Case Name:

R. v. Stewart

Albert Stewart, Appellant; and
Her Majesty The Queen, Respondent.

[1976] S.C.J. No. 93

[1976] A.C.S. no 93

[1977] 2 S.C.R. 748

[1977] 2 R.C.S. 748

71 D.L.R. (3d) 449

12 N.R. 201

[1976] 6 W.W.R. 644

1 A.R. 455

31 C.C.C. (2d) 497

1976 CanLII 202

Supreme Court of Canada

1976: October 20 / 1976: November 16.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence,
Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law -- Murder -- Trial by judge without a jury -- Stricter standard of proof than required applied to particular elements of evidence -- Discretion properly exercised under s. 9(2) of Canada Evidence Act, R.S.C. 1970, c. E10.

On a charge of murder, the accused elected to be tried by a judge without a jury under the provisions of s. 430 of the Criminal Code. The trial judge found the accused not guilty. The Appellate Division of the Supreme Court of Alberta allowed an appeal by the Crown and directed a new trial. An appeal by the accused was then brought to this Court.

The judgment of the Appellate Division was based on the following grounds: (1) the trial judge had failed to exercise properly his discretion under the provisions of s. 9(2) of the Canada Evidence Act, R.S.C. 1970, c. E-10; (2) the references to motive in the reasons for judgment of the trial judge do not represent the law on this subject and (3) the trial judge had, on several occasions, assigned a burden of proof to the Crown which was "far more stringent" than the burden put upon the Crown in law.

Held: (Laskin C.J. and Spence and Dickson JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ.: There was no misuse of the trial judge's discretion, under s. 9(2) of the Canada Evidence Act, in the direction he gave as to how a witness who was called by the Crown should be examined before leave would be given for Crown counsel to cross-examine him as to an inconsistent statement previously made.

The two other grounds of the judgment appealed from could be summarized by saying that the trial judge misdirected himself as to the standard of proof required. He fell into a double error, not only did he apply repeatedly a much stricter standard than that which is required, but he applied it to particular elements of the evidence taken in isolation. Instead of taking all the evidence and properly relating every fact to all the others, he dealt separately with each discarding them successively as insufficient to meet his exaggerated standard of proof.

In a charge to a jury, the failure of the trial judge to mention a large art of the incriminating evidence, to relate it properly to the rest and to instruct the jurors that the whole must be considered together in deciding whether there is proof beyond reasonable doubt, would certainly constitute misdirection requiring a new trial. There was no reason to hold otherwise in the case of a judge sitting without a jury. The judgment in this case showed serious misdirection and not mere slips. The Court of Appeal properly singled out as specially serious the manner in which incriminating statements made to police officers were swept aside because each of them taken separately did not prove anything beyond "any peradventure of doubt" or "beyond any shadow of a doubt".

Per Laskin C.J., Spence and Dickson JJ., dissenting: The trial judge, preparatory to exercising his discretion under s. 9(2) of the Canada Evidence Act, considered that the witness should have his memory refreshed and have an opportunity to read his alleged inconsistent statement. Counsel for the Crown resisted that reasonable request and, therefore, the trial judge exercised his discretion to refuse to permit the Crown counsel to cross-examine his own witness. That course could not be considered to be the failure to exercise his discretion in a judicial manner.

There was no error in the trial judge's statement that the absence of motive is usually considered on

the side of innocence nor in his statement that if it is believed that it has been proven beyond a reasonable doubt that the accused committed the crime of which he is accused or if there is a reasonable doubt that he committed the crime the matter of motive or absence of a motive becomes unimportant. Since the trial judge used the words "After consideration of all of the evidence" and since a very large part of the evidence at trial was concerned solely with the question of motive, the submission by Crown counsel that what the trial judge was saying was that if he considered all of the circumstances apart from the evidence of motive and had a reasonable doubt then the evidence of motive was irrelevant, could not be accepted.

The third ground of the Appellate Division's judgment should be rejected. Under the circumstances, following the words used by Crown counsel in his address, the trial judge's use in his reasons for judgment of the terms "beyond any peradventure of doubt", "conclusively" and "beyond any shadow of a doubt" cannot indicate his burdening of the Crown with any stricter standard of truth than the criminal law requires. The trial judge did not make findings of fact unsupported by the evidence. He merely drew inferences from the evidence as he was entitled to do.

Cases Cited

[Côté v. The King (1941), 77 C.C.C. 75, referred to.]

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, setting aside an acquittal by MacDonald J., sitting without a jury, on a charge of murder. Appeal dismissed, Laskin C.J., Spence and Dickson JJ. dissenting.

