Ritchie who chose to proceed with the matter in that fashion. In my opinion Mr. Cunliffe is not open to criticism for not, at that stage in the trial, immediately delivering a list of the additional Thursday witnesses to Mr. Ritchie but rather proceeding to answer the submissions being made by him. If defence counsel request a list of Crown witnesses and it is not forthcoming

the remedy is to apply to the court for a direction that it be provided. Mr. Ritchie never made such a request to Mr. Cunliffe. He chose to apply to the court. In those circumstances it was proper for Mr. Cunliffe to respond to the application and comply with the direction of the presiding trial judge.

In those circumstances I conclude that the discipline committee erred in finding that Mr. Cunliffe failed to fulfil his duty in not disclosing the Thursday witnesses to the defence.

The second issue dealt with by the discipline committee was whether there is a duty on prosecuting counsel to give to the defence statements of witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence. On this issue the discipline committee found, quite properly:

"A review of all the authorities indicates that no hard and fast obligation exists. Crown counsel must have some discretion in that regard. Such an absolute duty does not appear to exist within the scope of the decided cases".

I respectfully agree with that statement of the law. However, the discipline committee went on to criticize Mr. Cunliffe for the position he adopted in response to Mr. Ritchie's motions on 18th April 1978 because they perceived in his submissions a determination to keep the statements from the defence. They were critical of Mr. Cunliffe having purported to adopt the procedure based on s. 10 of the Canada Evidence Act.

In my opinion the course followed by Mr. Cunliffe on this occasion is above reproach. Rather than asking Mr. Cunliffe for the statements Mr. Ritchie applied to the presiding trial judge for an order that Mr. Cunliffe produce the statements to him. In view of Mr. Ritchie's position Mr. Cunliffe made reference to s. 10 of the Canada Evidence Act and immediately produced the statements then in his possession to the presiding trial judge. After perusing them the presiding trial judge directed Mr. Cunliffe to deliver them to Mr. Ritchie, which he immediately did.

In those circumstances it is difficult to appreciate the reasoning of the discipline committee which led to its conclusion on the second issue. Counsel for the law society threw some light on the matter by contending that it was apparent from the record of proceedings on 18th April 1978 that Mr. Cunliffe was "stonewalling" the defence with respect to the production of the statements in question. It is by reason of the fact that Mr. Cunliffe did not, in

Then the discipline committee turned to a consideration of the cases which refer to "an oblique motive" and particular reference was made to the decision of the Supreme Court of Canada in *Caccamo v. R.*, [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, 4 N.R. 133, and to the judgment of de Grandpré J., at pp. 275-76, where he said:

"The basic rule is that expressed in *Lemay v. R.* [supra] where it was held (S.C.R. headnote):

" '. . . that counsel acting for the prosecution has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor has been influenced by some oblique motive (of which there is here no suggestion). This is not to be regarded as lessening the duty of the prosecutor to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. The appeal should be dismissed since there was no obligation on the Crown to call either Powell or Lowes at the trial.'

"It is within the framework of the adversary system under which our criminal law is administered, that the accused must be guaranteed a fair trial."

After correctly instructing themselves on the law the discipline committee then went on to make a significant finding as follows: "There is no evidence to indicate 'an oblique motive' in these proceedings."

The effect of that finding was to reject the belief of Mr. Ritchie that any of the Crown counsel had deliberately suppressed evidence of the existence of the additional Thursday witnesses. Then the discipline committee went on to consider, in particular, the duty of Mr. Cunliffe to call witnesses whose evidence would be adverse to the prosecution and supportive of the defence. It said:

"It is apparent that the Crown must have a right to manage its own case and call the evidence of witnesses it deems to be relevant. However, underlying all of the Crown's discretion is the duty of the Crown to be fair.

"In this particular case, because of its serious nature and the direct conflict of the alibi evidence, and in exercise of the duty to be fair, the Crown should have exercised its discretion and called the 'Thursday' witnesses. Failing to call them could easily have

response to Mr. Ritchie's application, voluntarily turn over the statements to him immediately that the discipline committee concluded that his conduct evinced a determination to keep the statements from the defence.

