charged against him. The provisions of the statute cannot be extended or used in the manner proposed by counsel for the Crown. The necessary connection between the appellant and the disclosed conspiracy has not been shown, and the case which the Crown sought to establish must fail for want of evidence. I concur in the order of this Court as proposed by my Lord the Chief Justice of Ontario.

HOGG J.A. agrees with ROBERTSON C.J.O.

Conviction quashed.

Solicitors for the accused, appellant: Gowling, MacTavish, Watt, Osborne & Henderson, Ottawa.

[COURT OF APPEAL.]

Rex v. Smith.

Criminal Law—Conspiracy to Commit Breach of The Official Secrets Act, 1939 *(Dom.), c.* 49*—Form of Charge—Consent to Prosecution—The Criminal Code, R.S.C.* 1927, *c.* 36, *s.* 573.

The accused was convicted upon a charge that he did conspire with others "to commit an indictable offence, to wit, for purposes prejudicial to the safety or interests of the State to obtain, record, publish or communicate to another person or persons documents or information which were calculated to be or might be or were intended to be directly or indirectly useful to a foreign power . . . contrary to The Official Secrets Act . . . and contrary to Section 573 of The Criminal Code, in such case made and provided".

Held, the charge was one of conspiracy to commit an indictable offence, contrary to s. 573 of The Criminal Code, and was not a charge of any offence under The Official Secrets Act. The words "contrary to The Official Secrets Act" were merely part of the description of the indictable offence which the accused was charged with conspiring to commit, and the word "and" before the reference to s. 573 of the Code was elliptical, and should be read as if the allegation were "and so conspired contrary" to s. 573. It was therefore unnecessary for the Crown to produce the consent of the Attorney-General of Canada to the prosecution, required by s. 12 of The Official Secrets Act for all prosecutions under that Act.

Evidence—Criminating Questions—Evidence before Royal Commission—Objection to Taking Oath—Advice of Counsel—The Canada Evidence Act, R.S.C. 1927, *c.* 59, *s.* 5(2).

S, while in the custody of the police, was taken before the Royal Commission described in *Rex v. Mazerall*, [1946] O.R. 762, to give evidence. He objected to being sworn or giving evidence without first being permitted to consult his counsel, but was directed to take the oath, being informed at that time that if he wished to raise the question of having counsel in connection with any particular question put to him, the matter could then be discussed. After being sworn, he answered several questions without objection, but, on a further question, refused to answer until he had consulted counsel. After some discussion permission was granted, and following a recess S appeared again with his counsel, who stated that his client was ready

and willing to answer any questions that might be put to him. The examination then proceeded.

Held, the evidence, taken in these circumstances, was admissible against S on his subsequent trial on a criminal charge. The objection taken by S was not of the nature contemplated by s. 5(2) of The Canada Evidence Act, and the immunity provided for in that subsection therefore did not apply.

AN APPEAL by the accused from his conviction and sentence on a charge of conspiracy to commit an offence created by The Official Secrets Act, 1939 (Dom.), c. 49.

17th and 18th March 1947. The appeal was heard by ROBERTSON C.J.O. and HOPE and AYLESWORTH JJ.A.

L. A. Forsyth, K.C. (*H. A. Aylen, K.C.,* with him), for the accused, appellant: The trial judge lacked jurisdiction because no adequate consent to the prosecution was produced, as required by s. 12 of The Official Secrets Act. The charge, although it is for conspiracy to commit an indictable offence, contains the words "contrary to The Official Secrets Act", and the prosecution is accordingly under that Act as well as under The Criminal Code, R.S.C. 1927, c. 36. A consent was filed, after we had moved for a dismissal at the close of the case for the Crown, but it was invalid in that it did not specify with sufficient particularity the charge or charges to be laid: *Rex v. Bates,* [1911] 1 K.B. 964; *Rex v. Breckenridge* (1905), 10 O.L.R. 459, 10 C.C.C. 180. [ROBERTSON C.J.O.: Do you say that a charge of conspiracy could be laid under The Official Secrets Act?] Perhaps not, but that Act was relied on here to make the conspiracy unlawful, and the formal charge alleged that the offence was "contrary to The Official Secrets Act". [ROBERTSON C.J.O.: It is only the word "and" preceding the reference to s. 573 of the Code that gives any basis for your argument.] [AYLESWORTH J.A.: Would it change the sense if it were read "and so conspired"?] I submit it would. The reference to the Act was not necessary to characterize the conspiracy as unlawful, and the accused is entitled to have the indictment construed in the way most favourable to him.