A.M. Harradence, Q.C., for the appellant. D.C. Abbott and J. Franklin, for the respondent.

Solicitor for the appellant: A.M. Harradence, Calgary. Solicitor for the respondent: D. Ralston, Edmonton.

The judgment of Laskin C.J. and Spence and Dickson JJ. was delivered by

SPENCE J. (dissenting):-- This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta pronounced on November 12, 1975.

The appellant had been charged by indictment as follows:

Albert Stewart, you stand charged that you on or about the 13th day of August,

> A.D. 1973, at the City of Edmonton, in the said Judicial District did kill and slay Marion Hilda Parker, thereby committing murder punishable by life imprisonment, contrary to the provisions of the Criminal Code.

At the commencement of the trial, H.J. MacDonald J., stated:

> Mr. Stewart has elected to be tried with a judge alone.

That statement was confirmed immediately thereafter by the counsel for the accused and by the accused himself. Such a course is possible under the provisions of s. 430 of the Criminal Code which reads:

> 430. Notwithstanding anything in this Act, an accused who is charged with an indictable offence in the Province of Alberta may, with his consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without a jury.

The trial proceeded at once and on November 9, 1974, H. J. MacDonald J. found the accused, the present appellant, not guilty for reasons which he dictated. The Appellate Division, by its judgment aforesaid, allowed an appeal by the Crown and directed a new trial. Sinclair J.A. gave the reasons for the Court and based his judgment upon three factors. Firstly, the learned justice on appeal found that the trial judge had failed to exercise properly his discretion under the provisions of s. 9(2) of the Canada Evidence Act, R.S.C. 1970, c. E-10.

The Crown had called as a witness one Gordon Andersen and had examined this witness in chief for some time when counsel for the Crown made the following statement:

> Now, My Lord, at this stage I am making application under Section 9(2) of the Canada Evidence Act. I advise Your Lordship that the witness has made a statement, previous statement, which I submit is inconsistent with what he is now telling the Court, and in that regard, sir, I have the case of Regina vs. Milgaard, M-i-l-g-a-a-r-d, which is a decision of the Saskatchewan Court of Appeal, the judgment of the Court delivered by the Chief Justice Culliton, and it is found in 1971 2 Canadian Criminal Cases, at 206. I refer you to this decision, My Lord, because it contains a suggested procedure which I would urge Your Lordship to adopt here.

The learned trial judge expressed the view that prior to permitting the cross-examination of a witness on the basis that he had previously made an inconsistent statement, the counsel for the Crown should refresh the memory of the witness as to the making of such statement and permit the witness to read that statement, being of the opinion that had such a procedure been followed the witness might well have acknowledged that he had made the previous statement and that that statement was true. The learned trial judge said:

> I feel that any witness, knowing the frailties of the human mind, that the witness, without being cross-examined, should be examined carefully in direct examination and the questions put to him, if necessary, in a variety of ways, and that should be exhausted before we get into trying to get the evidence in some other manner. I am not going to accept the proposition of the Crown that they can call a witness and then almost immediately start cross-examining him under Section 9(2). Surely the section is there as a remedy or as a means of obtaining evidence that cannot be obtained in some other way, but we must exhaust the other ways of doing it first, and then I am prepared, if the Crown wants to move that the man be declared hostile or they want to take advantage of Section 9(2), to give it every consideration.

and later gave the specific direction:

> and, I think, in fairness, I would direct that we carry on as I have suggested.

Counsel for the Crown, upon Andersen returning to the witness stand, simply proceeded with his examination-in-chief and did not present the witness with any previous inconsistent statement.

Sinclair J.A., in his reasons for judgment for the Appellate Division, said:

> In our opinion, it is clear from the record that in dealing with the evidence of the witness Gordon Andersen, the learned trial judge misconstrued s. 9(2), and failed to appreciate the purpose for which the subsection was added to the Canada Evidence Act in 1968-69. He failed to draw a distinction between the objectives of subsection (1), on the one hand, and subsection (2), on the other. Consequently he failed to exercise the discretion given to him by s. 9(2) in a judicial manner. This is particularly significant in view of the learned trial judge's remarks concerning the evidence of Andersen made during the course of his judgment.

