[COURT OF APPEAL.]

Rex v. Mazerall.

Evidence—Admissibility of Evidence Given on Oath before Royal Commission—Inapplicability of Rules respecting Confessions to Police or Persons in Authority—Criminating Answers—Failure to Object—The Canada Evidence Act, R.S.C. 1927, c. 59, s. 5—Proof of Appointment of Commission.

Where the prosecution seeks to give in evidence against an accused upon his trial evidence given by him in other proceedings on oath duly administered by a body or person having authority, and it is proved that the accused, when examined, did not object to answer questions on the ground that the answers might tend to criminate him, the evidence is admissible without proof that it was "voluntary" in the sense that it was not induced by any promise or threat. The rules governing the admissibility of confessions are wholly inapplicable to the admission of such evidence, and there is no necessity for the trial of an issue by the judge as to its admissibility. *Rex v. Merceron* (1818), 2 Stark. 366; *Rex v. Haworth* (1830), 4 C. & P. 254; *Reg. v. Scott* (1856), Dears. & B. 47; *Reg. v. Coote* (1873), L.R. 4 P.C. 599, discussed; *Re Ginsberg* (1917), 40 O.L.R. 136; *Rex v. Barnes* (1921), 49 O.L.R. 374; *Rex v. Tass* (1946), 54 Man. R. 1, referred to.

Where the evidence so tendered has been given before a Royal Commission, and the Crown proves the Order in Council, made under proper statutory authority, for the constitution of the Commission, and that the persons named as Commissioners have proceeded to act as such, and were so acting when the evidence tendered was taken, there is sufficient proof of the authority of the Commissioners, without production of the actual instrument of appointment. The maxim *omnia praesumuntur rite esse acta* applies.

Conspiracy—To Commit Indictable Offences—Breaches of The Official Secrets Act, 1939 (Dom.), c. 49—Obtaining Information for Communication to Foreign Power—Purposes Prejudicial to Safety or Interests of the State—Sufficiency of Evidence.

On appeal from a conviction for conspiracy with others to commit an offence under The Official Secrets Act, *viz.*, for purposes prejudicial to the safety or interests of the State to obtain 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, *held*, the evidence, summarized in part in the reasons for judgment, was sufficient to support the verdict. It was true that the appellant had not taken an active part in all the activities of the conspirators, but there was ample evidence that he knew that the purpose, in the carrying out of which he was to take a part, was to supply, for communication to a foreign power, information, to be furnished by servants of the Government of Canada, of secret matters of the character charged in the indictment. The jury might reasonably infer, from different matters of evidence, that the appellant well knew of the existence of a conspiracy that went beyond his own part in it, and that it was of an unlawful character, as charged. *Rex v. Meyrick; Rex v. Ribuffi* (1929), 21 Cr. App. R. 94, referred to. Nor was it conclusive, in the circumstances, since it was proved that the appellant had agreed to supply information, as requested, that the only information actually supplied was not of a highly secret or confidential nature, since it was not unreasonable to assume that it would be useful to the foreign power in question to know what research activities were being carried on, and to have members of Canada's own research staff secretly keeping another Government informed of their work and its results was prejudicial to the interests of Canada as an independent State.

AN APPEAL by the accused from his conviction before McRuer C.J.H.C. and a jury. The judgment of McRuer C.J.H.C. as to the admissibility of certain evidence is reported *ante*, p. 511, 86 C.C.C. 137, 2 C.R. 1.

9th to 12th September 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

G. A. Martin, K.C. (*Roydon A. Hughes, K.C.*, with him), for the accused, appellant: The evidence of the accused before the Royal Commission should not have been admitted as evidence against him on this trial. The trial judge confused the rules respecting a witness's privilege against self-incrimination with those respecting confessions.

The trial judge's ruling that the body of law relating to the admissibility of confessions has no application to evidence given on oath, since the latter must be presumed to be true, is not supported by authority, and is directly contrary to the views expressed in Russell on Crimes, 8th ed. 1923, vol. 2, p. 2031; Wigmore on Evidence, 3rd ed. 1940, vol. 8, p. 387, s. 2266; Phipson on Evidence, 8th ed. 1942, p. 253. [ROBERTSON C.J.O.: Is there any case where a confession made on oath was excluded as not "voluntary" within the cases?] There is one referred to in Phipson, where an affidavit or sworn information was rejected on that ground.

There had clearly been an inducement by Inspector Harvison before the accused made a statement to him, which in turn was before he gave his evidence before the Royal Commission. [ROBERTSON C.J.O.: How can an inducement be material when the accused, in his evidence on the trial within the trial, swore that his evidence before the Commission was the truth?] The truth or falsity of a confession is not the criterion of its admissibility, although the rule is no doubt based upon the probability that a confession obtained by an inducement will not be true. The fundamental rule is that a confession so obtained is inadmissible. [ROBERTSON C.J.O.: But the effect of the accused's later evidence is that he was not influenced by any inducement, but told the truth before the Commission.] The rule is absolute that a confession obtained by improper means is inadmissible, and the Court will not inquire, when it is tendered in evidence, whether it is true or false. Neither the trial judge nor Crown counsel at the trial considered that the accused's later admission

was conclusive. [ROBERTSON C.J.O.: What I am pointing out is that the conversation with the police officer took place days before this evidence was given, and that the accused says that when he gave the evidence he told the truth.] There was no express finding by the trial judge that the evidence was not "induced", because he held that the rules as to inducements were inapplicable, and our submission is that such a finding was essential before the evidence could be admitted: *Reg. v. Croydon et al.* (1846), 2 Cox C.C. 67; *Reg. v. Thompson,* [1893] 2 Q.B. 12.

The accused, shortly after Inspector Harvison's statement that the Commission might take a lenient view if he "made a clean breast of it", made a statement to the inspector, and that statement was made part of the brief of Commission counsel, and the examination of accused before the Commission may have been much more complete than it would have been if there had been no such statement. The hope of leniency, induced by the inspector's remarks, may well have brought about a ready agreement by the accused with leading questions asked by Commission counsel. The accused, in his evidence on the trial within the trial, qualified his admission that the evidence was true.