We rely also, in this connection, on *Rex v. Seto Kin Kui,* 27 B.C.R. 416, [1919] 3 W.W.R. 318; *Rex v. Canadian Pacific Railway Co.* (1907), 12 C.C.C. 549, 6 W.L.R. 620; *Rex v. Kluge,* [1940] 3 W.W.R. 57, 74 C.C.C. 261; *Thorpe v. Priestnall,* [1897] 1 Q.B. 159.

The existence of the conspiracy was not properly proved. The classical definition of criminal conspiracy, in *Mulcahy v. The*

Queen (1868), L.R. 3 H.L. 306 at 317, contains nothing to dispense with the requirement of proof by evidence properly admissible. There appears to be an erroneous impression that conspiracy is proved according to rules of evidence different from these applicable in other cases. This has developed from the practice of permitting the Crown to put in, on conspiracy charges, evidence which, at the time it is tendered, is not properly admissible, and becomes so only on proof of further facts. The evidence here is defective on two principal grounds:

(1) The trial judge accepted the evidence of Mazerall, who was undoubtedly an accomplice, without giving proper heed to the rule respecting the evidence of accomplices. Mazerall had undoubtedly been offered inducements, by the police and others, before giving his evidence, and the Crown must take the responsibility for any inference Mazerall might have drawn from the intimation to him that the other charges would be dropped. There is not one word in Mazerall's evidence that links this appellant with the documents produced by Gouzenko, and therefore no evidence was ever introduced which made those documents admissible in evidence against the appellant. On this point, we refer to *Rex v. Imperial Tobacco Company Limited, et al.,* [1942] 1 W.W.R. 363, 77 C.C.C. 146, [1942] 1 D.L.R. 540; *Reg. v. Farler* (1837), 8 C. & P. 106, 173 E.R. 418; *Mahadeo v. The King,* [1936] 2 All E.R. 813, [1936] 3 W.W.R. 443; *Rex v. Lewis,* [1937] 4 All E.R. 360, 26 Cr. App. R. 110; *Rex v. Keeling,* [1942] 1 All E.R. 507, 28 Cr. App. R. 121.

The trial judge said that he considered and gave effect to the rule as to accomplices, but he did not consider the facts he should have considered, particularly about the inducement. The fact that he believed Gouzenko and Mazerall did not make Gouzenko's evidence admissible against the accused. In any case, the trial judge placed undue emphasis on Mazerall's evidence, and relied entirely on it to connect the accused with the conspiracy.

The trial judge said that the accused's evidence was "not worthy of credence". This is not a finding as to the witness's credibility, based on demeanour, etc., and does not restrict this Court. Not one "explanation" was given by the accused, because he denied all the allegations against him. When he was invited, in cross-examination, to speculate, he did so, but that can hardly be called an "explanation" which is not worthy of credence, or, as the trial judge termed it, a "fantastic explanation". As to the

burden of proof, we refer to *Woolmington v. Director of Public Prosecutions,* [1935] A.C. 462, 25 Cr. App. R. 72; *Fraser v. The King,* [1936] S.C.R. 296, 66 C.C.C. 240, [1936] 3 D.L.R. 463.

(2) The evidence given by the appellant before the Royal Commission should not have been admitted in evidence against him. The first departure from the old common law rule *nemo tenetur seipsum accusare* appears to have been in *Reg. v. Baldry* (1852), 2 Den. C.C. 430, 169 E.R. 568; See also *Reg. v. Fennell* (1881), 7 Q.B.D. 147; *Reg. v. Coote* (1873), L.R. 4 P.C. 599, C.R. [6] A.C. 282. Section 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, is an invasion of the common law, under which a witness was not compellable to answer criminating questions, and must therefore be construed strictly. What the accused said before the Commission should be construed as an objection to answering, sufficient to satisfy s. 5(2). Even if it is to be presumed that the witness knew that he must object, it surely will not also be presumed that he knew how to make his objection. Although a person may be presumed to know the law, he should not be allowed to remain in ignorance of his legal rights if it appears that he is not fully aware of them. Some of the Commissioners' statements to the accused were misstatements of his legal position: *Rex v. Villars* (1927), 20 Cr. App. R. 150; *Rex v. Graham* (1922), 17 Cr. App. R. 40.

It should be held, either that the accused effectively objected to answering incriminating questions, or that he tried to object and the Commissioners ruled that he had to answer, without telling him about the effect of a specific objection. In either case, his answers should not have been admitted at the trial. The advice given to the accused by his counsel was proper, because he was legally bound to answer questions. It was for the witness to take the objection required by s. 5(2) of the Act, and he had already objected, which should be taken as sufficient. His objection clearly was an objection to answer any question.

