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R. v. Vallières

Regina v. Vallières

Quebec Court of Appeal

Tremblay, C.J.Q., Owen, J.A., Montgomery, J.A., Turgeon J.A., Deschenes, J.A.

Judgment: February 28, 1973
Docket: None given.

Counsel: L. Meme, for accused

P. A. Belanger, Q.C., for the Crown

Subject: Criminal; Criminal

***Tremblay, C.J.Q.* (translation):**

1 I agree with the opinion of Deschenes, J.

***Owen, J.A.* (dissenting):**

2 The first problem in this appeal by Pierre Vallières against a conviction based on a verdict of manslaughter is whether this Court should confirm the conviction or direct a verdict of acquittal to be entered. This involves forming and expressing an opinion as to whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

3 Section 613(1) (*a*) (i) of the *Criminal Code* in part provides:

> 613(1) On the hearing of an appeal against a conviction ... the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

4 Regardless of how much evidence is cited and how much of the previous literature on the subject is repeated therein, the notes of a Judge in appeal boil down to his opinion as to whether the verdict under review is an unreasonable verdict which cannot be supported by the evidence.

5 This is not a case in which I would substitute my opinion for that of the jury. The verdict in the present case is not one which is unreasonable or cannot be supported by the evidence. I would confirm the conviction.

6 The second problem is whether a new trial should be ordered. It has been submitted that the document, ex. P-56, was illegally admitted in evidence and that there were errors in the presiding Judge's charge to the jury. In my opinion, a new trial should not be ordered on the ground of illegal admission of evidence, on the ground of errors in the Judge's address to the jury, or on any other ground.

7 For these reasons I would dismiss the appeal against conviction.

8 The Crown has also appealed against the sentence of 30 months in jail. Taking into consideration the period of 40 months which Pierre Vallières spent in jail prior to the sentence and the other factors involved in this particular case, I am of the opinion that the sentence imposed by the trial Judge is a fitting one.

9 I would dismiss the appeal by the Crown against sentence.

Montgomery, J.A. **(dissenting in part):**

10 I have had the advantage of reading the notes of my colleagues.

11 With all respect for the contrary opinion, I cannot agree that appellant should be acquitted. There may be no direct evidence to connect him with the placing of the fatal bomb but there is much circumstantial evidence. Whether or not appellant had the title of leader of the F.L.Q., there is evidence that he was generally regarded as leader by his associates and that he was involved in all its activities. In particular, there is evidence connecting him with a theft of dynamite shortly before the explosion and with the occupation and leasing of premises where explosives and arms were stored and bombs assembled.

12 In view of this evidence, it was, in my opinion, open to the jury to reject in part the testimony of Demers to the effect that, although appellant was in attendance most of the time at the meeting of members of the F.L.Q. at St. Phillippe de Laprairie when the decision to plant the bomb was taken, he was absent at the time of the discussion regarding this bombing and was not afterwards informed of the decision. The defence suggests that this testimony of Demers is plausible because appellant was at that time opposed to the taking of violent action. This is inconsistent not only with the publications of the F.L.Q., which were to a large extent the work of appellant, but with the testimony of Desrosiers, the schoolboy who was induced to bring the fatal bomb to the LaGrenade offices. Desrosiers testified that at some time between the end of February, 1966, and the explosion, on May 5th of that year, he attended a meeting in the apartment on Sherbrooke St. at which appellant appeared to be presiding. As to what went on at that meeting, he stated as follows (at pp. 499-500) (translation):

> Q At that time, when this meeting took place, what was the subject of discussion if there was one?
>
> A Mr. Vallières asked me if I wanted to take part in the operation.
>
> Q The operation, what did that mean at that time, the operation, in the F.L.Q. movement?

A It consisted of making some concrete moves such as obtaining arms, placing bombs.

Q And then, at that time, did you accept, when Mr. Vallières asked that?

A At that time I said no because I was studying, I preferred to wait until a little later.

He later (at pp. 501-2) referred to a discussion regarding the making of incendiary bombs (Molotov cocktails) in the course of which appellant answered several questions. Appellant cross-examined Desrosiers at some length and tried to persuade the jury that they should not believe this witness, but his testimony was legally before them, and whether or not they should have believed it is not a question that we are called upon to decide.

13 The Supreme Court has recently rendered judgment in a case which, despite notable differences in the facts, bears some analogy to this one: see *R. v. Caouette*, judgment pronounced December 22, 1972. Caouette was charged with murder following the shooting of a man by his accomplice Daigle. The evidence was that the two of them formed a common design of robbing a house which they, initially at least, believed to be vacant. Daigle alone entered the house, while Caouette and a companion waited outside. On meeting the victim, Daigle produced a fire-arm and shot him. There was no doubt that Daigle was guilty of murder but there was no direct evidence that Caouette knew that Daigle was armed. There was, however, evidence that the weapon had previously been in the joint possession of the two of them. For lack of direct evidence of such knowledge, this Court, by a majority of three to two, set aside the verdict finding Caouette guilty of murder and acquitted him: [1971] Que. C.A. 183*n*. In the Supreme Court a majority held that there was sufficient circumstantial evidence for the jury to infer that Caouette knew that Daigle had the weapon in his possession and might use it. The verdict convicting Caouette was accordingly restored.

14 Although the facts in the *Caouette* case were much simpler, there is, in my opinion, as much circumstantial evidence in the present case of appellant's complicity in the plot to place a bomb in the LaGrenade offices as there was of guilty knowledge on the part of the accused in the *Caouette* case. Whether another jury might have come to another decision on this great mass of circumstantial evidence or whether we ourselves would have arrived at the same decision are not questions with which we need concern ourselves at this stage.