With respect, I differ with the learned justice on appeal. It was agreed that under the provisions of s. 9(2) of the Canada Evidence Act the learned trial judge had a discretion as to whether he would permit counsel to cross-examine his own witness. The learned trial judge, preparatory to exercising his discretion, considered that the witness should have his memory refreshed and have an opportunity to read his alleged inconsistent statement. Counsel for the Crown resisted that reasonable request and therefore, the learned trial judge exercised his discretion to refuse to permit the Crown counsel to cross-examine his own witness. I am quite unable to see how that course could be considered to be the failure to exercise his discretion in a judicial manner. I might add that although the complete allegedly inconsistent statement does not appear in the record, the references to it in the discussion between the learned trial judge and counsel for the Crown and for the accused would seem to indicate that it is highly doubtful that the learned trial judge should have found it to be an inconsistent statement. It was a statement which was not as complete as the evidence which the witness gave at his trial but there is nothing, so far as one could see from

reading the relevant evidence, that contradicts the evidence given at trial.

The second ground upon which Sinclair J.A. based his reasons for judgment was the references to motive in the reasons for judgment of the learned trial judge. Sinclair J.A. quoted that part of the learned trial judge's judgment as follows:

> "Speaking of motive first. Were there a jury I would say something along these lines in dealing with motive: The proof of motive for an alleged crime is permissible and it is often valuable but never essential. The evidence of motive is sometimes of assistance in removing doubt and completing proof. Motive is a circumstance, but nothing more than a circumstance, to be considered. The absence of motive is usually a circumstance to be considered but on the side of innocence and to be given such weight as is deemed proper. After consideration of all the evidence if it is believed that it has been proven beyond a reasonable doubt that the accused committed the crime of which he is accused or if there is a reasonable doubt that he committed the crime the matter of motive or absence of a motive becomes unimportant."

And commented:

> With respect, it is difficult to understand what the trial judge meant to say by the last two sentences of the remarks just quoted, but, in our view, they do not represent the law on this subject, particularly in a case where there is evidence of threats against the deceased having been made.

Again, with respect, I am unable to find fault with the learned trial judge's reasons. It is true that in those reasons there is a certain degree of looseness which might result in a lack of clarity but it must be remembered that the learned trial judge was not charging a jury but was, rather informally, at the close of the trial, giving his reasons for the acquittal of the accused. The last two sentences to which Sinclair J.A. referred were, firstly:

> The absence of motive is usually a circumstance to be considered but on the side of innocence and to be given such weight as is deemed proper.

Surely, it is true, as the learned trial judge pointed out earlier, evidence of motive is always admissible and therefore the absence of evidence of motive is a circumstance to be considered. Since the absence of any evidence of motive would seem to make it less probable that the accused did commit the act, such absence of evidence is usually considered on the side of innocence. I find nothing in error in that sentence.

> Secondly, that is the second sentence, was:

> After consideration of all the evidence if it is believed that it has been proven beyond a reasonable doubt that the accused committed the crime of which he is accused or if there is a reasonable doubt that he committed the crime the matter of motive or absence of a motive becomes unimportant.

With respect, what the learned trial judge was saying was that if it was found beyond a reasonable doubt that the accused did the act with the necessary mens rea then his motive for so doing was irrelevant, and if, on the other hand, there was a reasonable doubt that the accused did do the act with the necessary mens rea then even the presence of a motive did not permit his conviction. That is a very trite statement of ordinary law.

Counsel for the Crown attempted to persuade this Court that what the learned trial judge was saying was that if he considered all of the circumstances apart from the evidence of motive and had a reasonable doubt then the evidence of motive was irrelevant. Since the learned trial judge used the words "After consideration of all of the evidence" (the underlining is my own), and since a very large part of the evidence at trial was concerned solely with the question of motive, one could not possibly attribute the meaning which Crown counsel advanced to the sentence uttered by the learned trial judge. For these reasons, I find the judgment of the Appellate Division in error as to this second ground.

The third ground upon which Sinclair J.A. based his reasons for judgment was his view that the learned trial judge had, on several occasions, assigned a burden of proof to the Crown which was "far more stringent" than the burden put upon the Crown in law.

The learned trial judge used, in his charge, certain words. Firstly, referring to the Crown's evidence adduced as to statements made to police officers, he said:

> and if these statements were to be relied on, then the statement or statements must convince the Court, beyond any peradventure of doubt, that the accused is guilty of the charge. It isn't a matter of whether the accused was telling the truth or not telling the truth, simply that there is no burden placed on the accused to prove his innocence, that the entire burden is on the Crown to present evidence that conclusively shows that the accused is guilty of the offence.

(The italics are my own.)

In the concluding half of the next paragraph of his reasons, the learned trial judge said:

> We are asked to put it together with the statement that he made to Detective Hecht on the way back in the plane, that "the main evidence is gone". The Court is asked to conclude or to infer that he must have been talking about the rifle that killed Mrs. Parker. There is no evidence to show what he was talking about, there is nothing in front of me that I feel that forces me to conclude, beyond any

> shadow of a doubt, that it was the rifle he was speaking of when he mentions this. I feel that to convict the accused were you to rely almost entirely on that would be to infer more than what the statement itself suggests should be inferred.