The trial judge completely overlooked the most important point in the case, which was when, if ever, the documents taken by Gouzenko from the Embassy acquired any probative force against this accused. Until he was connected with them, and some agreement was established between him and some other person to furnish information to the Embassy, the documents were not even admissible against him. That link was never forged, be-

cause Mazerall's evidence was insufficient for that purpose, and was quite consistent with other, and innocent, explanations.

The sentence imposed by the trial judge was excessive, and was clearly based on a wholly wrong idea that this appellant was as deeply involved in the conspiracy as Lunan, previously convicted and sentenced, and that is obviously not the fact.

J. R. Cartwright, K.C. (*B. W. Howard, K.C.*, with him), for the Attorney-General, respondent: No consent was required for the prosecution, which was not one under The Official Secrets Act: *Rex v. Rose*, not yet reported; *Rex v. Mazerall*, [1946] O.W.N. 664, 86 C.C.C. 147, 2 C.R. 15. If a consent was required, the one produced at the trial was sufficient, and the consent may be filed at any time before conviction. What determines jurisdiction is the question whether or not a consent has been given, not whether or not it has been produced: see Tremeear, Criminal Code, 5th ed. 1944, pp. 1180-1, as to permitting the re-opening of a case.

The trial judge correctly instructed himself as to the evidence of an accomplice, and in any case there was ample corroboration implicating the accused.

The admissibility of the evidence taken before the Royal Commission is concluded by *Rex v. Mazerall*, [1946] O.R. 762, 86 C.C.C. 321, 2 C.R. 261, [1946] 4 D.L.R. 791, and *Rex v. Lunan*, [1947] O.R. 201. The appellant's objection was not to answering questions, but to being sworn and answering questions unless he was assisted by counsel. When counsel was permitted to be present, he stated that his client was "ready and willing to answer any questions". A witness cannot obtain a "blanket" protection, except by special arrangement, and there is no way of construing counsel's statement here as an objection to answering, or a claim for the protection of s. 5(2) of The Canada Evidence Act. Further, the appellant made no admissions in his evidence before the Royal Commission.

The trial judge's statement as to the effect of Mazerall's evidence must be considered in relation to the whole of his reasons, and not divorced from its context. Mazerall's evidence was not the only thing that linked the appellant with the conspiracy. Gouzenko's evidence was admissible, quite apart from any special rules, to prove the existence and nature of the conspiracy. Mazerall's evidence, apart from what he said about this appellant, showed that he furnished some information in pur-

suance of that conspiracy. Then Gouzenko produced two sheets of paper from the Embassy, which we proved by other evidence to have been written by the appellant. This is ample to connect the accused with the conspiracy.

The statements of one conspirator in furtherance of the common design become admissible against a fellow-conspirator when the Crown has given some evidence on which a jury might (not must) find that the accused was a party to the conspiracy. From that point on, the documents, etc., become admissible, and can be examined and considered in finally determining the question of guilt. The rule is sometimes stated that they become admissible when it has been "shown" that the accused was a member of the conspiracy, but this cannot require more than *prima facie* proof, as otherwise the evidence would be unnecessary: *Rex v. Russell,* [1920] 1 W.W.R. 624 at 628, 33 C.C.C. 1, 51 D.L.R. 1; *Koufis v. The King,* [1941] S.C.R. 481 at 488, 76 C.C.C. 161, [1941] 3 D.L.R. 657; *Paradis v. The King,* [1934] S.C.R. 165 at 170, 61 C.C.C. 184, [1934] 2 D.L.R. 88.

There was *prima facie* evidence of the appellant's participation in the conspiracy in: Gouzenko's evidence that the conspiracy had been going on for many months, with the object of collecting information of all sorts, obtained through agents in the employ of the Dominion Government, and forwarded to Moscow; that there were found photostat copies of three sheets of a highly technical character, and two sheets of a note-book, giving in detail the organization of the National Research Council, and all virtually admitted to be in the accused's handwriting. Further than this, the accused went into the witness-box and gave an explanation which was quite inconsistent with his innocence. Mazerall's evidence, though not conclusive, is further *prima facie* evidence of the accused's participation.

If the other documents can be looked at, the accused's guilt becomes clear beyond peradventure.

As to the sentence, no error in principle has been shown. The sentence is not out of proportion when compared with others imposed for similar offences.