15 Being of the opinion that appellant is not entitled to an acquittal, I am obliged to consider the various grounds of appeal which might lead to the granting of a new trial. Of these the most serious appears to me to be the irregular production of the supposed minutes of the meeting held at St. Philippe de Laprairie. I need not repeat all that has been said regarding the production of this document by my colleague Mr. Justice Deschênes, with whom I am in agreement on this point. I note that counsel for the Crown has made no effort to refute appellant's arguments in this connection. Although the factum on behalf of the Crown is clear and detailed on the question of circumstantial evidence, it is silent as to the production of these alleged minutes. Counsel for the Crown has taken the position (at p. 43) that the case against appellant was so strong that any such irregularities may be disregarded. I cannot accept this. While the circumstantial evidence may be strong, its appreciation by the jury depended to a large extent upon the impressions they formed as to the credibility of witnesses.

16 It could be argued that this document was in no way essential to the Crown's case, and in fact there is little in it that does not also appear from the testimony of Demers. This argument would have greater strength were it not for the fact that counsel for the Crown and the trial Judge, in their addresses to the jury, both stressed this document so strongly, as pointed out by my colleague Mr. Justice Deschênes. They built around it a theory to discredit the testimony of Demers that appellant was absent when the decision to plant the bomb was taken. One of the most crucial questions to be decided by the jury was whether or not to believe Demers on this point,

and the use of this document improperly produced to discredit his testimony was, in my opinion, an irregularity fatal to the validity of the conviction.

17 I would maintain the appeal, set aside appellant's conviction and order a new trial. Under the circumstances I need express no opinion on the Crown's appeal as to sentence.

***Turgeon, J.A.* (translation):**

18 I have had the privilege of reading the opinion of my colleague Deschenes, J., and I would reach the same conclusion.

19 The circumstantial evidence adduced is insufficient to connect the accused with the offence with which he is charged, since this evidence, though consistent with his guilt, is not inconsistent with his innocence. In the circumstances he is entitled to the benefit of the doubt.

20 Like my colleague, I believe that the improper admission in evidence of exhibit B-56 and certain portions of the Judge's charge to the jury were conducive to the rendering of an improper verdict.

***Deschenes, J.A.* (translation):**

21 The accused appeals against his conviction for manslaughter found against him by a jury of the assizes sitting in Montreal, on December 17, 1969.

22 The Crown appeals against the sentence of 30 months' imprisonment, starting on the day of the judgment rendered on December 18, 1969.

Appeal of the accused against conviction

23 The charge reads as follows:

> The Attorney General of Her Majesty Queen Elizabeth II, for the Province of Quebec, prefers the following charge:
>
> > PIERRE VALLIERES: at St.-Philippe and Montreal in the District of Montreal, and at St.-Alphonse in the District of Joliette, between the 1st of July 1965 and the 6th of May 1966 for an unlawful purpose, to wit: having illegally counselled or procured or encouraged by his attitudes, his acts, his writings or otherwise, the exploding of a bomb at the H.B. LaGrenade Ltd. shoe factory, at Montreal in the District of Montreal, which he knew or ought to have known was likely to cause the death, notwithstanding that he did not mean to cause death or bodily harm to anyone and which caused the death of Miss Therese Morin, therely committed murder contrary to sections 201(c), 202-A(3), 206(2) and sections 21 and 22 of the Criminal Code.
>
> Contrary to the form of the Statute.

24 To understand the verdict of manslaughter, we must remember that we are dealing with a second trial. The first trial had been instituted by a charge, which in its final modified version, was couched in the similar terms to those cited earlier. On April 5, 1968, a jury found the accused guilty of *manslaughter*. On appeal; this

Court on September 23, 1969, quashed the verdict and ordered a new trial. The second trial started with the modified charge still alleging a non-qualified murder.

25 The Judge of first instance expressed the opinion that the first verdict indicated an acquittal to the charge of murder and that, even in the absence of precise instructions on this subject from the Court of Appeal, the second trial could only deal with the charge of manslaughter. He instructed the jury accordingly.

26 Page 4119: "this brings me to inform you that in law the accused was acquitted during his first trial of the charge of murder and what occurred before the Court of Appeal did not remove the benefit of this verdict."

27 Page 4122: "Let me explain: during the first trial the jurors could have said that the accused was guilty of murder, they did not do it. You have no right to do it."

28 The appellant, who should have been rather content with the decision of the trial Judge, paradoxically complains and insists that he had the right to a verdict by the jury on the charge of murder, and no other.

29 I will not undertake to discuss this question: however serious it might be, it only has a purely academic interest and it should not be considered during an appeal which will necessarily solve it.

30 Also it does not seem useful to undertake a separate analysis of the 65 other grounds of appeal submitted by the appellant. Considering all the circumstances of this case, we must first consider the main issue and if possible resolve it.

31 The Crown did not tender any direct evidence of the perpetration of the offence with which the appellant is charged. The trial Judge properly instructed the jury that:

32 Page 4169:

> There is direct evidence when the Crown produces witnesses who saw the accused committing the crime.
>
> You do not have that here.

33 The case of the Crown therefore rests entirely on circumstantial evidence. It is useful to commence an analysis of the evidence with a brief review of the principles which, according to the authorities, must guide a Court of Appeal in such a situation.

34 It is well known that, when applying the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, we must constantly bear in mind the cardinal distinction between questions of law and of fact, between the domain of the Judge and that of the jury. *Can* the evidence satisfy the double test of *Hodge's Case*? — That is a question of fact, which belongs to the jury and, with certain exceptions, is not subject to review by the Court of Appeal.

