Copyright (c) 2004 Canada Law Book Inc.

REGINA v. TRUSCOTT

126 C.C.C. 109

Ontario Court of Appeal
Porter C.J.O., Gibson, Schroeder, LeBel and Morden JJ.A.

JANUARY 21, 1960

Trial II B — Evidence V A — Crown counsel mentioning in opening address that accused had given statement to police officers — Impropriety.

Since a statement made by a prisoner to the police can never become evidence until the trial Judge rules that it is admissible, Crown counsel should refrain from making any reference to the fact that a statement was obtained in his opening remarks to the jury. In the instant case, however, Crown counsel merely referred to a statement being taken, as opposed to a confession, and there being no

suggestion that such statement was inculpatory, held, that accused was not prejudiced by the improper reference.

[R. v. Walker, 16 Can. C.C. 77, 15 B.C.R. 100; R. v. Willis & Pople, 21 Can. C.C. 64, 9 D.L.R. 646, 23 Man. R. 77, 4 W.W.R. 761, distd]

APPEAL from conviction for murder. Affirmed.

J.G.J. O'Driscoll, for accused.

W.C. Bowman, Q.C., and F.L. Wilson, for the Crown.

PORTER C.J.O.

LEBEL J.A.

PORTER C.J.O.:— This is an appeal on behalf of the accused who was convicted at Goderich after trial before the Honourable Mr. Justice Ferguson, with a jury, upon an indictment charging that on or about June 9, 1959, at the Township of Tuckersmith, in the County of Huron, he did unlawfully murder Lynne

Harper.

At the time of the commission of the alleged offence the accused was 14 years of age and the deceased, Lynne Harper was 12 years of age. The main grounds of appeal advanced by counsel for the appellant were as follows: (1) The jury's verdict should be set aside and the conviction quashed because the evidence considered as a whole was as consistent with the innocence as with the guilt of the appellant; (2) The remarks made by Crown counsel in his opening to the jury were highly prejudicial to the appellant and, as a result, there had been a substantial wrong or miscarriage of justice; (3) Although in certain parts of his charge the learned trial Judge had correctly instructed the jury on the doctrine of reasonable doubt, in other important parts of the charge he failed to advise the jury that even though they did not believe the defence, it was sufficient if the evidence as a whole created a reasonable doubt.

It was also contended that the learned Judge had erred in allowing certain Crown witnesses to be sworn in that these witnesses did not appreciate the nature, quality and consequences of an oath; that the theories of the defence were not sufficiently and adequately placed before the jury; that the learned Judge had commented to the jury in a manner which amounted to a comment on the appellant's failure to testify at the trial; and that in dealing with the unsworn testimony of the children, he failed adequately and properly to define corroboration and erred in instructing the jury that certain unsworn witnesses were in fact corroborated. We

disposed of these latter grounds of contention in the course of the argument and held that they were without substance.

I now advert to the three major grounds of appeal. After having carefully considered the evidence adduced at the trial, we are unanimously of the opinion that there was ample evidence for submission to the jury and we entertain no doubt that it was open to the jury to find on the evidence that the deceased, Lynne Harper, was murdered by the appellant as charged. Specifically, counsel for the appellant contended that the evidence considered as a whole, was as consistent with the innocence of the appellant as with his guilt. The learned trial Judge accurately charged the jury with respect to circumstantial evidence in accordance with the rule in Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136. In the view which we take, it was open to the jury to conclude, as they evidently did, that the evidence, viewed as a whole, was consistent only with the guilt of the accused and inconsistent with any other rational conclusion.

The next ground of objection is founded on certain statements made by counsel for the Crown in his opening address to the jury wherein he referred to an alleged statement obtained by the police from the appellant. I refer to the following observations made by counsel for the Crown in his opening address to the jury: "Arising out of these things, that you will be told that Steven said, during these days of investigation, you will not hear of any concessions (sic) at all or anything like that, but the mason they will be put before you is that I will also call witnesses to show, or try to show falsehoods told by him during
that period ....

"I might say then that in sequence that on the Friday night -- I should say the Friday a statement was taken from the accused by Inspector Graham and the other Police, one of the other Policemen, signed that night by him ....

"HIS LORDSHIP: Mr. Hays. MR. HAYS: I don't intend to say anything about it. HIS LORDSHIP: You shouldn't have said anything about it at all. MR. HAYS: Even the fact that it was taken at all? HIS LORDSHIP: I may have to discharge this Jury and start over again. You shouldn't do that, you know. I will have to consider that. MR. HAYS: I felt, my lord,

that the reference .... HIS LORDSHIP: Never mind what you felt. Nothing about it."

Since a statement or confession made by a prisoner to the police or other persons in authority can never become evidence until the trial Judge rules that it is admissible, counsel for the Crown should refrain from making any reference to such evidence in his opening remarks to the jury. Here, however, Crown counsel did not refer to a confession but spoke only of a statement alleged to have been signed by the appellant. He did not suggest what its contents were but, on the contrary, he stated earlier that "You will not hear of any concessions (sic) at all or anything like that". The word "concessions" was obviously reported in error for the word "confessions". Thus it was not suggested by Crown counsel that the alleged statement was in any sense inculpatory; in any event, the statement was not admitted in evidence. The jury were given a clear intimation in the learned Judge's charge that they were to have regard only to the evidence submitted to them. The observation complained of was made on September 16th and the case was not given to the jury until September 30, 1959. We do not consider that the irregularity complained of caused any prejudice to the appellant or that it occasioned any substantial wrong or miscarriage of justice. The present case is clearly distinguishable on this point from such cases as R. v. Walker (1910), 16 Can. C.C. 77, 15 B.C.R. 100, and R. v. Willis & Pople (1913), 21 Can. C.C. 64, 9 D.L.R. 646, 23 Man. R. 77.

I now consider the objection that the trial Judge while in some portions of his charge, correctly instructed the jury on the doctrine of reasonable doubt, but in other portions failed to advise them that even though they did not believe the defence evidence, it was sufficient if the evidence as a whole created a reasonable doubt. We are unable to give effect to this objection. It is, of course, fundamental that the trial Judge's charge must be read as a whole, and so perused, the charge is unexceptionable upon that ground. Towards the very end of the trial the learned Judge recharged the jury in these words: "Let me repeat to you,

and it is a matter of fact for you to decide, if you think that this evidence is consistent only with the guilt of the accused and inconsistent with any other rational conclusion, you should convict. But if this evidence or any part of it, whether adduced by the Crown or by the defence, raises a doubt in your mind, a reasonable doubt in your mind, you must acquit him. The matter is entirely for you."

In the result, therefore, the appeal fails on all grounds and will be dismissed.

GIBSON and SCHROEDER JJ. A. concur with PORTER C.J.O.

LEBEL J.A.:-- I agree and have nothing to add.

MORDEN J.A. concurs with PORTER C.J.O.

Appeal dismissed.