L. A. Forsyth, K.C., in reply: Gouzenko's evidence did not prove the existence of the conspiracy, but only that Rogov had certain documents in his possession, and stated that he had received information from other persons. The *Russell, Koufis* and *Paradis* cases, *supra,* show that the complicity of the accused

must be shown before the acts and declarations of co-conspirators become admissible. That complicity must be proved beyond a reasonable doubt. The other evidence is admissible to prove, not the accused's participation, but the nature and extent of the conspiracy, or the quality of the common design. It cannot be used to prove, or bolster the proof of, the accused's membership or participation in the conspiracy.

The reasons for judgment show clearly that the trial judge placed great reliance on Mazerall's evidence, and drew from it conclusions which were entirely unwarranted.

Rex v. Mazerall, [1946] O.W.N. 664, 86 C.C.C. 147, 2 C.R. 15, rather supports my position here as to the consent to the prosecution, because it states clearly that a proper consent must be proved at some time before conviction.

Cur. adv. vult.

24th April 1947. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This is an appeal from the appellant's conviction and sentence on trial before His Honour Judge McDougall, sitting in the County Court Judges' Criminal Court of the County of Carleton, on the 27th December 1946. The charge upon which the appellant was tried, convicted and sentenced to imprisonment for five years in the penitentiary was that "he, the said Philip Durnford Pemberton Smith, during the year 1945 at the City of Ottawa in the County of Carleton and elsewhere in the Province of Ontario and in the Province of Quebec, did unlawfully conspire together and with Lieutenant-Colonel Vasili M. Rogov, Colonel Nicolai Zabotin, Edward Wilfrid Mazerall, David Gordon Lunan and Israel Halperin, one with another or others of them, and with other persons unknown, to commit an indictable offence, to wit, for purposes prejudicial to the safety or interests of the State to obtain, collect, record, publish or communicate to another person or persons documents or information which were calculated to be or might be or were intended to be directly or indirectly useful to a foreign power, to wit, the Union of Soviet Socialist Republics, contrary to The Official Secrets Act, being Chapter 49 of the Statutes of Canada, 1939, 3 George VI, and contrary to Section 573 of The Criminal Code, in such case made and provided."

The grounds upon which the appeal was argued may be summarized as follows:

(a) The charge as laid is for an offence under The Official Secrets Act, 1939 (Dom.), c. 49, as well as for conspiracy contrary to s. 573 of The Criminal Code, R.S.C. 1927, c. 36. No effective or adequate consent was given by the Attorney General of Canada to the prosecution under The Official Secrets Act, as required by s. 12 of that Act.

(b) The trial judge misdirected himself as to acceptance by him of the evidence of the accomplice Mazerall.

(c) The evidence of appellant taken before a Royal Commission was inadmissible at his trial because appellant, when before the Commission, had objected to answering the questions then put to him, as permitted and provided by subs. 2 of s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, upon the ground that his answers might tend to criminate him. The trial judge, therefore, was in error in receiving and acting upon that evidence.

(d) No evidence was adduced linking appellant with a conspiracy such as was charged, and the trial judge convicted appellant upon evidence *qua* the conspiracy which was not admissible as against him.

It will be convenient to deal with these grounds of appeal in the same order as they herein appear. Section 12 of The Official Secrets Act reads in part:

"A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General".

At the trial the Crown closed its case without adducing proof of any consent to the prosecution from the Attorney General of Canada. Thereupon, motion was made to the learned trial judge on behalf of appellant for acquittal upon the ground, among others, that the trial judge was without jurisdiction to try appellant in the absence of the aforementioned consent. Counsel for the Crown immediately requested and obtained leave, *"ex abundanti cautela"*, as he put it, to reopen the Crown's case, and the consent, properly proved and in these words, was then filed:

"Consent is hereby given by the undersigned, the Attorney General of Canada, to the prosecution of Philip Durnford Pemberton Smith of the City of Hull in the Province of Quebec, for an offence under the Official Secrets Act, namely violation of Section 3(1)(*c*) of the said Act, and for conspiracy to commit the same.

"Dated at Ottawa this 29th day of March, A.D. 1946."

Counsel for appellant, here and in the court below, submitted that the consent was filed too late, and in any event that it was insufficient, referring to several authorities in support of the latter submission.