If a confession has been improperly obtained, it will be excluded, even if it is clearly proved to have been true: *Rex v. Hammond* (1941), 28 Cr. App. R. 84; *Reg. v. O'Keefe* (1893), 14 N.S.W.L.R. 343. The very case relied on by the Crown here, and by the trial judge, *Walker v. The King,* [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353, merely states that compulsion *alone* does not render a statement inadmissible, thus clearly implying that other circumstances may make inadmissible a statement given under the compulsion of a statute. See also *Rex v. Steinson,* [1945] 3 W.W.R. 438, 85 C.C.C. 200 at 205, [1946] 1 D.L.R. 543.

Inspector Harvison's words are clearly an inducement within the authorities, and the inducing effect of such a statement need not be sworn to, but is presumed: *Gach v. The King,* [1943] S.C.R. 250, 79 C.C.C. 221, [1943] 2 D.L.R. 417. This being so, the effect of the inducement must be shown to have been removed before the confession can be admitted in evidence: Tremeear's Criminal Code, 5th ed. 1944, p. 760; Phipson, *op. cit.,* p. 258; *Rex v. Kong* (1914), 20 B.C.R. 71, 24 C.C.C. 142; *Rex v.*

Myles, 56 N.S.R. 18, 40 C.C.C. 84, [1923] 2 D.L.R. 880; *Rex v. Hammond, supra,* shows clearly that the truth of a confession is not decisive as to its admissibility as "voluntary". We refer to the discussion of this case in *Rex v. Weighill,* 61 B.C.R. 140, 83 C.C.C. 387, [1945] 1 W.W.R. 561, [1945] 2 D.L.R. 471. [ROBERTSON C.J.O.: That is hardly my point. My question was rather whether the accused's statement at the trial that he had told the truth before the Commission did not show clearly that no inducement had been operating at that time.]

Reg. v. Coote (1873), L.R. 4 P.C. 599, C.R. [6] A.C. 282, and *Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909, 7 Cox C.C. 164, relied on by the trial judge, are both cases where the previous statement on oath was not preceded by any promise or inducement. They deal only with the privilege against self-incrimination, and have nothing to do with the special rules as to confessions.

In the particular circumstances of this case, the line of cases holding that a witness is presumed to know the law and must object to answer questions before having the protection of s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, should not be applied. Here the accused had not the benefit of counsel's advice, and did not voluntarily waive any privilege. He may even have been led to waive it (if his conduct is held to amount to a waiver) by Inspector Harvison's inducement. *Rex v. Tass,* 54 Man. R. 1, 86 C.C.C. 97, 1 C.R. 378, [1946] 2 W.W.R. 97, [1946] 3 D.L.R. 804, is distinguishable on its facts from the case at bar, in several respects, particularly in that there was there no question of an inducement. The dissenting judgment of Dysart J., at p. 128 (C.C.C.), is, in our submission, a correct statement of the law. See also *Reg. v. Coldwell and Ryder* (1863), 2 W. & W. 208 at 210.

There was no proper evidence of the appointment of the Royal Commissioners. The Order in Council, P.C. 411/1946, does not appoint anyone, and is not itself a "commission" within the meaning of The Inquiries Act, R.S.C. 1927, c. 99, and there is therefore no evidence that the Commissioners had legal authority to take evidence on oath. [ROBERTSON C.J.O.: We know that the persons named in P.C. 411 sat as commissioners, and is there not a presumption, in such circumstances, that everything was validly done?] Not where the Crown produces an Order in Council, which in fact does not appoint a Commission.

[ROBERTSON C.J.O.: The Order in Council gives power to issue a commission, and surely we must presume that one was in fact issued.]

The essence of an offence under s. 3 of The Official Secrets Act, 1939 (Dom.), c. 49, is an intent or purpose prejudicial to the safety or interests of the State. This is not required under s. 4, but the charge here is one of conspiracy to violate s. 3. The indictment is defective in that it does not allege that the information to be collected, etc., was secret. The accused's evidence before the Commission negatives any such intent or purpose. According to this and other evidence, both the reports that he gave to Lunan were marked "confidential" only, and were given to Russian representatives at a conference in London within a few days after he gave them to Lunan, and were published in the following month. The evidence of the accused's superior officer is that if the accused had asked for permission to disclose this information to the Russians it would probably have been granted, and that the same type of information was actually being given to them from month to month.

To establish a conspiracy, a real agreement, or meeting of minds, must be shown. The evidence here is capable of supporting an inference that the accused, who says he gave only innocuous documents, never intended to give Lunan secret or important documents, and that he agreed only outwardly to Lunan's proposition. The charge, and the essence of the offence, is that the agreement was made for a purpose prejudicial to the State, and such an inference as this would negative such a purpose. This possible view of the evidence was never submitted to the jury by the trial judge. [ROBERTSON C.J.O.: Are you not attaching too much importance to these particular documents? The agreement between the accused and Lunan was far wider, and he agreed to be a part, even if only an insignificant part, of the general scheme.] The accused's own state of mind and intention is all-important in deciding what he actually agreed to do. [ROBERTSON C.J.O.: The jury are not required to believe his evidence on that point.] No, but they should have been given an opportunity to consider it. The trial judge's definition of the offence alleged in the indictment was wholly inadequate. He passed very lightly over the words referring to the purpose prejudicial to the safety or interests of the State, emphasizing the word "interests" only, and thus left the jury to think that

the accused's state of mind was not important. In reading from the accused's evidence to the jury, he omitted passages in which the accused said that he did not know the documents were marked "confidential", and thus withdrew these passages from their consideration.

Subs. 2 of s. 3 of The Official Secrets Act provides for a presumption, in certain circumstances, of a purpose prejudicial to the safety or interests of the State, but this subsection applies only "on a prosecution under this section", and cannot be invoked here, where the indictment was for conspiracy, under s. 573 of The Criminal Code, R.S.C. 1927, c. 36.

As to the effect of the trial judge's failure to draw this favourable evidence to the jury's attention, we rely on *Rex v. Hughes,* 57 B.C.R. 521, [1942] 3 W.W.R. 1, 78 C.C.C. 1 at 15-6, [1942] 3 D.L.R. 391, affirmed [1942] S.C.R. 517, 78 C.C.C. 257, [1943] 1 D.L.R. 1; *Rex v. Findlay,* 60 B.C.R. 481, 81 C.C.C. 183, [1944] 1 W.W.R. 609, [1944] 2 D.L.R. 773; *Brooks v. The King,* [1927] S.C.R. 633, 48 C.C.C. 333, [1928] 1 D.L.R. 268; *Markadonis v. The King,* [1935] S.C.R. 657 at 662, 64 C.C.C. 41, [1935] 3 D.L.R. 424; *Rex v. Harms,* [1936] 2 W.W.R. 114, 66 C.C.C. 134 at 141, [1936] 3 D.L.R. 497.