In my opinion the record of the proceedings on 18th April 1978 does not support that conclusion. On that day Mr. Cunliffe was met with the motions made by Mr. Ritchie. He dealt with them as best he could and in doing so made reference to s. 10 of the Canada Evidence Act. I find no fault whatsoever in the course followed by Mr. Cunliffe on that occasion. Mr. Ritchie was seeking the assistance of the court to obtain the names of the additional Thursday witnesses and copies of their statements and Mr. Cunliffe was meeting the application by immediately producing the statements to the trial judge and making submissions with respect to the production of the statements. As Mr. Ritchie was seeking the assistance of the court it was proper for Mr. Cunliffe to deal with the matter upon the basis upon which he did. The criticism of the discipline committee on this aspect of the matter is unfounded.

The third issue dealt with by the discipline committee was whether there was a duty on prosecuting counsel to call witnesses whose evidence he deems to be adverse to the prosecution or supportive of the defence. The discipline committee made reference to a number of authorities, including: *Lemay v. R.*, [1952] 1 S.C.R. 232, 14 C.R. 89, 102 C.C.C. 1; *R. v. Seneviratne*, [1936] 3 W.W.R. 360, [1936] 3 All E.R. 36 (P.C.); and *Adel Muhummed El Dabbah v. A.G. (Palestine)*, [1944] A.C. 156, [1944] 2 All E.R. 139 (P.C.).

Those decisions make it plain that the prosecution has a discretion as to what witnesses it will call to support its case. Thus in *Lemay* Rand J. said at p. 9:

"I think it is clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal in the earlier proceeding held. Material witnesses in this context are those who can testify to material facts, but obviously that is not identical with being 'essential to the unfolding of the narrative'. The duty of the prosecutor to see that no unfairness is done the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed."

meant that the narrative could have unfolded inaccurately and with potentially serious consequences.

"In addition, in a case such as this where the theory of the Crown is solely directed toward a crime which, if the accused is to be found guilty, could not have been committed on a Thursday and the Crown at the same time has in its possession statements in writing from witnesses whose evidence would tend toward the commission of the offence on the Thursday, the Crown is duty-bound in our view to *ensure* that the defence has in hand at the earliest possible date copies of these statements."

Upon the basis of that reasoning the discipline committee reached a conclusion with respect to the appellant Cunliffe as follows:

"It is our further conclusion that Mr. Cunliffe breached his duty as prosecutor in the circumstances of this case by not advising the defence in a timely manner of the existence of the Thursday witnesses and providing a summary of their evidence, in not providing defence counsel with copies of the statements and then by not voluntarily calling the 'Thursday' witnesses."

In the present case Mr. Ritchie applied to the trial judge to compel the Crown to produce the statements and to call the additional Thursday witnesses in order that they could be cross-examined by the defence. I have already discussed the duty of Crown counsel to give to the defence statements of witnesses whose evidence he considers to be adverse to the prosecution or supportive of the defence. This issue deals with the obligation of the Crown to call witnesses favourable to the defence in order that defence counsel may cross-examine them.

At trial Mr. Cunliffe intended to call some of the Thursday witnesses. He did not intend to call others on behalf of the Crown because he considered them to be ambivalent, that is, he was not certain whether they would say they had last seen the deceased alive on 24th March or on 25th March 1976.

In my opinion in those circumstances there was no duty on the Crown to call those witnesses. Mr. Cunliffe had exercised his discretion and decided not to call them. In those circumstances it was not appropriate for the trial judge to direct the Crown to call those witnesses. The proper course for the trial judge in those circumstances, if he felt that it was unfair to the defence to leave it to the defence to call those witnesses, was for the trial judge to call

the witnesses and permit them to be cross-examined by both th Crown and the defence. Thus, in my opinion, the trial judge erre in directing the Crown to call such witnesses.

It will be apparent therefore that I do not share the views o the discipline committee as to the duty of Mr. Cunliffe to call th Thursday witnesses referred to by the discipline committee. He i not open to any criticism for not "voluntarily" calling such witnesses

Before the discipline committee Mr. Ritchie stated that th course he adopted on 18th April 1978 was designed to achieve a advantage for the defence. Clearly he was successful in tha endeavour. In my opinion the motive of Mr. Ritchie in adoptin that course should have had some bearing on the views of th discipline committee. Apparently it did not. As a result Mr Cunliffe has faced charges which in my opinion were unfounded and criticism by the discipline committee which was unwarranted.

By its decision the discipline committee has sought to impose obligations upon Crown counsel which the law does not counte- nance and has failed to deal with the burden upon defence counse to gain a working knowledge of the charges and the evidence in support of them by ensuring that the defence knows in broad outline the case to be made against the accused. The record in this matter discloses that Mr. Ritchie simply stumbled from one event to the next without ever making the kind of inquiry of the Crown which a competent defence counsel should do. In those circum- stances his charges against Mr. Cunliffe are to be regretted.