In my view, it is unnecessary to consider these authorities. The Official Secrets Act does not in terms describe as an offence a conspiracy to commit any of the offences therein defined. The charge, which is one of conspiracy, ought not, therefore, to be read as charging a conspiracy contrary to The Official Secrets Act as well as contrary to The Criminal Code, unless, upon consideration of all of the words used in the charge, that meaning emerges as the only logical one to be given to it. I think what is charged is a conspiracy to commit an indictable offence (namely, one of the offences defined in The Official Secrets Act), contrary to s. 573 of the Code, and nothing else. All of the words in the charge, commencing with the words "to wit" and concluding with the words "contrary to The Official Secrets Act, being Chapter 49 of the Statutes of Canada, 1939, 3 George VI", merely describe the indictable offence which it is alleged the appellant and others conspired to commit. This description is a somewhat lengthy one, followed by the words, "and contrary to Section 573 of The Criminal Code in such case made and provided." The "and" is really unnecessary; appearing as it does, however, at the end of a lengthy description of the indictable offence which it is said the appellant and others conspired to commit, it is not to be taken as merely joining the two phrases "contrary to The Official Secrets Act" and "contrary to Section 573 of The Criminal Code". Its use, upon a consideration of the whole charge in the count upon which appellant was tried, is to be considered as elliptical and as relating back to the foundation for the whole charge, namely, the allegation of conspiracy to commit an offence, which offence is described as being contrary to The Official Secrets Act— "did unlawfully conspire . . . to commit an indictable offence, to wit . . . and [so conspired] contrary to Section 573 of The Criminal Code."

The next ground of appeal, namely, that the trial judge misdirected himself as to the acceptance by him of the evidence of the accomplice Mazerall, may be disposed of shortly. The trial judge, in his reasons for judgment, states in part:

"The Crown produced certain evidence seeking to link the accused with the conspiracy. The first item consisted of the evidence of the witness Mazerall, and of his conversation with the accused. Having still in mind the rule with respect to the evidence of an accomplice, I also came to the conclusion that I believed Mazerall and that when he was conversing with the accused the accused made statements that establish beyond doubt the accused's connection with the conspiracy."

The rule as to the danger of convicting upon the uncorroborated evidence of an accomplice is beyond controversy. Nevertheless, where a trial judge, sitting without a jury and fully charging himself as to the rule to be applied in such circumstances, as was done here, comes to the conclusion that the evidence of an accomplice is to be believed, this Court ought not to interfere: *Rex v. Meimar,* [1943] O.W.N. 269, 80 C.C.C. 134, [1943] 3 D.L.R. 672.

I turn now to the submission that the evidence of appellant, taken before a Royal Commission, was inadmissible at his trial.

Appellant, while still in custody of the Royal Canadian Mounted Police and before any charge was laid against him, was brought before a Royal Commission, the members of which were the Honourable Robert Taschereau and the Honourable R. L. Kellock (ex. 20). The circumstances of his detention in custody and the nature of the Commission are as described in *Rex v. Mazerall,* [1946] O.R. 762, 86 C.C.C. 321, 2 C.R. 261, [1946] 4 D.L.R. 791. It is important to note the position taken by appellant when requested by the Commission to take the usual oath administered to a witness. I quote in full upon this matter from the transcript of the proceedings before the Commission:

"P. DURNFORD PEMBERTON SMITH, called:

"MR. COMMISSIONER KELLOCK: Will you take the book, please, in your right hand?

"THE WITNESS: My Lord, I feel that I cannot take this oath until I have seen my counsel, Mr. Aldous Aylen.

"MR. COMMISSIONER TASCHEREAU: You will have to take the oath. You listen to the oath. You will have to take that and then we will discuss the matter of counsel later. You are called here as a witness and you are under obligation to attend and to be sworn.

"THE WITNESS: My Lord, I have not seen my counsel for thirty-two days.

"MR. COMMISSIONER KELLOCK: That is all right. I said that you will first take the oath. There are two oaths. One is that you will speak the truth, which is the ordinary oath that any witness takes in any judicial proceedings or before any Commission. The other is that these proceedings are *in camera* and that you will keep secret anything that you tell us or anything you learn here unless you get permision from us.

"THE WITNESS: My Lord, I feel it is not fair to make me testify until I have seen Mr. Aylen.

"MR. COMMISSIONER KELLOCK: Mr. Smith, there is not any question of fairness involved. You are here as a witness. We are sitting as a Royal Commission and you are here as a witness. Now then, you must give evidence under oath. Now, if any question is put to you after you have been sworn, either by counsel or by us, and you want to raise the question of counsel then, that will be the time to raise it and we will discuss it with you then, but at the moment you are here summoned as a witness and you must be sworn like any other witness. If you do not, that is an offence, if you refuse, and we will have to consider just what should be done in that event. But there is no question of fairness at all. You are being treated like anybody else who comes here as a witness.

"THE WITNESS: But is it not true that all previous witnesses have been subsequently placed under accusation?

"MR. COMMISSIONER TASCHEREAU: There is no accusation at all against you.