(The italics are my own.)

The italicized expressions are those to which the Appellate Division took objection and which the Appellate Division considered to be the application of a much more stringent burden of proof than required by the criminal law. A reading of this section of the reasons for judgment demonstrates that there the learned trial judge was dealing with the probative value of evidence that the accused had made certain statements to police officers. Counsel for the Crown had stressed the weight of those statements in his submission and had gone so far as to say:

> Then, sir, you have the incident of the plane, and this was some hours after the interview by Detective Hecht, and he was sitting there and nothing was being said and the accused has had these several hours to consider his statements to Detective Hecht and the subject must have been on his mind. Out of the blue, to use my learned friend's suggestion, to Detective Hecht, the term he used, he says "Just between you and me, the main evidence is gone". Surely the only inference there to draw, My Lord, is that he is referring to the firearm. No weapon was found.

In short, the Crown was putting to the learned trial judge the submission that the only possible inference which could be drawn from that evidence was that the accused was referring to the actual weapon used to cause the victim's death. It was quite evidently the view of the learned trial judge that there was no such irresistible inference to be drawn from the evidence and remembering again that he was giving reasons for judgment and not charging a jury, his use of the stronger terms of "beyond any peradventure of doubt", "conclusively" and "beyond any shadow of a doubt" were mere reflections of the positive nature of the Crown's submission which could be characterized as a submission that the matter had been proved in any of those three strong fashions. In the very next paragraph, the learned trial judge describing the onus said:

> The decision of the Court must be made, of course, on the evidence that has been presented. That evidence itself, no matter how suspicious it is, must, when one considers everything that has been said and what weight can be given to it it must convince the mind and satisfy the conscience to the extent that no other rational conclusion could be reached. I feel that in this case that there is room for a reasonable doubt. There are, of course, a number of things that have not been explained, the fact they have not been explained does not entitle one to place any burden on the accused.

And two paragraphs later when concluding his reasons, the learned trial judge again referred to the recognized standard of "beyond a reasonable doubt".

Under the circumstances to which I have referred, I can find no reason for a new trial in the learned trial judge's use of the three above-mentioned sets of words in his reasons for judgment.

A fourth ground was mentioned by Sinclair J.A. in his reasons for judgment but the learned justice on appeal found it unnecessary to deal with it in view of his finding as to the other three reasons and that ground was that the learned trial judge erred in his application of the rule in Hodges case.

In this Court, counsel for the respondent Crown seemed to put this ground more on the basis that the learned trial judge, in finding that he had a reasonable doubt of the guilt of the accused, based his conclusion on facts which were not substantiated by the evidence. Counsel for the Crown outlined five different statements made by the learned trial judge in his reasons all of which he alleged were not made on a basis of any evidence. Without going through them in detail, I am strongly of the view that in each one of the cases the learned trial judge was drawing an inference which a finder of fact could draw from the evidence. For example, a consideration of the injuries to the victim might lead a trier of fact to conclude that those injuries had occurred in a struggle. It might well be that the counsel for the Crown or members of the Appellate Division, or even members of this Court, would not find that such an inference was a proper one from the evidence, but we are not triers of fact. That was a task put upon the learned trial judge under the unusual provisions of s. 430 of the Criminal Code and I do not think that any appellate court is free to vary the findings of fact made by the learned trial judge or inferences which the learned trial judge drew from the evidence unless one can say that there was no evidence upon which the learned trial judge could make such a finding. Counsel for the Crown was unable to put any of the incidents to which he referred in that class. I am, therefore, not ready to concur in this additional ground of appeal which was urged in the Appellate Division but not dealt with.

For these reasons, I would allow the appeal, quash the judgment of the Appellate Division, and restore the judgment of the learned trial judge directing the acquittal of the accused.

The judgment of Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

PIGEON J.:-- This appeal is from a judgment of the Appellate Division of the Supreme Court of Alberta setting aside an acquittal pronounced by a judge sitting without a jury, with the consent of the accused, on a charge of murder.

The judgment in appeal rests on three grounds. The first is that the trial judge misconstrued s. 9(2) of the Canada Evidence Act and failed to exercise in a judicial manner the discretion given to him by that provision. In what respect the trial judge was thus in error is not stated. At the hearing, counsel for the Crown complained of the direction given as to how the witness should be examined before leave would be given to cross-examine him as to an inconsistent statement previously made. I fail to see any misuse of the trial judge's discretion in the direction which he gave. It was for him to decide whether the cross-examination on the statement would be permitted. I cannot see why this

would not include the power to require examination along certain lines before the discretion would be exercised in favour of allowing the cross-examination. In my view, no case was made for considering such direction as an abuse of the power implicit in the discretion to grant or to refuse leave to cross-examine.