I would dismiss the appeal of Mr. Bledsoe and allow the appeal of Mr. Cunliffe.

Judgment accordingly.

The provisions of subsec. (2) are mandatory and require that the person arrested be personally brought before the justice for the identity hearing. On the hearing the onus is on the Crown. In calculating the six-day period in para. (*b*) neither the remand date nor the release date should be excluded. The remand order under para. (*b*) should provide for the accused's release unless a warrant is executed within that six-day period: *Re MARSHALL and THE QUEEN* (1984), 13 C.C.C. (3d) 73 (Ont. H.C.J.).

Information, Summons and Warrant

IN WHAT CASES JUSTICE MAY RECEIVE INFORMATION.

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside, within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice. **R.S.C. 1970, c. 2 (2nd Supp.), s. 5.**

This provision is *intra vires* Parliament and provincial provisions such as those contained in the Youth Protection Act, 1977 (Que.), c. 20, which attempt to prevent anyone from laying an information unless the person has consent of a government official are inoperative: *A.-G. QUE. et al. v. LECHASSEUR et al.* (1981), 63 C.C.C. (2d) 301, 128 D.L.R. (3d) 739 (S.C.C.) (9:0).

In *R. v. SOUTHWICK, Ex p. GILBERT STEEL LTD.*, [1968] 1 C.C.C.356, 2 C.R.N.S.46 (Ont. C.A.) it was held that on the swearing of the written complaint the information is "laid" and becomes the commencement of criminal proceedings.

It does not affect the validity of either information to have two separate informations charging the same offence outstanding at the same time: *R. v. POLICHA, Ex p. HRISCHUK*, [1970] 5 C.C.C.165, 11 C.R.N.S.99 *sub nom. HRISCHUK v. CLARK AND POLICHA.* (Sask. Q.B.).

In *ZASTAWNY v. THE QUEEN* (1970), 10 C.R.N.S.155, 72 W.W.R. 537 (Sask. Q.B.) an information that failed to state on its face the site of the offence was quashed as not disclosing an offence within the territorial jurisdiction of the Magistrate.

An information which omits the date it was sworn in the jurat is a nullity: *PLATT v. THE QUEEN; R. v. COWAN*, [1981] 4 W.W.R. 601, 9 Man. R. (2d) 75 (Q.B.).

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(a) an indictable offence mentioned in section 483,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,

(c) an offence punishable on summary conviction, or

(d) any other offence that is punishable by imprisonment for five years or less,

authorize the release of the accused pursuant to section 453.1 by making an endorsement on the warrant in Form 25.1. 1985, c. 19, s. 79(3).

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 453.1, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 133(5), to have been confirmed by a justice under section 455.4. R.S.C. 1970, c. 2 (2nd Supp.), s. 5; 1972, c. 13, s. 35(2).

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing. 1985, c. 19, s. 79(4).

The issuance of a summons by a justice of the peace other than the Justice before whom the complaint was sworn is legal: *R. v. SOUTHWICK, ex p. GILBERT STEEL LTD.*, [1968] 1 C.C.C.356, 2 C.R.N.S. 46 (Ont.C.A.).

In determining whether to issue a summons or a warrant a Magistrate exercises his discretion and accordingly *mandamus* cannot lie against him: *R. v. COUGHLAN, ex p. EVANS*, [1970] 3 C.C.C.61, 8 C.R.N.S. 201 (Alta. S.C.). In any event the supervisory court may only order the inferior court to hear the matter again: *R. v. JONES, ex p. COHEN*, [1970] 2 C.C.C.374 (B.C.S.C.).

A justice has jurisdiction to withdraw and annul his warrant where he issued it under a misconception of the facts: *Re ECKERSLEY and THE QUEEN* (1972), 7 C.C.C. (2d) 314 (Que.Mun.Ct.).

The justice's failure to hold an inquiry as required by this section prior to issuing the summons does not affect the jurisdiction of the magistrate: *R. v. POTTLE* (1979), 49 C.C.C. (2d) 113 (Nfld. C.A.); *R. v. BACHMAN*, [1979] 6 W.W.R. 468 (B.C.C.A.). It would seem that the law in Ontario is to the contrary: *R. v. GOUGEON; R. v. HAESLER; R. v. GRAY* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C. refused 35 N.R. 83*n*.