The essential question was whether there had ever been a real meeting of minds, and this was never put before the jury, nor was their attention drawn to evidence upon which they could have found that there was no such agreement: 15 Corpus Juris Secundum, 1939, p. 1061, s. 38 and note 29.

Lunan's reports to his superiors as to what the accused had done were not evidence against the accused of the truth of the statements therein, and should not have been admitted at the trial: Taylor on Evidence, 12th ed. 1931, vol. 1, p. 377.

Reverting to our first argument, there is no presumption of law against the commission of perjury, and this is therefore not a case of conflicting presumptions. The cases 100 years ago seem always to have excluded a statement of an accused before magistrates if it was made on oath, though not if it was unsworn. Part of the judgments in *Reg. v. Coote, supra,* and *Reg. v. Scott, supra,* is devoted to rejecting the idea that an oath rendered a statement inadmissible: see Russell, *op. cit.*, vol. 2, p. 2028.

Where an inducement is shown to have been held out, the Court will not enter upon an exhaustive inquiry to determine

whether or not it brought about the making of the statement: Wigmore, *op. cit.*, vol. 3, pp. 333-4.

The trial judge should not have told the jury that they might find corroboration of Gouzenko's evidence in the documents produced by him. Since the testimony of Gouzenko was required to authenticate the documents, they could not constitute *independent* evidence implicating the accused.

J. R. Cartwright, K.C. (*Lee A. Kelley, K.C.*, with him), for the Crown, respondent: The documents were properly put in as exhibits on Gouzenko's evidence, and when other evidence shows that statements in the documents are undoubtedly true, and it is obvious that Gouzenko could not have made them up, they are properly available as corroboration of his evidence. The trial judge's charge to the jury as to corroboration was unexceptionable. If the accused's evidence before the Royal Commission was properly admitted, it corroborates Gouzenko so amply that no error in the charge on this point could possibly have resulted in a miscarriage of justice.

The indictment need not allege, nor need we prove, that the documents handed over by the accused were secret. It is plain from s. 3(1)(*c*) of The Official Secrets Act that the offence does not include that element, and that the word "secret" in the paragraph qualifies only the following words "official code word, or pass word"; this is clear upon an ordinary grammatical construction of the paragraph, and is made even clearer by a consideration of subs. 2 of s. 3, where the order is transposed. By analogy, we refer to *Rex v. Simington*, [1921] 1 K.B. 451; and *Rex v. Crisp and Homewood* (1919), 83 J.P. 121. There was no motion to quash the indictment on this ground.

We submit that the presumption under s. 3(2) does apply in this case: *Desrochers v. The King*, 69 C.C.C. 322 at 332, [1938] 3 D.L.R. 128. In any case, however, the trial judge said nothing to the jury about any presumption, and we need not rely upon it, since the prejudicial purpose is amply shown by the evidence. The prejudicial purpose must be shown to exist, not in connection with the agreement, but in connection with the collection and transmission of information. We are in no way concerned with the accused's state of mind in entering into the agreement. What matters is what he agreed to do. The questions to be answered are: Did the accused agree to collect and communicate information? For what purpose was that information to

be collected and communicated? Was that purpose prejudicial to the safety or interests of the State? The trial judge, in his charge, made it plain that this prejudicial purpose was an essential ingredient of the offence, and no objection was taken to his charge in this respect. It is abundantly plain that the accused agreed to collect and communicate information which he knew was to be transmitted to a foreign power through unauthorized channels. No properly directed jury could have failed to find, on the evidence, that he had agreed as charged. There is no basis in the evidence for the suggestion that he agreed in words only, without any intention of actually giving any information of value. The jury were entitled to draw an inference from his failure to report to the authorities, and also from his failure to go into the witness-box in his own defence at the trial: *Rex v. Baugh* (1917), 38 O.L.R. 559 at 565, 28 C.C.C. 146, 33 D.L.R. 191. Such an explanation was not even suggested by counsel at the trial.

The failure to prove the formal appointment of the Commissioners was not fatal. Since The Inquiries Act, R.S.C. 1927, c. 99, permits the Governor in Council to appoint commissioners, and there is before the Court a certified copy of an Order in Council recommending such an appointment, and it appears that the two persons named did in fact sit as commissioners, the maxim *omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium* applies. As to the maxim, we refer to Broom's Legal Maxims, 10th ed. 1939, p. 642. The burden lay on the accused, if he challenged the validity of the appointment, to substantiate his challenge. In any case, the burden, if it lay on the Crown, was fully met. Sections 2 and 3 of The Inquiries Act, and the terms of P.C. 411/1946, make this quite clear. As to the words "commission in the case", as used in s. 3, we refer to Craies, Statute Law, 4th ed. 1936, p. 150; the Shorter Oxford Dictionary, 2nd ed. 1936, vol. 1, p. 349, *s.v.* "commission"; *Rex v. Dudman* (1825), 4 B. & C. 850 at 854, 107 E.R. 1275; *Mansell v. The Queen* (1857), 8 E. & B. 85 at 109, 120 E.R. 32. The word "commission" has no particular meaning, and is not defined in The Inquiries Act.

The evidence given by the accused before the Royal Commission was properly admitted as evidence against him at this trial. The body of law relating to confessions has nothing to do with evidence lawfully given on oath before a tribunal entitled

to receive it, which is admissible on quite different principles. The cases do not support the statements to the contrary in the text-books. *Reg. v. Gillis* (1866), 11 Cox C.C. 69, cited by Phipson, *loc. cit.*, is distinguishable on its facts, and in any case is not binding on this Court. In this, and every other case which appears to be contrary to the principle just stated, the witness was under no compulsion to give the evidence in question. *Reg. v. Cherry* (1871), 12 Cox C.C. 32 at 34, shows the distinction between evidence volunteered and evidence given under the compulsion of a statute. [ROBERTSON C.J.O.: Best on Evidence, 12th ed. 1922, pp. 472, 475, deals in separate sections with the admissibility of confessions and that of self-incriminating evidence.] Our submission is that that is the correct way to treat the matter. Wigmore, *loc. cit.*, in support of his dogmatic statements, refers back to vol. 3, pp. 298-311, ss. 848-50. There is no case cited in those sections to support the principle here contended for by the appellant. They rather support our submission: see particularly p. 308. Russell, *loc. cit.*, cites no case which can support the appellant's contention, and there is a statement in our support at p. 2032, which is borne out by *Reg. v. Goldshede and Sidney* (1844), 1 Car. & K. 656, 174 E.R. 979; *Reg. v. Sloggett* (1856), Dears. C.C. 656, 169 E.R. 885; *Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909; *Stockfleth v. De Tastet et al.* (1814), 4 Camp. 10, 171 E.R. 4.