35 The Supreme Court of Canada, confirming a judgment of this Court, expressed the following opinion in *Reinblatt v. The King* (1933), 61 C.C.C. 1 at p. 3, [1934] 1 D.L.R. 648, [1933] S.C.R. 694:

> When, however, we turn to the examination of the matter, we are clearly of opinion that there was evidence on which it could well be found that the accused was guilty.
>
> We do not lose sight of the point submitted by counsel for the appellant that the evidence was wholly circumstantial, and that this would be a case where the well known rule laid down by Alderson, B., would ap-

> ply (*Hodge's Case*, 2 Lew. 227, 168 E.R. 1136). Bearing that in mind, we think the evidence was of such character that the inference of guilt of the accused *might and could legally and properly be drawn therefrom* . That is sufficient to dispose of the appeal on the question of law raised by the dissenting opinion of Howard, J. The further question whether guilt ought to have been inferred in the premises was one of fact, with which we are not concerned here. (Emphasis added.)

36 On numerous occasions since, the same principles have been reiterated by the Supreme Court of Canada and by Courts of Appeal throughout the country: *Fraser et al. v. The King* (1936), 66 C.C.C. 240, [1936] 3 D.L.R. 463, [1936] S.C.R. 296; *Cote v. The King* (1941), 77 C.C.C. 75, [1942] 1 D.L.R. 336; *R. v. Robichaud* (1950), 98 C.C.C. 86, 12 C.R. 167, 27 M.P.R. 88; *Dufresne v. The Queen* (1966), 50 C.R. 208, [1967] Que. Q.B. 305*n; R. v. Devarennes*, [1968] Que. Q.B. 673*n*.

37 It is therefore, the first of the two questions which were stated earlier which must be considered. If it appears that after analyzing the evidence too much of a doubt is created to satisfy Hodge's doubt test, it is the duty of the Court of Appeal on this question of law, to quash the verdict of guilty pronounced by the jury.

38 There are numerous precedents dealing with this issue.

39 In 1931, in the case of *R. v. Bookbinder* (1931), 23 Cr. App. R. 59 at p. 60, the Court of Appeal of England quashed a verdict based on circumstantial evidence and stated:

> On consideration of the facts of this case, including the statement which the appellant is alleged to have made when arrested: "I have never seen him [Ferns] before. I hope you will be able to square it for me" — an observation clearly capable of an innocent as well as a guilty interpretation — the Court has come to the conclusion that there was no evidence which was not as consistent with the innocence as with the guilt of the appellant. We think that the verdict was unsatisfactory, and cannot be supported having regard to the evidence. The appeal will be allowed and the conviction quashed.

40 In the same year, in the case of *R. v. Carter* (1931), 23 Cr. App. R. 101 at p. 102, the Court of Appeal of England quashed another verdict based on the same kind of evidence and decided:

> When we come to consider the evidence as a whole, it seems to be clear that the evidence is as consistent with the innocence of the appellant as with his guilt.
>
> In all the circumstances, we have come to the conclusion that this conviction was unsatisfactory and cannot be supported, having regard to the evidence. The appeal is allowed and the conviction quashed.

41 In 1938, the Ontario Court of Appeal rendered a judgment in the case of *R. v. Comba* (1938), 70 C.C.C. at p. 205, [1938] O.R. 200. After referring to the judgments previously cited, Mr. Justice Middleton wrote (p. 234): "Upon this principle of law it is evident to the majority of the Court that this verdict must be set aside and the verdict of acquittal recorded."

42 Mr. Justice Masten added (p. 235):

> I agree in the conclusion that the conviction must be quashed on the ground that the Crown's evidence is not incompatible with the innocence of the accused. I am firmly of the opinion that no unprejudiced jury could on this evidence honestly find that the evidence is incompatible with appellant's innocence.

43 Mr. Justice Fisher added (p. 236):

> My conclusion is that the evidence is as consistent with the accused's innocence as with his guilt, and that the jury was not justified in making the finding it did.
>
> The result is that the appeal must be allowed and the conviction quashed.

44 Finally Mr. Justice Henderson wrote (p. 237):

> For these reasons and for those stated in the opinion of my brother Middleton, it becomes our duty, in my opinion, to quash the conviction and to direct a judgment and verdict of acquittal to be entered.

45 The Crown appealed to the Supreme Court of Canada who unanimously concurred in the views expressed by the Ontario Court of Appeal. The Chief Justice of Canada, speaking on behalf of the Court, stated, 70 C.C.C. 205 at pp. 237-8, [1938] 3 D.L.R. 719, [1938] S.C.R. 396:

> It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada ... the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.
>
> We have no doubt that the facts adduced have not the degree of probative force that is required in order to satisfy the test formulated by this rule; which is one that Courts of justice in Canada are governed by and are bound to apply.

46 In 1948, the British Columbia Court of Appeal faced the same problem in *R. v. Dawley* (1943), 79 C.C.C. 140, [1943] 2 D.L.R. 401, [1943] 2 W.W.R. 257. The Judge faithfully summarized the substance of this judgment [headnote]:

> Where the evidence on a charge of conspiracy is purely circumstantial an appellate court may, notwithstanding the verdict of guilty by the jury, decide on the evidence that the facts are equally consistent with the innocence as with the guilt of the accused and accordingly quash the conviction.

47 The editor of the reports commented in a footnote: "The rule stated in the present case would seem to be now well established."