If the Justice's refusal to issue process was based on extraneous considerations, or if his discretion was not exercised judicially following a proper hearing, *mandamus* will lie: *RE BLYTHE AND THE QUEEN* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.); *Re SWAN and TAVRYDAS and THE QUEEN, ex p. SYME* (1979), 48 C.C.C. (2d) 501 (Ont. H.C.J.).

A Justice acts judicially in determining whether or not he will issue a process requiring attendance in Court. A refusal does not invalidate an information; the informant is entitled to re-apply before the same or another Justice for process to be issued: *R. v. ALLEN* (1974), 20 C.C.C. (2d) 447 (Ont.C.A.).

Although the justice presiding at a preliminary hearing has no power to order production of any statements given before a justice under this section,

as a matter of fairness such statements should be made available to the accused notwithstanding the proceedings under this section are conducted *ex parte* and *in camera*. If the defence has these statements he may cross-examine the witness on them in the same manner as any other prior statement: *Re COHEN and THE QUEEN* (1976), 32 C.C.C. (2d) 446, 34 C.R.N.S. 362 *sub nom. A.-G. QUE. v. COHEN* (Que.C.A.). An appeal by the Crown to the S.C.C. was allowed 46 C.C.C. (2d) 473, 13 C.R. (3d) 36, the Court holding that the decision of the justice refusing such cross-examination was not reviewable on *certiorari*. In the result the Court did not consider the correctness of the justice's ruling.

Although the information may not comply with the requirements as to sufficiency in s. 510(3) such a defect does not render the information null and void *ab initio* and incapable of founding jurisdiction to compel the appearance of the accused before the Court to answer the allegation that he committed an indictable offence: *Re BAHINIPATY and THE QUEEN* (1983), 5 C.C.C. (3d) 439, 23 Sask. R. 36 (C.A.).

To be valid, an information cannot be laid against an unknown person but must be sworn against a named person or against a person who can be sufficiently described so as to be identifiable. As a pre-condition to the exercise of the power to hear and consider the evidence of witnesses under this section, the information must comply with ss. 455 and 510 and the name or sufficient description of the accused is an essential part of an information. The justice of the peace has no power to embark on an inquiry on an information which does not conform with the provisions of s. 510 in order to obtain sufficient information to take a proper information: *Re BUCHBINDER and THE QUEEN* (1985), 20 C.C.C. (3d) 481, 47 C.R. (3d) 135 (Ont. C.A.).

Where there has been non-compliance with the mandatory provisions of s. 455.1, it is open to the Crown to proceed by way of an information laid under s. 455 and the justice may issue either a summons or a warrant under this section in order to compel the accused's attendance unless it can be said that the subsequent proceedings constitute an abuse of process: *Re RILEY and THE QUEEN* (1981), 60 C.C.C. (2d) 193 (Ont. C.A.).

Where the provisions of s. 455.1 have not been complied with, the information having been sworn after the return date in the appearance notice, a warrant or summons may issue under this section. There is no necessity to cancel the appearance notice and in fact no jurisdiction to do so: *Re TREMBLAY and THE QUEEN* (1982), 68 C.C.C. (2d) 273, 28 C.R. (3d) 262 (B.C.C.A.).

A summons may also issue under this section although the appearance notice was invalid for failure to comply with s. 453.3(4) and the information laid under s. 455.1 was neither cancelled nor confirmed by the justice: *Re THOMSON and THE QUEEN* (1984), 11 C.C.C. (3d) 435, 51 A.R. 273 (C.A.).

Until such time as the accused comes before a Judge capable of taking his election and plea, the Court has not assumed any jurisdiction in the matter and should any error be made in the method of summoning the accused to Court then it may be corrected by the issuance of a new summons or warrant. It is only when the accused has appeared in Court and made his election or plea that the Court has become seized with jurisdiction which can be lost if nothing is done on a Court date: *R. v. MacASKILL* (1981), 58 C.C.C.

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(2d) 361, 45 N.S.R. (2d) 181 (S.C. App. Div.). Similarly, *Re KENNEDY and THE QUEEN* (1983), 8 C.C.C. (3d) 322, [1983] 6 W.W.R. 673 (B.C.C.A.).

JUSTICE TO HEAR INFORMANT AND WITNESSES—Procedure when witnesses attend.