The Australian cases cited by the appellant are not authorities against our contention, and in any case are not binding on this Court. *Reg. v. Coldwell and Ryder* (1863), 2 W. & W. 208, is based upon an Australian statute which is not available here, but would appear, from the judgments, to be quite different from anything in force in Canada. In *Reg. v. O'Keefe* (1893), 14 N.S.W.L.R. 345, a confession (not on oath) had been improperly admitted in evidence against the accused, and the Court refused to hold that there had been no substantial wrong or miscarriage merely because, after the improper admission of this confession, the accused had gone into the witness-box and admitted his guilt.

The question of an inducement may affect the weight of the evidence, but has nothing to do with its admissibility. The passage referred to in *Rex v. Steinson,* [1945] 3 W.W.R. 438, 85 C.C.C. 200 at 205, [1946] 1 D.L.R. 543, which is *obiter* only, is based on the fact that there are different ways in which a man may make a statement "under the compulsion" of a statute.

One way is as in the present case, where the statute requires him to give evidence on oath. Another is as in *Walker v. The King,* [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353, where information must be given, but not on oath. The words "for that reason alone" in the *Walker* case may mean that an accused may rely upon the presence of an inducement or threat in the case of such a statement as was there required.

There was no duty on the trial judge to determine whether or not there had been an inducement. *Reg. v. Croydon* (1846), 2 Cox C.C. 67, and *Reg. v. Thompson,* [1893] 2 Q.B. 12, do not support the argument that there was such a duty; in neither of them was it a question of the admissibility of evidence given on oath. It is irrelevant, for the same reason, whether or not Inspector Harvison was a person in authority.

There is nothing in any of the cases to shake the authority of the decisions relied on by the trial judge in this connection. We refer also to *Rex v. Tass*, 54 Man. R. 1, 86 C.C.C. 97, 1 C.R. 378, [1946] 2 W.W.R. 97, [1946] 3 D.L.R. 804, particularly the judgment of Bergman J.A. at pp. 104, 108, 109, 115 (C.C.C.).

If, as argued, the accused failed to object to answer questions (as required for the protection of s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59) because of the inducement previously held out by Harvison, surely he would have said so at the trial within a trial. He said nothing of the sort, but rather that Harvison's remarks induced him to speak truly, and to reject his first idea, which was to deny everything.

The appellant's argument that the evidence does not disclose a purpose prejudicial to the safety or interests of the State cannot be supported. The whole evidence in the case must be considered in this connection, and that evidence makes it clear that the purpose of the obtaining and communicating of information was highly prejudicial.

The statements in the documents are properly admissible as evidence against the accused, because he has admitted his agreement with Lunan, and these statements by Lunan and others were clearly made in furtherance of the common object: *Reg. v. Connolly and McGreevy* (1894), 25 O.R. 151, 1 C.C.C. 468; *Rex v. Wilson* (1911), 4 Alta. L.R. 35, 21 C.C.C. 105, 1 W.W.R. 272, 19 W.L.R. 657; *Rex v. Hardy* (1794), 24 State Tri. 199 at 447; 31 Corpus Juris Secundum, 1942, s. 362.

It is not misdirection for the trial judge to fail to put to the jury a "theory of the defence" which has not been put forward at the trial, but has been evolved subsequently, on a careful consideration of the record. It was never suggested at the trial that the accused had not really agreed with Lunan. It has repeatedly been laid down that the agreement often cannot be directly proved, but must be inferred from the overt acts. What the trial judge told the jury about the theory of the defence was proper and consistent with the case presented at the trial, and was sufficient within the authorities. He was not required to go, point by point, over every submission made in the trial.

If there was any error on the part of the trial judge, apart from the admission of the evidence given before the Royal Commission, that evidence makes the accused's guilt so abundantly plain that the appeal should be dismissed despite such error, under s. 1014(2) of the Code: *Rex v. Haddy*, [1944] K.B. 442, [1944] 1 All E.R. 319, 29 Cr. App. R. 182; *Stirland v. Director of Public Prosecutions*, [1944] A.C. 315, [1944] 2 All E.R. 13, 30 Cr. App. R. 40.

G. A. Martin, K.C., in reply: It is obvious that a prosecution for conspiracy cannot be a prosecution "under" The Official Secrets Act, since the accused, if subsequently indicted under the Act, could not plead *autrefois acquit* or *autrefois convict*: *Rex v. Brown*, [1945] O.R. 869, 85 C.C.C. 91, [1946] 1 D.L.R. 741.

No authority, except possibly *Reg. v. Cherry, supra*, has been cited to show that evidence on oath is admissible notwithstanding a previous inducement or threat. [ROBERTSON C.J.O.: Where the rules respecting confessions are applicable, the Crown is required to prove affirmatively that the statement in question was "voluntary". Apparently it was not called upon in any of the cases to show that there had been no inducement, and does that not indicate that the rules as to inducements were not considered applicable?] The matter does not appear to have arisen at all. The cases holding that the burden is on the Crown appear to date from *Reg. v. Thompson, supra*, in 1893, whereas both *Reg. v. Scott, supra*, and *Reg. v. Coote, supra*, were decided before that date. These two cases, relied on both by the trial judge here and by the Supreme Court in *Walker v. The King, supra*, must be considered in the light of the law as it existed

when they were decided, under which an accused person could ordinarily not be sworn in his own case at all. *Reg. v. Cherry, supra,* is a *nisi prius* judgment, and what was said to the accused there was not an "inducement" within the meaning of the rules relating to confessions.

The accused's obligation in this case was the same as that on any witness on whom a *subpoena* is served—to attend, and to answer such questions as were put to him. Commission counsel's questions here were no doubt formulated very largely from the statement taken from the accused by the police, and may have been much more thorough and searching than they would have been if there had been no such statement. The inducement which brought about the original statement therefore probably caused the accused to go beyond what would otherwise have been his legal obligation.