48 Finally, in 1968, in *R. v. Knox*, [1968] 2 C.C.C. 348, 62 W.W.R. 8, the British Columbia Court of Appeal was again resolving the same issue. Speaking on behalf of the Court, Mr. Justice Branca wrote (pp. 355-6):

> I pause to note that the evidence was almost completely of a circumstantial character.
>
> In order to become legal evidence, which might be submitted to a jury for consideration, it became necessary for the learned trial Judge to decide whether that body of circumstantial evidence was capable or incapable of satisfying the test laid down in *Hodge's Case*. If the evidence was incapable of satisfying that test there was no legal evidence to submit to the jury for consideration. If, on the other hand, it was capable of satisfying the test, it then became legal evidence which should have been submitted to the jury and in that event the task of the jury was to determine whether or not the circumstances (or so much thereof as the jury

found to be established) taken cumulatively, did in fact satisfy the test propounded in *Hodge's Case*, subject to an adequate judicial direction on the facts and the applicable law, particularly in relation to circumstantial evidence and the theory of reasonable doubt.

49 After analyzing the evidence, the Court reached the conclusion that the evidence was not sufficient to satisfy *Hodge's* test in law "in view of the dubious nature of the evidence"; consequently the conviction was quashed and the appellant acquitted.

50 Therefore, it is the duty and the responsibility of this Court to examine the evidence in light of the appellant's submissions and of the contrary opinion expressed by the trial Judge, in order to determine whether or not, in law, the evidence leads us to conclude that the Crown discharged the burden imposed by the rule in *Hodge's Case*.

51 In order to weigh the evidence we must analyze it in the context of the familiar double test: that it is consistent with guilt and inconsistent with the innocence of the accused.

52 We must keep in mind the essential elements of the offence which the Crown had the burden of proving against the appellant:

(a) at St. Alphonse, St. Philippe and Montreal;

(b) between July 1, 1965, and May 6, 1966;

(c) having illegally advised or incited or encouraged;

(d) by his attitudes, his actions, his writings or otherwise, and

(e) to explode a bomb at the H. B. LaGrenade Limited shoe factory in Montreal.

53 We should now study the two alternatives drawn from *Hodge's Case*:

(i) that the proof is consistent with the guilt of the appellant.

54 The argument of the Crown is based on the following propositions:

(a) the crime was planned and perpetrated by the Front de liberation du Quebec (F.L.Q.);

(b) the appellant was one of the leaders, and possibly the head of the F.L.Q.;

(c) the appellant must have been aware of the decision to commit the crime, and

(d) the appellant participated in this decision, after inciting and encouraging it.

55 The Crown relies on numerous facts, of varying importance. It would not be useful to attempt to enumerate the facts at this point. I will simply recall, among others, the following:

(a) the articles published in the F.L.Q. periodicals, "La Cognee" and "L'Avant-garde", from January to June, 1966, contained increasing appeals to use violence and specific references to the LaGrenade establishment;

(b) a memorandum (ex. P-30) written in the middle of 1966, identified by the appellant during the trial.

56 Page 3386:

MR. PIERRE VALLIERES:

The accused is ready to admit, My Lord, in order to shorten argument, that he is the author of everything which is handwritten in the document referred to as the memorandum.

THE COURT

And on balance, everything which is typewritten?

MR. PIERRE VALLIERES:

The accused is ready to admit that everything typewritten roughly corresponds to his ideas but he is not positive whether he wrote it from his own notes or whether someone else typed it from his notes. He is ready to admit that this document reflects a single work.

57 Page 3397:

MR. PIERRE VALLIERES:

The accused has admitted that everything that was handwritten in this document is by the accused's own hand.

THE COURT

And what about the typewritten parts?

MR. PIERRE VALLIERES:

I share all the opinions expressed but I cannot give any assurance that I typed the text in question myself or that whether others typed it from notes that I had written.

THE COURT

From your notes.

MR. PIERRE VALLIERES:

From my notes.

MR. BELANGER

And it forms a whole.

MR. PIERRE VALLIERES:

And I admit that it is a whole.

(c) this memorandum shows the appellant (P.V.) as the only permanent member of the F.L.Q. until January,

1966, and as one of its two permanent members from January to May, 1966, in addition to involvement in several acts of violence in 1965;

(d) in this memorandum the appellant writes: "Our actions have killed 2 persons and wounded about ten others, if we exclude those injured during demonstrations. One of the victims was a member of the F.L.Q."

(e) an organization chart (ex. P-34) entirely handwritten by the appellant (p. 3420), outlines the organization of the direct action groups with those responsible identified, from various cells operating in Montreal and the outside area, and with notations of "hiding places for primary products — manufacturing and warehousing — relays — transportation and orders — distribution of finished products".

(f) introduction of each of the F.L.Q. recruits to the appellant;

(g) in the spring of 1966, the appellant's trip to St. Hyacinthe with Serge Demers who drove Charles Gagnon's car, all members of the F.L.Q. They met Professor Guy St. Germain, whose father was a manager of a quarry in South Stukeley, and they discussed the easiest way to obtain dynamite;

(h) less than two weeks later, a theft of dynamite and detonators at this quarry by Serge Demers and some friends, the transportation of the products of the theft to an apartment on Sherbrooke St. in Montreal, where the appellant is known to go, then the meeting the same night with the appellant and the perpetrators of the theft. Then they all go back together to St. Philippe;

(i) at the same time, they rent a flat on Henri-Julien St., in Montreal, which will serve as a warehouse for the F.L.Q.; the rent receipt is found in an envelope marked "P.V.", in the apartment of a friend of the appellant;

(j) still at the same time, a theft of weapons at Mont St. Louis; these weapons were taken to the above-mentioned premises;