"THE WITNESS: But all previous witnesses before the Commission, as far as I know, have been subsequently accused. I cannot rid myself of the feeling—

"MR. COMMISSIONER TASCHEREAU: There is no witness that has been accused here when he came as a witness. When the investigation is finished and we have finished with our work we will make a report to the Government and the Government will deal with you as they deem it advisable, but for the moment you are just a witness for the purpose of this investigation. That is all. You have to be sworn.

"THE WITNESS: I have a feeling I am not really a witness.

"MR. COMMISSIONER TASCHEREAU: Oh, yes, you are a witness.

"MR. COMMISSIONER KELLOCK: It does not matter what your feeling is. You are here as a witness and the statute provides

that you must be sworn. As I say, it is an offence not to be sworn and it is a matter for you to think over.

"THE WITNESS: Well, my Lord, I feel it is a question of principle. I have been held thirty-two days. I am not a lawyer and I do not know the technicalities of the law. I am not refusing to give testimony, but I do wish to see Mr. Aylen before I am questioned.

"MR. COMMISSIONER KELLOCK: Mr. Smith, let me tell you again. You are here before this Royal Commission. You must be sworn first before we listen to you at all. I am not going to listen to you unless you are sworn. As I explained to you, that is the first thing. After that, if you want to raise the question you are now discussing, raise it and we will discuss it with you, but you must be sworn now. Will you take the book, Mr. Smith? You swear that the evidence you give before this Commission touching the matters in question shall be the truth, the whole truth and nothing but the truth, so help you God?

"THE WITNESS: I swear."

Clearly, the objection taken was to being sworn without first having the advantage of consulting with counsel.

Appellant was then asked and answered several questions without further objection. Counsel for appellant admitted before us that nothing turns upon the actual answers so made, which were with respect to matters of a routine nature, such as appellant's position, duties and residence. Appellant was next asked to identify a photograph (ex. 119 in the proceedings before the Commission) said to be of himself, and said to have been taken from the files of the Russian Embassy at Ottawa. The following then occurred:

"THE WITNESS: Mr. Commissioner, that is the sort of question I would prefer to see my counsel before answering.

"BY MR. WILLIAMS: Q. Mr. Smith, that is your own photograph, is it not? A. I have asked the presiding judge a question.

"BY MR. COMMISSIONER KELLOCK: Q. In discussing the matter with my fellow Commissioner, we do not see any reason at the moment why you should not be able to recognize your photograph, or not recognize it, just as you like, without consultation with counsel, Mr. Smith.

"A. I am not endeavouring to obstruct you, sir, but I realize that, nevertheless, although I am a witness, I am in a serious position.

"Q. I know; but all you are being asked is whether you do or do not identify a certain photograph shown you. A. That is correct, sir.

"Q. That does not require any legal advice, as far as I can see.

"A. It is difficult for me to be sure of that, sir.

"Q. Well, Mr. Smith, under the statute, The Inquiries Act, which is one of the authorities under which this investigation is being conducted, we have a discretion as to whether we shall allow or shall not allow counsel, up to the point when any charge is made against you. There is no charge made against you as yet. Your conduct is being investigated, unquestionably; but up to the time that a charge is made, we have a discretion as to whether you shall be represented by counsel or not.

"Under the same statute we may not report adversely on your conduct without you having been given an opportunity to be represented by counsel here and to make the fullest statement or explanation you care to make, or to call any evidence that you want to call; but just at the present time, while your conduct is being investigated and no charge has been made against you, we have a discretion, and as I told you when you objected to the oath this morning, if you want to raise the question at any time we will consider it.

"You have raised it now. My brother Commissioner and I see no reason why we should change our ruling at the present time, when you are asked as to whether or not a certain photograph is yours.

"A. Well, sir, I feel—I cannot rid myself of this feeling—that I know I have been held for thirty-two days, as I say. I have been questioned by Inspector Harvison. I know that whether it is correct or not he has a bulk of evidence which is alleged to connect me with certain infractions of the laws. I have the feeling that what is actually happening is that I am being questioned by a prosecution, without the advantage of legal advice.

"Q. Well, that is not so. Your conduct is being investigated, but there is no question of a prosecution; there is no question of a charge.

"A. There is not at the present moment.

"Q. That is so.

"A. But I have heard that all the other people appearing before this Commission have been subsequently charged.

"Q. Well, that is not before us.

"A. Not before you, but still it follows afterwards; and here we have lawyers who are questioning me. I do not know the intricacies of the law; I may be being led into a trap, for all I know, and that is why I am asking for counsel.

"Q. Well, I have explained the situation to you. The question has been put to you. You will have to make up your mind whether you are going to answer it, or whether you are not going to answer it, then after that we will give the matter consideration.