The two other grounds are much more serious and I find it desirable to deal with them together. They can be summarized by saying that the trial judge misdirected himself as to the standard of proof required. While in the end, he properly spoke of proof "beyond any reasonable doubt", twice before, in dealing with particular elements of the evidence, he referred to a much higher standard. Dealing with statements made by the accused to police officers, he said:

> ... if these statements were to be relied on, then the statement or statements must convince the Court, beyond any peradventure of doubt, that the accused is guilty of the charge. (Italics added.)

Again, dealing with a statement to a police officer that "the main evidence is gone", he said:

> There is no evidence to show what he was talking about. there is nothing in front of me that I feel that forces me to conclude, beyond any shadow of a doubt, that it was the rifle he was speaking of when he mentions this (Italics added.)

In my view, the trial judge fell into a double error, not only did he apply repeatedly a much stricter standard than that which is required, but he applied it to particular elements of the evidence taken in isolation. In other words, instead of taking together all the evidence and properly relating every fact to all the others, he dealt separately with each discarding them successively as insufficient to meet his exaggerated standard of proof. This is the error in which he fell in the somewhat equivocal reasoning whereby, at the outset, he practically swept aside the evidence of motive saying:

> The proof of motive for an alleged crime is permissible and it is often valuable but never essential. The evidence of motive is sometimes of assistance in removing doubt and completing proof. Motive is a circumstance, but nothing more than a circumstance, to be considered. The absence of motive is usually a circumstance to be considered but on the side of innocence and to be given such weight as is deemed proper. After consideration of all the evidence if it is believed that it has been proven beyond a reasonable doubt that the accused committed the crime of which he is accused or if there is a reasonable doubt that he committed the crime the matter of motive or absence of a motive becomes unimportant.

After this, the trial judge went on to mention not mere evidence of motive but evidence of plan and design. He said:

> In this case, to begin with, we have the evidence of several witnesses, Mr. Serby, Gay Parker and her sister Edith Parker and Gordon Andersen who mentioned that the accused made statements indicating or stating that he was going to kill the victim and it is suggested by the Crown that this proves a plan, a design, an obsession and yet no one of these witnesses when they heard these statements made and when they heard them repeated apparently considered that there was any danger involved. No complaint was made to the police and nothing was done to protect the victim from what they allege. The Court was asked to conclude there was a serious plan or design.
>
> I think the evidence of Gordon Andersen was reliable evidence and I place some weight on it. He indicated that the mention of killing he took as a rather flippant statement, he felt the man was joking.

Like the Court of Appeal, I wish to avoid going into any detailed discussion of the evidence, but I must point out that there was evidence that the accused had worked on making a silencer and gone to a quarry for testing one which had exploded, that the victim had been shot in her apartment and nothing but clicks heard by neighbours. There was also evidence that shortly before the murder was committed, the accused had bought traveller cheques with his savings, that afterwards, he had gone east as far as Winnipeg as he had said he would when talking of his intention to kill the woman he had recently deserted, that when he was arrested, rubber gloves were found in the trunk of his car that he had tried to conceal, etc.

In a charge to a jury, the failure of the trial judge to mention a large part of the incriminating evidence, to relate it properly to the rest and to instruct the jurors that the whole must be considered together in deciding whether there is proof beyond reasonable doubt, would certainly constitute misdirection requiring a new trial. I can see no reason to hold otherwise in the case of a judge sitting without a jury. It may sometimes be presumed to a certain extent, that he is not misdirecting himself, even when not spelling out every direction which he should give to a jury but, in this case, the judgment taken as the whole shows serious misdirection and not mere slips. The Court of Appeal properly singled out as specially serious the manner in which incriminating statements made to police officers were swept aside because each of them taken separately did not prove anything beyond "any peradventure of doubt" or "beyond any shadow of a doubt".

In my view, this was made all the more serious by the trial judge considering the weight of various elements of proof taken separately. In Côté v. The King [(1941), 77 C.C.C. 75.], Taschereau J. as he then was, said, speaking for all but one member of the Court (at p. 76):

> It may be, and such is often the case, that the facts proven by the Crown, examined separately have not a very strong probative value; but all the facts put in evidence have to be considered each one in relation to the whole, and it is all

of them taken together, that may constitute a proper basis for a conviction.

I would dismiss the appeal.

Appeal dismissed, LASKIN C.J. and SPENCE and DICKSON JJ. dissenting.