While the trial judge was not bound to read all of the evidence to the jury, he was not entitled to read only some of it, omitting those parts on which the defence relied, and then tell the jury that he had "dealt with" or "covered" all of it.

There is no evidence that the accused knew the extent of the conspiracy, as set out in the particulars. If we are limited to the particular conspiracy set out in the indictment, at least half the documents put in at the trial were inadmissible. [ROBERTSON C.J.O.: Surely the cases are to the effect that if a man knowingly enters a conspiracy he is responsible for the whole of that conspiracy, even if he does not know all the details.] Only within the common purpose to which he agreed.

Many of the documents were not admissible at all—*e.g.,* the diary of Col. Zabotin. A mere personal narrative cannot be an act or declaration in furtherance of the common purpose: Phipson, *op. cit.,* p. 93; *Rex v. Wark* (1898), 33 L. Jo. 615.

As to substantial wrong or miscarriage of justice, we refer to *Maxwell v. Director of Public Prosecutions,* [1935] A.C. 309 at 323, 24 Cr. App. R. 152.

Cur. adv. vult.

16th October 1946. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—The appellant appeals from his conviction by McRuer C.J.H.C. and a jury, at Ottawa, on the 22nd May 1946, on a charge that he, 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 Vassili M. Rogov, Colonel Nicolai Zabotin, David Graham Lunan and Israel Halperin, one with another or others of them, and with other persons unknown, to commit an indictable offence, to wit, a breach of Section 3, Subsection (1)(c) of The Official Secrets Act, being Chapter 49 of the Statutes of Canada, 1939, 3 George VI, that is to say 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 Section 575 of The Criminal Code, in such case made and provided."

The appellant is a graduate of the University of New Brunswick in electrical engineering, and is a member of the American Institute of Electrical Engineers. He was born at Fredericton, in the Province of New Brunswick, in the year 1916, and is a married man. He was employed with the Canadian Broadcasting Corporation in Ottawa from 1939 until January 1942. On the 13th January 1942 he entered the service of the National Research Council at Ottawa, where he became an engineer in the Radio Research and Development Section, until some time in the year 1944. He then became an engineer in the Air Force Section of the Radio Branch of the National Research Council, where he was employed at the time of the matters with which this prosecution was concerned. The National Research Council is a branch of the Government of the Dominion of Canada, and the appellant was required, upon his engagement, to take the oath of allegiance, an oath of office and an oath of secrecy.

The Official Secrets Act, 1939 (Dom.), c. 49, provides in s. 3(1)(*c*) as follows:

"(1) If any person for any purpose prejudicial to the safety or interests of the State,

"(*c*) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; he shall be guilty of an offence under this Act."

Section 14 of The Official Secrets Act applies to such an offence. It provides that where no specific penalty is provided in the Act, any person who is guilty of an offence under the Act shall be deemed to be guilty of an indictable offence.

The charge of conspiracy on which the appellant was tried was laid under s. 573 of The Criminal Code, R.S.C. 1927, c. 36, which is as follows:

"Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence."

Certain events occurred that preceded the laying of the charge of conspiracy against the appellant, and I should state them here.

On the 15th February 1946, the appellant was taken into custody by an officer of the Royal Canadian Mounted Police, and was detained in custody in the police barracks in Ottawa under the authority of an Order in Council of the 6th October 1945, purporting to be made under powers conferred upon the Governor General in Council by The War Measures Act, R.S.C. 1927, c. 206. By this Order in Council the Acting Prime Minister or the Minister of Justice, if satisfied that, with a view to preventing any particular person from communicating secret and confidential information to an agent of a foreign power, or otherwise acting in any manner prejudicial to the public safety or the safety of the State, it was necessary so to do, was authorized to make an order that any such person be interrogated and/or detained in such place and under such conditions as he might from time to time determine. Clause 2 of the Order in Council provided that any person shall, while detained by virtue of an order made under the Order in Council, be deemed to be in legal custody.

While still in the custody of the Royal Canadian Mounted Police, under the authority aforesaid, no charge having as yet been laid against him, the appellant, on the 27th February 1946, was brought before a Royal Commission, the members of which were The Honourable Robert Taschereau and The Honourable R. L. Kellock, both judges of the Supreme Court of Canada. This Royal Commission was appointed by Order in Council of 5th February 1946, made under The Inquiries Act, R.S.C. 1927, c. 99, with authority "to inquire into and report upon which public officials and other persons in positions of trust or other-

wise have communicated, directly or indirectly, secret and confidential information, the disclosure of which might be inimical to the safety and interests of Canada, to the agents of a Foreign Power and the facts relating to and circumstances surrounding such communication".

The Commissioners were expressly empowered to summon before them any person or witness, and to require them to give evidence on oath or affirmation, orally or in writing, and to require them to produce such documents and things as the Commissioners deemed requisite to the full investigation of matters into which they were appointed to examine. Exercising this power, the Commissioners administered an oath to the appellant, and he was examined by counsel for the Commissioners and by the Commissioners themselves. The appellant was not represented by counsel before the Commissioners, and it does not appear that he expressed any desire to have counsel. The questions put to him, and his answers thereto, were taken down in shorthand, and extracts from a transcript of this evidence, proved by the shorthand reporters who took it down, were put in as evidence by the prosecution on the trial of the appellant.

This evidence of the appellant taken before the Commissioners formed an important, and indeed an essential, part of the case against him on his trial, and its admissibility in evidence against him was strongly contested at the trial, and again upon argument of the appeal.

It is this evidence of the appellant upon which the Crown mainly relied to connect him with a conspiracy, the existence of which, according to the contention of the Crown, had been proved by the evidence of other witnesses introduced earlier in the trial. The appellant's evidence is also of importance upon the question of the purposes and scope of the conspiracy, although it is not the only evidence of these matters. The evidence can hardly be called a confession by the appellant that he had committed any criminal offence, and, as already stated, the appellant had not been charged with any criminal offence at the time of his examination before the Royal Commission. There are, however, admissions by him in his evidence that, beyond question, may be said to tend to criminate him. The answers made by him upon his examination were made without objection by him.

Counsel for the Crown relied upon s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, which is as follows:

"No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

"2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

This provision of The Canada Evidence Act is, by s. 2 of the Act, made to "apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf".