(k) around the end of April, 1966, a "summit" meeting at St. Philippe, at which the appellant participated with six other members of the F.L.Q. and during which a decision is made to place a bomb at LaGrenade's; according to Serge Demers, the appellant was absent at the moment of the decision which was not conveyed to him later on; however the "agenda" (ex. P-56), which is rather the minutes of the meeting, does not mention the absence and puts the appellant in the "committee of action";

(1) on May 1st, with two members of the F.L.Q. the appellant rented, under a false name, a cottage at St. Alphonse de Rodriguez;

(m) in the fall, the police found in this cottage and hidden in the area, guns, dynamite sticks, detonators, a printing machine, etc.;

(n) on May 5th, an explosion at LaGrenade's of a bomb brought by Gaetan Desrosiers aged 16 years and wearing Michel Paquette's raincoat; Desrosiers had received this bomb from Serge Demers who had made it on the premises at Henri-Julien St. and who had contacted Desrosiers through Real Mathieu. According to ex. P-56, the "committee of action" was made up of three members: Demers, Mathieu and the appellant;

(o) about two weeks later, the Montreal Gazette published an article which designated a certain "P.V." as a suspect in the explosion at LaGrenade's;

(p) the appellant and Mathieu, using aliases, took a tour of the United States which took them to Philadelphia, to two different hotels, then to Rochester, Watertown and New York.

58 This dry enumeration does not give justice to the considerable evidence, contained in the approximately 1000-page transcript, without counting the numerous exhibits, and which swarms with details permitting us to reconstitute the events which took place, by definition, in clandestinity.

59 This evidence, seen as a whole and from the Crown's side, justifies the conclusion that the appellant was involved in the discussions where the plot was hatched and which ended with the explosion of a bomb at LaGrenade's: he preached "action", in general, he helped supply the raw materials, he incited the protagonists, he participated in the decision making, he was satisfied with it: even if he did not participate directly, the evidence is compatible with his guilt: ss. 21(2) and 22(1) of the *Criminal Code*.

(ii) incompatibility of the evidence with the innocence of the appellant

60 The appellant gives this second alternative great importance. Can we come to the conclusion that the evidence does not exclude several hypotheses compatible with his innocence?

61 This is what the appellant maintained before the jury in a brilliant address which lasted seven hours and this is what he invites us now to decide.

62 At the outset, we must admit that the appellant correctly put the issue to the jurors:

63 Page 3871:

This is why I find the question of knowing whether in nineteen hundred and sixty-six or in nineteen hundred and sixty-nine I was or I am for or against violence is outside the present issue. The only thing worth knowing is whether or not I, Pierre Vallieres, and not the F.L.Q. participated in the plot or in the conspiracy which led to the bomb explosion which took place May fifth nineteen hundred and sixty-six at the La Grenade shoe factory and which caused the death of Miss Therese Morin.

64 Page 3873:

The only question which must retain your attention is the following: did I or didn't I participate in placing the bomb or in the decision of placing the bomb which on May fifth nineteen sixty-six exploded at La Grenade's shoe factory? Nothing else, absolutely nothing else has anything to do with the present case.

65 Page 3886:

What the Crown had the burden to prove beyond any reasonable doubt, accordingly to the law, was the following: the only question that matters: as an individual and not as a member of a movement, as an individual, I, Pierre Vallieres, did I participate to the plot or to the conspiracy which led to the explosion of the bomb, not any bomb, the bomb which on May fifth nineteen hundred and sixty-six exploded at La Grenade's shoe factory and caused the death of Miss Morin? That is the only question which must concern you and which you have to answer on the basis of the evidence that the Crown according to the law had the duty to lay before you without prejudice, without malice and without hiding anything.

66 We must recognize that when confronted with the theory of reasonable doubt, the trial Judge also cor-

rectly stated the principles for the jurors:

67 Page 4172:

> You have to examine all the evidence and to decide what to accept or reject or not to accept from the testimony of the witnesses. Take the result, consider the facts that you think were proven: whether oral or written because the writings are part of the evidence, and ask yourselves the following question: before all this, and taking everything into account, what was heard, what was seen, what was read, ask yourselves: "is it reasonable, is it reasonably possible" ... and I emphasize the two words; "...is it reasonably possible to think and to conclude that the accused did not have his say, did not take part in the decision in Saint-Philippe when it was decided to explode a bomb?"
>
> If you think it is reasonably possible to think that, and I emphasize the two words: "reasonably possible" and not... I am not saying: if you believe that it is possible, I am saying: if you believe that it is reasonably possible; gentlemen, if you answer "yes" to this question, you must acquit the accused.

68 We saw earlier the theory of the Crown; what is the theory of the appellant? — It rests on the following propositions:

(a) he was not the head of the F.L.Q.;

(b) he did not in any way participate in the decision to put a bomb at LaGrenade's;

(c) he ignored this "action", and

(d) it is because of his hostility at the time against the use of violence that his companions kept him out of their decision.

69 To support his theory, the appellant also stresses an infinite number of facts, and it would be illusive to attempt to mention them all here; let us list the main ones, as illustrations:

(a) the only person that the evidence qualifies as the "leader" of the F.L.Q. is its founder in 1963: Georges Schoeters (memorandum P-30, p. 10);

(b) the Crown presented as witnesses only four of the participants to the bombing: Desrosiers, Paquette, Montpetit and Demers. They all exonerate the appellant;

(c) Gaetan Desrosiers was approached by Real Mathiew on May 4th for an "action", but it is only on May 5th that he heard about LaGrenade for the first time:

70 Page 505:

> THE COURT:
>
> Q. Was it the first time that you were going to La Grenade's when you took the bomb?
>
> A. Yes Sir.
>
> Q. When, for the first time, did you hear about La Grenade?