455.4 (1) A justice who receives an information laid before him under section 455.1 shall

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so;

(b) where he considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice, promise to appear or recognizance or to an included or other offence,

(i) confirm the appearance notice, promise to appear or recognizance, as the case may be, and endorse the information accordingly, or

(ii) cancel the appearance notice, promise to appear or recognizance, as the case may be, and issue, in accordance with section 455.3, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice, promise to appear or recognizance, as the case may be, has been cancelled; and

(c) where he considers that a case is not made out for the purposes of paragraph *(b)*, cancel the appearance notice, promise to appear or recognizance, as the case may be, and cause the accused to be notified forthwith of such cancellation. 1985, c. 19, s. 80.

(2) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(a) take the evidence upon oath; and

(b) cause the evidence to be taken in accordance with section 468 in so far as that section is capable of being applied. R.S.C. 1970, c. 2 (2nd Supp.), s. 5.

Subsec. (1)*(a)*. The Justice who receives an information must actually hear and listen to the informant's allegations in order to satisfy himself that a case has been made out. Failure to follow the procedure in this subsection will mean that the appearance notice has not been properly confirmed. The accused then is not bound by it and a charge of failing to appear contrary to s. 133(5) must be dismissed: *R. v. BROWN* (1975), 28 C.C.C. (2d) 398 (Ont. Prov. Ct.).

Failure to confirm the appearance notice has relevance only to any proceedings taken against the accused should he fail to attend Court as required therein. Such failure does not void the information and once the accused appears there is no necessity that the appearance notice be confirmed: *R. v. WETMORE* (1976), 32 C.C.C. (2d) 347 (N.S.S.C. App. Div.); *Re MAXIMICK and THE QUEEN* (1979), 48 C.C.C. (2d) 417, 10 C.R.

d) 97, [1979] 6 W.W.R. 731 (B.C.C.A.); *Re McGINNIS and THE QUEEN* 979), 51 C.C.C. (2d) 301, [1980] 2 W.W.R. 89, 19 A.R. 249 (C.A.). *Contra: v. HARRIS* (1978), 39 C.C.C. (2d) 256 (Ont. Prov. Ct.) and *semble, R. v. OUGEON; R. v. HAESLER; R. v. GRAY* (1980), 55 C.C.C. (2d) 218 (Ont. A.), at least where timely objection is made.

MMONS—Service on individual—Proof of service—Contents of summons—tendance for purposes of *Identification of Criminals Act*.

455.5 (1) A summons issued under this Part shall

(a) be directed to the accused;

(b) set out briefly the offence in respect of which the accused is charged; and

(c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law. 1985, c. 19, s. 81.

(2) A summons shall be served by a peace officer who shall deliver it rsonally to the person to whom it is directed or, if that person cannot nveniently be found, shall leave it for him at his last or usual place of ode with some inmate thereof who appears to be at least sixteen years age.

(3) Service of a summons may be proved by the oral evidence given der oath, of the peace officer who served it or by his affidavit made fore a justice or other person authorized to administer oaths or to take fidavits.

(4) A summons shall set out therein the text of subsection 133(4) and ction 455.6.

(5) A summons may, where the accused is alleged to have committed indictable offence, require the accused to appear at a time and place ted therein for the purposes of the *Identification of Criminals Act*, and person so appearing is deemed, for the purposes only of that Act, to be lawful custody charged with an indictable offence. R.S.C. 1970, c. 2 nd Supp.), s. 5.

There is no jurisdiction in a Court to proceed *ex parte* against a defendant rved with a summons outside Canada: *Re SHULMAN and THE QUEEN* 975), 23 C.C.C. (2d) 242, 58 D.L.R. (3d) 586 (B.C.C.A.).

Subsection (5) and like provisions requiring the fingerprinting of the cused have been held not to violate the Charter of Rights and Freedoms: *JAMIESON and THE QUEEN* (1982), 70 C.C.C. (2d) 430, 142 D.L.R. (3d) (Que. S.C.); *R. v. McGREGOR* (1983), 3 C.C.C. (3d) 200 (Ont. H.C.J.).

A justice has no power to issue a summons to an accused solely for the rpose of the Identification of Criminals Act and not in conjunction with ocuring his attendance at Court: *Re MICHELSEN and THE QUEEN* 983), 4 C.C.C. (3d) 371, 33 C.R. (3d) 285 (Man. Q.B.).

ILURE TO APPEAR.

455.6 Where an accused who is required by a summons to appear at a ne and place stated therein for the purposes of the *Identification of iminals Act*, does not appear at that time and place, a justice may issue warrant for the arrest of the accused for the offence with which he is arged. R.S.C. 1970, c. 2 (2nd Supp.), s. 5.