The admissibility of the evidence was contested upon several grounds:

It was contended that the Crown must first show that the Royal Commission was legally appointed, and that its proceedings were legal and strictly within the authority given it. It was contended that the Crown must first show that the statements made in evidence by the appellant were made voluntarily, in the sense that there was "an absence of fear of prejudice or hope of advantage held out by persons in authority". A third ground of objection was that the Royal Commission, even if shown to be properly constituted, had, by its conduct, lost jurisdiction to examine the appellant under oath.

It is, in my opinion, only the second of these objections that calls for any extended comment. With respect to the first objection, there is this to say, that the Crown did in fact prove in a proper way the Order in Council for the constitution of the Royal Commission, and that the persons named as Commissioners proceeded to act as such, and were so acting when the evidence objected to was taken. It seems to be clearly a case for the application of the maxim *omnia praesumuntur rite esse acta*: see Taylor on Evidence, 12th ed. 1931, pp. 135 and 155.

As to the third of the objections, what I take to be relied upon in support of it is the fact of the appellant's detention for a period before his evidence was taken; that he was brought before the Commissioners, not by the process of a *subpoena*, but in charge of the police who had detained him in custody; and that he did not have the assistance or advice of counsel. Whatever value these grounds of objection might have in considering the weight that ought to be given to the appellant's evidence taken before the Commissioners, I am quite unable to see how they could affect their right to examine him. The detention of the appellant in custody was not by the authority of the Commissioners, nor had they authority to release him. In examining the appellant on oath they were simply carrying out the purpose of their appointment. The retaining of counsel for the appellant was entirely a matter for him.

I deal then with the second objection. The ground upon which a confession, or the admission by an accused person of a fact that may tend to criminate him, is admitted in evidence against him, is that it may be presumed that he will not admit anything against his own interest, and which may be assumed reasonably to be within his knowledge, unless it be true. If, however, such confession or admission is made after a charge has been made, even informally, against the accused, to, or in the presence of, a person in authority, such as, for example, a constable who has the accused in custody, or the prosecutor, or the accused person's master, if the offence has been committed against the master's person or property, then the burden is cast upon the prosecution of establishing that the confession, or admission, is voluntary, in the sense that it was not induced by any threat or by any promise or inducement. Until the Crown has established that the confession, or admission, made in these circumstances was voluntary, in the sense stated, the confession, or admission, is not admissible in evidence. The principle upon which this rule is founded is not that there is any *prima facie* presumption that the statement is untrue, but rather that the accused may have been influenced to say what is untrue, and, it being uncertain whether the statement is true, it would be unsafe to receive a statement made under any influence or fear.

The rule is of long standing. Sir Matthew Hale (who died in 1676) in his "Pleas of the Crown", vol. II, p. 284, in dealing with the reception in evidence of confessions by the prisoner upon his

examination by a justice of the peace, taken without oath, says, "As to the examination of the prisoner it must be testified, that he did it freely without any menace, or undue terror imposed upon him . . ." More than a century later there is the case of *Rex v. Warwickshall* (1783), 1 Leach 263, 168 E.R. 234, where it was said, ". . . a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." See also *Reg. v. Thompson,* [1893] 2 Q.B. 12 and *Ibrahim v. The King,* [1914] A.C. 599 at 609-614. I have made the older of these references in support of a well-established rule because in the course of the argument counsel for the appellant, in commenting upon an observation from the Court that the rule would not seem ever to have been applied in the case of admissions made in the course of evidence properly taken under oath, suggested that the rule requiring it to be first established that the statement was voluntary is of fairly recent origin. The rule is in fact a long-standing rule of the common law.

Notwithstanding that the rule is an ancient one that casts a burden upon the Crown to establish that a confession or an incriminating admission, made to one in authority, was voluntary in the understood sense, counsel for the appellant was unable to cite any case where any such proof was required from the Crown before admitting in evidence statements of the accused made in the course of his examination on oath before one duly authorized so to take the examination. There are many reported cases where such evidence has been admitted, but in none of them that I have found, or to which we were referred, was it required of the Crown that first it must be established that the statement was voluntary. These reported cases go back a long way. In *Rex v. Merceron* (1818), 2 Stark. 366, 171 E.R. 675, on the trial of an indictment against a magistrate for misconduct in his office, the evidence of the accused given before a committee of the House of Commons was admitted against an objection that the statements had been made under compulsory process from the House of Commons, and were not voluntary. In *Rex v. Haworth,* (1830), 4 C. & P. 254, 172 E.R. 693, evidence given by a witness on the trial of another for forgery was admitted against him on his own subsequent trial for forgery. In *Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909, 7 Cox C.C. 164, the evidence given

by a bankrupt on his examination in the Court of Bankruptcy was admitted against him on his trial upon a criminal charge. In *Reg. v. Coote* (1873), L.R. 4 C.P. 599, C.R. [6] A.C. 282, the depositions of a witness taken before fire commissioners investigating, under a statute of the Province of Quebec, the origin of fires, were held admissible as evidence against him when subsequently indicted for felony.

In none of the cases I have cited—and there are a number of similar cases—does it appear that the Crown was required, before the statements made by the accused on oath were admitted in evidence, to establish that there had been no promise or threat that induced them. The statements were admitted upon proof that the accused had made them on oath duly administered. No distinction seems to be made between statements made in a judicial proceeding and statements made upon an inquiry similar in character to that conducted before the Royal Commission here. I refer also on that point to *Re Ginsberg* (1917), 40 O.L.R. 136, 38 D.L.R. 261, and *Rex v. Barnes* (1921), 49 O.L.R. 374, 36 C.C.C. 40, 61 D.L.R. 623. I should also cite the recent decision of the Court of Appeal of the Province of Manitoba in *Rex v. Tass*, 54 Man. R. 1, 86 C.C.C. 97, 1 C.R. 378, [1946] 2 W.W.R. 97, [1946] 3 D.L.R. 804, which I have had the advantage of reading during the consideration of this appeal.

A limited privilege was allowed a witness who objected to answer when, under examination on oath, a question was put to him and an answer might tend to expose him to any criminal charge, or to a penalty or forfeiture. The objection must, however, be that of the witness, and the judge must determine, when the objection was taken, whether, in the circumstances of the case, the objection was reasonably well-founded. The maxim *nemo tenetur seipsum accusare* was applied, subject to these limitations. It is important also to note that the maxim applies to the time when the question is put, not to the use sought to be made of the answer, when the answer has been given: *Rex v. Scott*, *supra*, *per* Lord Campbell at p. 59 (Dears. & B.).