A. It was at that time Sir.

71 The appellant then could not have "incited" or "encouraged" Desrosiers to put a bomb at LaGrenade's;

(d) When Desrosiers stated that in February, 1966, the appellant asked him if he was ready "to act in a concrete way such as getting arms and putting bombs"; that the appellant explained to him how to make Molotov cocktails: the appellant claims that Desrosiers is perjuring himself. During the trial he showed Desrosiers the discrepancy between his present testimony and his previous evidence in September, 1965, October, 1966, March, 1968, and June, 1969, which, at the beginning, exonerated the appellant and then became unfavourable. He made him recognize that the copies of L'Avant-Garde produced as evidence were contrary to his assertions. Before the jury, the appellant then asks the question as follows:

72 Page 3918:

Was it to give you the opportunity to test Desrosiers' perjury that you were told of the meeting of February, 1966. And why did Desrosiers insist on testifying in that manner? Is it because he was on probation; because he was under protection; because he only went to jail for two months; because he lives with his uncle who is a policeman, and by saying such a thing, totally foreign to the charge, he could, by his testimony totally foreign to the present case, influence you to help you decide an unfavourable verdict, based on a story which is not true, which is a pure lie and which is totally foreign to the charge. We wonder if that was the intention of the Crown.

(e) the publications of the F.L.Q. never put out a call for bombing, even less at LaGrenade's; moreover the appellant was not identified as being the one who "wrote everything which was written in La Cognee" (p. 3920);

(f) Michel Paquette, who was also 16 years at the time, did not want to drop the bomb himself, but he loaned his raincoat to Desrosiers. He had been recruited by Real Mathieu. The appellant was only his equal;

(g) Paquette exonerated the appellant from any particigation in the LaGrenade case:

73 Page 881:

Q. Mr. Paquette have you already been personally incited or advised or encouraged by writings, words, acts, attitudes or otherwise by the accused to drop a bomb at La Grenade's factory on May fifth sixty-six?

A. No.

Q. Have you already been incited or advised by writings, words, acts, attitudes or otherwise by the accused to commit any criminal act?

A. No.

74 Page 884:

Q. I ask you again the question, has the accused incited, encouraged or advised you, you personally, by writings, words, acts, attitudes or otherwise, to drop a bomb or commit any criminal act?

A. No.

Q. On any occasion?

A. On no occasion.

(h) Maurice Montpetit was 18 years at the time; he had been recruited by Serge Demers who asked him to put a bomb at LaGrenade's. He accepted and then changed his mind two or three days later;

(i) Montpetit also exonerates the appellant from any participation in the LaGrenade case:

75 Page 838:

Q. Have you already been incited, advised or encouraged by writings, words, acts, attitudes of the accused to put a bomb anywhere?

A. No, I have never been encouraged.

Q. Have you already been incited, advised or encouraged by any of the persons you have just mentioned or by the accused, by writings, words, acts, attitudes of the accused to put bombs at La Grenade's?

A. No, never.

Q. Have you already been incited, advised or encouraged by writings, words, acts, attitudes or otherwise, by the accused, to go to South Stukely to steal dynamite?

A. By the accused, no.

Q. Have you already seen anything, a plan intended for the blowing up of the La Grenade factory?

A. No.

(j) Montpetit had only met the appellant once, in the company of Demers, before the LaGrenade case; he did not know him and was never influenced by him;

(k) we are left with Serge Demers, called the key witness by the Judge. He had been recruited by Real Mathieu and he made the bomb which exploded at LaGrenade's. He was just 20 years at the time and had just quit school;

(l) towards the end of Easter week 1966, there was a two-day meeting at St. Philippe. On Saturday, according to Demers, seven persons were present: Gagnon, Mathieu, Faulkner, Laquerre, Demers, Lavoie and the appellant. Current Quebec problems were discussed in general;

(m) the morning after, still according to Demers, Gagnon and the appellant left for Montreal and came back at night. In their absence, the other five members decided to form a central committee and also to put a bomb at La Grenade's. Gagnon and the appellant came back around 6 p.m. According to Demers:

76 Page 967:

Q. When Vallieres and Gagnon came back, were your friends still at St. Philippe?

A. Yes.

Q. Did they inquire if everything had gone well during the day?

A. Yes. We informed them that we had decided to form a central committee.

Q. Did you inform them of the decisions that the central committee had taken?

A. No, because we had decided before their arrival, not to inform them on anything concerning the action.

Q. Why didn't you want to tell them what you had decided?

A. First, all those present knew their opposition to form action cells.

77 Page 1374:

Q. Could you explain, if you know anything about it, Mr. Demers, the motivations of Mr. Pierre Vallieres relative to a bombing action in May, his point of view relative to a bombing action in May 1966, what was his point of view, his thinking on it?

A. I have already explained that I had discussed the subject of dynamite and the idea of forming an action network with Mr. Vallieres, but he was against it; I had discussed it also with Mr. Gagnon but he shared the same opinion.

78 Page 1375:

Q. Is it not correct, Mr. Demers, that according to the kind of structures planned, this central committee had been formed prematurely?

A. Correct.

Q. Is it not correct, Mr. Demers, that it was formed prematurely by five persons, because these five persons were impatient, and wanted to go immediately into action?

A. Effectively, the five persons wanted to form an action network.

Q. Is it not correct that Mr. Pierre Vallieres and Mr. Charles Gagnon considered and had often stated that it was ill-timed to go into action on May 1966?

A. I have already mentioned, it is correct.

79 Page 1547:

Q. Did you consult the accused regarding the preparation of one or the other of the different criminal attempts that you had organized in 1966?