"A. I am afraid I am not going to answer, sir.

"MR. COMMISSIONER KELLOCK: All right. Then I think we should have a recess for a few minutes.

. . . .

"BY MR. COMMISSIONER KELLOCK: Q. Well, Mr. Smith, we have decided to reserve our decision on your refusal, for the time being at least, with regard to that particular question. Will you proceed, Mr. Williams?

"BY MR. WILLIAMS: Q. Now, Mr. Smith, I am going to show you another photograph, which was found in the original records of the Russian Embassy, and which appears in a document which is marked ex. 18. I am going to ask you to look at that photograph and say of whom it is a photograph.

"A. Mr. Chairman, I practically repeat everything I have said before. I feel this is a question of principle. We have been held without counsel, and this is a new type of procedure, I believe.

"MR. COMMISSIONER KELLOCK: No, it is not a new type of procedure; the statute under which we are acting has been in existence a good many years. The last exhibit you showed the witness was what, Mr. Williams?

"MR. WILLIAMS: It was ex. 18, the file from the Russian Embassy; and it contains, pasted on the upper right-hand corner, a snapshot.

"MR. COMMISSIONER KELLOCK: Then where does ex. 119 come from?

"MR. WILLIAMS: Ex. 119 is a photograph of the face in ex. 18.

"MR. COMMISSIONER TASCHEREAU: It is enlarged?

"MR. WILLIAMS: Yes, an enlarged photograph of the head down to the neck.

"BY MR. COMMISSIONER KELLOCK: Q. Well, Mr. Smith, I did not realize when you objected to saying anything about ex. 119, just where ex. 119 had come from. That fact is in evidence, but you can appreciate that we have heard a great deal of evidence and all of it is not in the forefront of our minds at all times. I can now appreciate, however, why you desire counsel and do not desire to answer either of these questions without having an opportunity of seeing counsel.

"While we have a discretion, in considering it with my fellow Commissioner we believe it is a case where, in the circumstances, you should have the opportunity for which you have asked, and should have an opportunity to see your counsel and have your counsel here for the remainder of your examination before us. You mentioned the name of a counsel?

"A. Yes, sir: Mr. Aldous Aylen."

A recess was then taken for something over three hours. On resumption before the Commission, the following statements were made to the Commissioners:

"DURNFORD P. SMITH, recalled:

"Mr. H. Aldous Aylen, K.C., appeared.

"MR. WILLIAMS: Messrs. Commissioners, Mr. H. Aldous Aylen, K.C., is here. When Mr. Smith asked to be permitted to consult him this morning that was arranged. Mr. Aylen will tell the Commission what the advice is that he has given to his client. I take it that the question is whether your client will answer the question that has been put to him.

"MR. AYLEN: Messrs. Commissioners, my client is quite ready and willing to answer any questions which may be put to him."

The examination of appellant before the Commission then proceeded to its conclusion and appellant's counsel remained in attendance throughout the balance of such examination.

On behalf of appellant it is urged that his objection was in reality a twofold objection, namely, that in the first instance he desired counsel before being sworn, and later that he not only desired counsel before answering the questions put to him but

was also objecting that his answers to the questions put to him would tend to criminate him. By virtue of subs. 2 of s. 5 of The Canada Evidence Act, this latter objection, it is said, precluded the admission at his subsequent trial of his evidence given before the Commission.

I am of the opinion that appellant's objection cannot be so construed. As already demonstrated, his objection, up to the time his counsel appeared in the proceedings, was, initially, to being sworn before consultation with counsel, and, subsequently, to answering two specific questions addressed to him concerning photographs without first having such consultation. Before answering the specific questions objected to, he was afforded ample opportunity to consult counsel and did so. He then stated, through his counsel, his readiness and willingness to answer any questions which might be put to him, and the entire balance of his examination proceeded in the presence of his counsel and without further objection of any kind. In these circumstances, the submission that the requirements of the relevant subsection of The Canada Evidence Act were complied with, so as to invoke the privilege or immunity therein provided, fails completely. The wisdom or folly of appellant's course is immaterial. The immunity which, if invoked, was available to him under The Canada Evidence Act in fact was not invoked, and I consider that the learned trial judge was right in receiving the evidence objected to.

There remains the submission that no evidence was adduced linking appellant with the conspiracy.

Counsel for appellant argued that the trial judge's initial reference to the evidence of Mazerall, already quoted, must stand by itself as constituting the ground upon which appellant was held to be identified with the conspiracy and that, as he puts it, "the trial judge convicted Smith at that moment". Counsel therefore submits that the trial judge's subsequently expressed findings, as to other items of evidence upon this point, cannot be looked at to support his view of appellant's activities and further, that Mazerall's evidence is in fact no evidence of participation in the conspiracy on the part of appellant.