In Wigmore on Evidence, 3rd ed. 1940, Vol. 8, s. 2266, the distinction is clearly pointed out between the rule excluding a confession that may be untrustworthy because of the existence of some promise or threat that may have influenced the making of it, and the privilege allowed a witness against making answers that may tend to criminate him. The effect of s. 5 of The Canada

Evidence Act, which I have already quoted, is to make an even more obvious distinction. The witness, under the statute, must answer when examined on oath, whether the answer tends to criminate him or whether it does not, and whether he objects or does not object. His privilege now is, as defined by the statute, by objecting to prevent the use of his answer against him in other proceedings.

The appellant made no objection to answering the questions put to him on his examination before the Royal Commission, and, in my opinion, that circumstance determines the question of the admissibility of his statements then made when tendered in evidence against him upon his trial. If I am right in this opinion, then there was no occasion for hearing witnesses on the *voir dire* to enable the trial judge to determine the admissibility of the evidence tendered. That question of admissibility was to be determined by applying the rules of evidence to facts that were not substantially in dispute, and that were subsequently put in evidence again before the jury. It was proved that the appellant, when on oath before a Royal Commission duly appointed and acting within its authority, had been asked questions relevant to the inquiry the Commission was appointed to make, and that he had answered these questions without objection. That, in my opinion, was all the Crown should be required to show to become entitled to have the appellant's answers so given admitted in evidence against him on this trial.

It is, I think, proper, before leaving the question of the admissibility of the appellant's evidence given before the Royal Commission, to note that in answer to a question put to him by counsel for the Crown in the course of appellant's cross-examination on the *voir dire* as to whether the statements he made in the evidence he gave before the Royal Commission were true or not, the appellant said, "At the time the questions were put to me I did not intentionally try to evade the issue by misleading answers. I did in fact try to tell the truth. But on reading it over with a better chance to recollect, I find that several of the answers are not strictly the truth; that in answering the first question put to me I would answer as truthfully as I could, sir. Then following that question I might be asked, on the basis of my answer, several leading questions to make me answer what was not in fact actually true." Upon being invited by the cross-examining counsel to tell of any matters of substance which he

said were untruthfully stated or incorrectly stated, objection to the question was taken by counsel for the appellant, and on the suggestion of the trial judge the question was not pressed, against objection by the appellant's counsel. Counsel for the Crown then asked, "Mr. Mazerall, would this be a fair and correct statement, that throughout the giving of your evidence before the Royal Commissioners you endeavoured to the best of your ability to tell the truth throughout?" The answer was "Yes."

The appellant did not, at this stage of the trial nor before the jury, avail himself of the opportunity that was open to him to point out or to correct or explain any errors or untrue statements in his evidence given before the Royal Commission. It is fair to assume that there was nothing of substance to correct or explain.

The appellant, in his evidence given before the Royal Commission, said that he had been a member of a group interested in studying the theories of Karl Marx, and that one Lunan had got in touch with him. Lunan was on the editorial staff of the Military Journal. He had, according to other evidence, been for some time in contact with members of the staff of the Russian Embassy, and had associated himself with them in procuring, for communication to Moscow, information from inside regarding what was going on in various Government departments at Ottawa. To Lunan had been delegated the getting of appellant into their circle of informants—"into the net" is the rather suggestive phrase used at the Embassy. According to the evidence of the witness Gouzenko, the records of the Embassy showed that what it was designed to get the appellant to do was "to give the models of developed radio-sets, its photographs, technical (data) facts and for what purpose it is intended. Once in three month to write the reports in which to characterize the work of Radio Department, to inform about the forthcoming tasks and what new kinds of the models are going to be developed."

The appellant, in his evidence before the Royal Commission, admitted that Lunan had asked him if he would supply him with information for the Soviet Union. He could not recall his own immediate answer, but thought he must have told Lunan that he would think it over. The source of the information he was asked to supply, he admits, would be in the course of his employment. Appellant was not quite certain as to all the details of his interviews with Lunan. At one place there is read to him an extract

from a report of Lunan's to the Russian Embassy in regard to his progress with the appellant, reading as follows, "I gave him a full quota of tasks, and he promised reports on his work and on various other aspects of the general work at his place." He was asked, "What do you say about that?" To this his answer was, "That is true. I told him I would, but I did not." Later in his evidence the following questions were asked and answers given:

"Q. There would be lots of things, of course, in your laboratory that you would not think of giving because they would not be very novel or interesting, I suppose. What was to guide you in selecting information to give to Lunan? A. Just my own interests, I suppose, what I thought they might want.

"Q. What you thought the Soviet people might want, is that so? A. Yes, not actually—well, I suppose it would have amounted to that. There was no definite request for anything specific at all.

"Q. I suppose it did not need to be put in words. You correct me if I am wrong, but you would understand from such a request that Lunan wanted you to give him information that would enable him to pass on to the Russians and keep them apprized of what was going on in the Research Council? A. That is entirely correct."

The appellant did in fact supply Lunan with copies of two reports of his branch of the National Research Council. They are ex. 34, which is a report "re Airborne Distance Indicator", dated 15th July 1945, and ex. 35, which is a report "re Interim and Long Term Proposals covering Short Distance Navigational Systems for Airways and Airport Control", dated 1st June 1945. Appellant's meetings with Lunan occurred in June and July 1945, and the reports were handed to Lunan in July. There was much secrecy in their contacts, and on the occasion when the appellant handed the two reports to Lunan the latter informed him that he (appellant) would be known by the name "Bagley" in their relations. Appellant says that the whole dealings with him were to be secret. He admits that the purpose of handing the reports to Lunan was for the latter to turn them over to the representatives of the Soviet Union for them to make copies of them or read them. Later the reports were returned by Lunan to appellant, on an occasion when, by arrangement, they met on a street corner. The precautions to avoid discovery, which were

enjoined by the Embassy, and which appear to have been faithfully observed by the appellant and others, plainly indicate the unlawful character of their activities, and the appellant's recognition of it. He was asked upon his examination whether he would not speak to Lunan about trying to obtain other information for the Soviet Union, in the event that they met at one of the meetings of the study group. The evidence proceeded as follows:

"A. Oh no, in the group there would be no reference to it.