A. No.

Q. On several occasions, Mr. Demers, you have repeated that Gagnon and myself did not agree with you, Laquerre, Mathieu, Faulkner and Lavoie on the advisability of exploding bombs in the Spring and Summer 1966, is that correct?

A. It is correct.

Q. Did it imply between the seven of us that there was a disagreement on the fundamental principles and the objectives of the movement?

A. Not on the fundamental principles of the movement, maybe on the means used.

Q. The decision to go or not into direct action had to be made at the earliest in the Fall of 1966, during a congress?

A. It had to be made later during the coming year.

Q. Around the middle of April, you took advantage on Sunday, of the fact that Gagnon and myself were in Montreal, to expedite matters?

A. The five decided to form a central committee.

Q. Is it from that moment that a five member committee was formed and it was decided between these five persons that you would not communicate the decisions of the central committee to Gagnon and the accused?

A. And to the other members of the F.L.Q.

Q. Is it then that Laquerre took charge of the propaganda?

A. That is correct.

Q. But there was no president, no secretary?

A. No.

80 Page 170:

THE ACCUSED:

Q. Is it not correct, Mr. Demers, that I have never disagreed with the objectives of the F.L.Q.?

A. With the objectives and our ideals, no.

Q. That I disagreed on the advisability to form an action network at that time?

A. Yes.

(n) put in the presence of previous contradictory statements and evidence Demers denies certain parts and explains them by the coaxing and the kindness, then by the threats and all sorts of pressures that the legal and the police authorities exercised on him (pp. 1090-6), and which led him to a suicide attempt;

(o) the accused was not the head of the F.L.Q.; according to Demers, "we all worked in collaboration, there was no leader" (p. 1529);

(p) Demers affirms that the appellant had nothing to do with the criminal attempt at La Grenade:

81 Page 1652:

Q. Mr. Demers, did I incite you, advise you or encourage you by my writings, my words, my attitudes, by my acts or otherwise to explode a bomb at the La Grenade factory?

A. Neither.

Q. Mr. Demers, did I incite, advise or encourage you by my writings, my words, my attitudes, my acts or otherwise to explode bombs at any other place beside La Grenade's?

A. No.

Q. Mr. Demers, did I incite, advise or encourage you by my writings, my words, my attitudes, my acts or otherwise to have Gaetan Desrosiers place the bomb which exploded at La Grenade factory on May 5th 1966?

A. No.

Q. Mr. Demers, did I incite, advise or encourage you by my writings, my words, my attitudes, my acts or otherwise to have Gaetan Desrosiers recruited by Real Mathieu for an action or another.

A. No.

Q. Mr. Demers, did I participate in any way with you or with others to your knowledge in the preparation or the execution of the bombing attempt which took place at the La Grenade shoe factory on May 5th, 1966?

A. No.

Q. In any way?

A. No.

(q) the Crown ran the risk of not hearing the other five participants at the meeting of St. Alphonse: Charles Gagnon, Marcel Faulkner, Andre Lavoie, Real Mathieu and Gerard Laquerre; the Crown is now bound by the evidence which exonerates the appellant;

(r) the appellant neither ran away to the United States after the LaGrenade case nor as a consequence of it; he only left two and a half months later to publicize the F.L.Q.;

(s) the memorandum P-30 was a publicity document; the appellant pleaded:

82 Page 4028:

Other interpretations can be found in the memorandum; a flock of interpretations can be found. Such as acting important in order to dazzle possible subscribers to the F.L.Q. Because if you read the first pages, you will see that the crucial problem is the need for money. We needed money, we needed help.

And when you need funds you act big to find some.

83 Page 4033:

Let us suppose that in a strike taking place, there is a fellow who shoots his boss and kills him. A confession would be: "well I was the organizer of the strike and I took the gun, I shot the boss and I killed him." That is a confession.

It is a confession such as required by the law. But to speak of "our strikes", "our actions", is not a confession. It is propaganda and publicity. All publicity is made that way.

84 Page 4040:

So when the Crown said that in the memorandum "Our actions killed two persons ... et cetera" constitutes a confession by the accused, well it is as ridiculous as saying that the New York Times editor is guilty of the My Lai massacre because he wrote in the New York Times "We are guilty of the massacre of the civilians at My Lai". It is the same thing. Because, like the editor of the New York Times, the author of the memorandum could have been informed by newspaper or otherwise about actions which took place, which happened, which were attributed to the F.L.Q. and say "Our actions...", since he is a member of the F.L.Q., just like the editor is a member of the American nation; he could say "Our actions killed two persons" without having participated himself in the decision or the perpetration of the crime. That does not constitute a confession. There is no confession in such an expression.

(t) the agenda (P-56) does not contain any mention of a decision relative to a criminal attempt at La Grenade's, even less the participation of the appellant in such a decision;

(u) general inciting to violence is no evidence of the participation of the crime in question.

85 Based on these facts, the appellant maintains that he must be exculpated or at least obtain the benefit of the doubt.

86 At first, the evaluation of Serge Demers' testimony sets out a problem that the Judge explained clearly to the jury:

87 Page 4146:

Gentlemen, you can if you want and if you feel justified in doing so, believe Demers in that part of his testimony given here where he says that the accused had nothing to do with the decision made by the F.L.Q. to put a bomb at La Grenade's.

If that is what you believe, gentlemen, do not waste your time; do what is just.

Or also you can reach the conclusion that because of these numerous contradictions, Demers is not a believable witness and so you will decide to put aside only part of his testimony. Which part? It is for you to say and you can then accept other parts of his testimony.