It is not without significance that in the passage in the learned trial judge's reasons under consideration, he states:

"The Crown produced *certain evidence* seeking to link the accused with the conspiracy. The *first item* consisted of the

evidence of the witness Mazerall." (The italics are mine.) The immediately following paragraphs of the trial judge's reasons then deal with certain other items of evidence, after which he concludes:

"*These three items* of evidence, that is the conversation with Mazerall, the finding of documents written by the accused in the files of the Russian Embassy, and the fact that documents which had been in his possession were also proven to have been in the hands of the Russian Embassy during the period he had them on charge, these three items of evidence I say undoubtedly established the fact that the accused was linked with the conspiracy." (Again the italics are mine).

I think the whole of the learned trial judge's reasons must be considered, and when they are so considered no error in law or fact has been established. The evidence amply discloses the existence of an unlawful conpiracy such as was charged: *Rex v. Mazerall, supra; Rex v. Lunan,* [1947] O.R. 201. The conversation between appellant and Mazerall, the existence in the Russian Embassy of data, in the handwriting of appellant, pertaining to the organization and work of the National Research Council, the unsatisfactory nature of appellant's explanation as to why he prepared certain of the documents referred to, the correspondence in time between the period of appellant's possession of a large number of secret documents withdrawn by him from the library of the Research Council and the period within which photostatic copies of these documents, or of copies of them, were said to have been made in the Russian Embassy, the fact that one document so obtained from the library had nothing to do with appellant's work and yet was the document mentioned in the papers brought from the Embassy as having been photographed there, are some of the facts in evidence from which the learned trial judge as a matter of law might reasonably infer appellant's participation in the concerted action which constituted the conspiracy, and convict him accordingly: *Rex v. Meyrick; Rex v. Ribuffi* (1929), 21 Cr. App. R. 94; *Paradis v. The King,* [1934] S.C.R. 165, 61 C.C.C. 184, [1934] 2 D.L.R. 88.

For these reasons I would dismiss the appeal against conviction.

Appellant also appeals against sentence. The sentence imposed is five years in the penitentiary. The evidence clearly in-

dicates, not only the gravity of the conspiracy in which appellant was engaged but the impressive extent of the information actually supplied by appellant and in contemplation of the conspirators for future supply. The sentence in fact is no more severe than that imposed upon some of the appellant's fellow-conspirators. No error in law as to the sentence has been, or could be, demonstrated, nor can the sentence be considered disproportionate to the crime or of undue severity. The sentence, therefore, will not be interfered with and the appeal against it will also be dismissed.

Appeal dismissed.

Solicitors for the accused, appellant: Aylen & Maclaren, Ottawa.

[COURT OF APPEAL.]

Rex v. German.

Criminal Law — Preferring Indictment — Charge Triable either Summarily or on Indictment — Summary Proceedings Begun — Indictment Preferred thereafter — The Criminal Code, R.S.C. 1927, *c.* 36, *ss.* 872, 873.

An accused was charged with (1) dangerous driving and (2) driving while intoxicated. Before the magistrate, counsel for the Crown announced his intention of proceeding by indictment on charge 1 and summarily on charge 2. A preliminary inquiry was then held on charge 1, and at its conclusion the magistrate, instead of committing for trial under s. 690 of The Criminal Code, admitted the accused to bail under s. 696. Charge 2 stood adjourned, by consent, until 9th December. On 2nd December a bill of indictment was preferred by counsel for the Crown at the General Sessions of the Peace, containing not only charge 1 but also charge 2. A true bill having been found, the accused was called on to plead. He pleaded not guilty to count 1, and his counsel then moved to quash count 2, on the sole ground that a charge for that offence was then pending before the magistrate, and no other Court had jurisdiction to deal with it. The motion to quash was dismissed and the trial proceeded, the accused being convicted on both counts.

On appeal it was argued that there was no jurisdiction on count 2, not only on the ground taken at the trial, but also on the ground that, since the accused had not been committed for trial under s. 690, the laying of count 2 was not authorized by s. 872. Counsel for the Crown, in answer to this objection, stated that count 2 had been laid by direction of the Attorney-General, under s. 873, and tendered affidavits to establish this direction.

Held, the appeal should be dismissed.

Per ROBERTSON C.J.O. and AYLESWORTH J.A.: In view of the fact that counsel for the appellant had relied upon a certified transcript of the proceedings before the magistrate, which was not in the record strictly before the Court, and in view of all the other circumstances,