"Q. There would be no reference to it? A. No, indeed.

"Q. Why do you say 'indeed'? A. Because that would mean that he would have to tell the other people in the group.

"Q. And you wanted that to be kept secret? A. Oh, yes."

The only direct contact the appellant is shown to have had with any person other than Lunan, in regard to supplying information for the Russian Embassy, was with one Durnford Smith. He was an engineer in the Radio Branch of the Research Council. Smith asked appellant if Lunan had approached him, and appellant told him he had. This was subsequent to the handing of exhibits 34 and 35 by appellant to Lunan. Smith wanted to know whether they could get together and pool their information. Appellant did not recall exactly what he replied, except that he did not think he wanted to. He assumed from the conversation that Lunan had spoken to Smith also.

Counsel for the appellant took the point that the appellant may have been influenced to refrain from exercising his privilege to object to answer before the Royal Commission, and thereby to obtain the benefit of s. 5 of The Canada Evidence Act, by a statement that the appellant said, in the course of his examination on the *voir dire*, had been made to him by the police officer in whose custody he was before he gave evidence before the Royal Commission. The statement attributed by the appellant to the police officer was that the appellant would appear before the Royal Commission, and that if the appellant were to "make a clean breast of it" he felt the Commission would take a more lenient view. No question of the appellant having been influenced to forego his right to object to answer was raised at the trial, and there is nothing to support it now, except the ingenious suggestion of counsel. It would require some evidence that the appellant was in fact so influenced before consideration could be given to such an objection, even if the statute warranted the extension of the definitely qualified privilege it allows to cover such a case.

It is objected by counsel for the appellant that there is no evidence to support a finding that the appellant was a party to a conspiracy for the purposes charged in the indictment, that is, for purposes prejudicial to the safety or interests of the State. There was, first, the evidence of one Gouzenko, who had been a member of the staff of the Russian Embassy at Ottawa, describing in considerable detail certain activities on the part of the other persons named in the indictment, as persons with whom the appellant conspired, which had for their purpose the obtaining and communicating, to officials of the Russian Embassy, for transmission to the Government of the Union of Soviet Socialist Republics at Moscow, of information in respect to military, naval and air force arrangements in Canada, inventions, munitions of war, developments in radio and radar, and other matters. It is true that the appellant did not take an active part in all these matters, and probably did not know the full extent of the conspirators' activities. There is, however, ample evidence that he knew of the purpose, in the carrying out of which he was asked to take a part, to supply, for communication to Moscow, information, to be furnished by servants of the Government of Canada, of matters of the character charged in the indictment. The secret and undercover methods adopted, the care to avoid discovery of what was going on, and of who were actively participating, support an inference that a jury could reasonably draw, that the appellant well knew of the existence of a conspiracy that went beyond his own part in it, and that it was of an unlawful character, as charged: *Rex v. Meyrick; Rex v. Ribuffi* (1929), 21 Cr. App. R. 94, 45 T.L.R. 421.

Much was made by appellant's counsel of evidence indicating that the information actually supplied by the appellant, through Lunan, to be forwarded to Moscow, was of little value, and that it could have been obtained by the Embassy at Ottawa by ordinary open methods. That one overt act, however, is not all the evidence of an agreement by the appellant to become one of those taking a part in the carrying out of the purpose charged. There was first his definite agreement with Lunan to supply information. All his conduct is to be looked at as well, including his communications and meetings with Lunan, and his conversation with Smith, whom he knew also to be in the plan. Neither is the act of furnishing Lunan with exhibits 34 and 35 entirely

without significance, notwithstanding their lack of any great value for any secrecy of the information they contained, or of any strictly confidential character. It was an act done by the appellant, intended as a contribution to the object of the conspirators. The appellant does not suggest that he was merely playing a game on Lunan in supplying these exhibits, or that his conduct was a mere pretence and not intended as a real compliance with Lunan's request, nor was it so taken by Lunan. The documents were taken to the Embassy to be copied or photographed, and the appellant displayed some interest in having them returned to him. Neither can it be assumed that only information upon new discoveries or developments was of value to be sent to Moscow, and the supplying of it against the interests of Canada. It is not unreasonable to assume that it would be useful to Moscow to know what the activities in the Research Branch at Ottawa really were, from time to time. To have members of its own research staff secretly keeping another Government secretly informed of their work and its results, was prejudicial to the interests of Canada as an independent State.

Appellant's counsel also argued that Gouzenko, who gave evidence of the existence of a conspiracy, and of its purpose, and of what was done to carry it out, was an accomplice, and that his evidence was not corroborated. The appellant's evidence, in my opinion, affords sufficient corroboration.

Upon the whole case it was a matter for the jury ultimately to decide whether the charge of conspiracy was made out upon the evidence. It was within the competence of the jury, in considering their verdict, to make reasonable inferences from the facts proved. There was, in my opinion, evidence before them sufficient to support the conviction, and for the reasons I have stated there was no material evidence of consequence admitted for the Crown that, in my opinion, was not properly admitted.

It is not necessary for the disposition of this appeal that we should consider, or have any opinion upon, the wisdom or propriety of the action of the Government of Canada in passing the Order in Council authorizing the detention of the appellant and others suspected of like misconduct, nor of what was done under the authority of that Order in Council. The appellant's own evidence, given upon the *voir dire* in the course of his trial, makes it plain that his sworn testimony before the Royal Commission was not affected by these matters. His purpose, he says, was still

to tell the truth, and if that condemns him, as, in my opinion, it does, our duty on this appeal is to uphold his conviction. It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true.

In my opinion the appeal should be dismissed.

(I have used the expression "examination on the *voir dire*" throughout the judgment to denote the examination, during the course of the trial, but by the trial judge in the absence of the jury, of witnesses on oath, to enable the trial judge to rule on the admissibility of evidence. That is a common use of the expression in the courts of this Province, although more generally it has been used to denote an examination to determine the competency of a witness, the oath administered being to answer truly all such questions as the Court shall demand of him: see Taylor on Evidence, 12th ed. 1931, p. 880; Roscoe's Criminal Evidence, 15th ed. 1928, pp. 132, 147, 160.)

Appeal dismissed.

Solicitors for the accused, appellant: Hughes and Laishley, Ottawa.