88 Page 4148:

The only aim pursued by the Crown and the only one considered by the law by having Demers face his contradictions, if you think that these are contradictions, gentlemen, is to allow you to judge the value of the testimony given before you here by Demers.

And I repeat, it only helps you to justify putting aside all of Demers' testimony or part of it. I add that you have the right, if you think you can do it, to say that Demers only said the truth here. If that is the case, gentlemen, acquit right now, do not waste your time.

89 Page 4152:

If Demers had come here to say: "Yes, Vallieres was amongst us", I would say: "You can believe Demers; be careful if he is not corroborated by the evidence, either circumstantial or by another witness who is not an accomplice." But here Demers made every effort to clear the accused. I repeat, you have the right to believe a witness, when he clears an accused, and to give a verdict accordingly.

If on the other hand, faced with the evidence, you decide to put aside his testimony, either all of it or part of it, it is as if he had not testified. For example, if you decide to forget completely Demers' testimony because of the contradictions, it is as if he had not testified.

90 The appellant took advantage of this situation before the jury:

There is just one thing that is evidence, just one thing: what Demers said. Of course you can believe Demers or not but you cannot for example choose between what he said in the witness box and what he would have said at the police station or in another trial. You will have the choice to believe him or not, to accept or to refuse his testimony concerning the charge. This is your situation: you either believe Demers and you acquit me, just as you would acquit me after hearing Desrosiers, Montpetit and Paquette, or you do not believe him but you acquit me anyway because without Demers there is no evidence, there is no more evidence, there are no more witnesses. Take away Demers and there is nothing. The structure falls apart. A good part of it fell with the testimony of Desrosiers who never knew anything about La Grenade before May 5th; with the testimony of Paquette who did not know anything about it either; with the testimony of Montpetit who says he never was incited by the accused; with the testimony of Renaud who never knew anything about the case; then with the testimony of Demers who says that I did not participate, that Gagnon did not participate in the La Grenade case.

You either accept his testimony and you acquit me, or you reject it and you acquit me anyway, whether or not in your opinion, Demers said the truth. You have no choice. And that is the evidence of the Crown.

91 Of course, one is free to wonder why Demers with four of his co-militants decided to hide some of their decisions from Charles Gagnon and the appellant. The Crown could have called these other four witnesses, but decided against it. I will not either undertake to speculate as to his motives, nor will I go through those that the Crown's counsel emphasized, quite illegally by the way, under the pretext of giving hypotheses to the jury. But the appellant describes the situation in a way which should be acknowledged.

92 Page 3965:

This testimony shows what was at stake: not an idealogical conflict between Gagnon and Vallieres on the one hand and Demers and the others, on the other hand, but a conflict as to the right time to go into action. Violence in general was not at stake, but the fact of going into action in May nineteen sixty-six (1966)

We can find that in the current events examples which show that these situations are not particular to our case. For instance: during the last by-elections, there were several political parties which all agreed on vote-

catching manoeuvres as a means to obtain power. None of them contended that in their philosophy. They were all electoralist parties which means they were all in favour of elections. So during the last by-elections, the Liberal Party and the Party Quebecquois decided that it was not an opportune time to go into action and to go into elections. They said that it was not an opportune time, that they did not have any time to waste, that they were not ready for those by-elections, and that they would probably spend their energy in vain. They decided not to participate in the elections and yet they were for electoralism, but at the time of the by-elections, they said: "We are not participating in the elections". However, in Trois-Rivieres, the liberal candidate decides to stand for election in spite of the disagreement of the other members of the party. As to the Parti-Quebecquois, one of its members Mr. Reggie Chartrand decided to stand for election in Ste-Marie, although his party had decided against it. You see that these are not extraordinary situations. Theory can be agreed on, but not the action. The same thing happened in our case.

Everybody agreed on the principle but some disagreed on the time of the activities. And Vallieres and Gagnon disagreed on the time chosen by Demers and the other four. This is what Demers explained. He did not say that I was against violence, he did not say that we were against the theory of the F.L.Q. He said we were against the time to go into action. This is why we did not participate in the La Grenada plan. It is as simple as that.

93 Finally, the appellant gave numerous examples in order to make the jury better understand his theory; let us recall the first one.

94 Page 4096:

Let us imagine, let us suppose that you twelve are members of a hunting and fishing club, you are shareholders in this club and you have the same common goal, to go hunting and fishing, to go resting in the country, and so on. You have all contributed to the formation of this hunting and fishing club. For a week or two, I don't know, you all go to your club, to your reserved piece of land, at a time of the year when the hunting of the North American moose is forbidden. You can hunt for hares, for partridges at that time of year, but moose-hunting is forbidden. Among the twelve of you, there are three who find a moose trail and who particularly like moose-hunting. They cannot resist, they follow the trail, they find the moose and they kill it. It so happens that the gamekeeper is in the area. Having caught them in the act, he arrests them. Will the twelve of you be charged with poaching because three of you did it?

And yet you are together, you all knew one another, you have a common interest in a fishing and hunting club, you share the same ideals. When you go there you follow the same rules and so forth. You will not be all charged, and the club will not be charged; only the three who killed the moose at a forbidden time and who took the initiative to do it.

95 Regarding the guilt of the accused, the evidence is puzzling from the point of view of the defence. All the oral evidence before the jury exonerates the appellant from the criminal attempt at La Grenade's. The idealogical division between the appellant and Gagnon on the one hand, and the other members of the group on the other, not with regard to the objectives of the movement, but with regard to the bad timing of acts of violence, is not unthinkable. The normal effect should have been to exclude the two dissident members from certain decisions concerning other individuals. On this subject, the Crown relied strongly on the title of ex. P-56 (the letters C.C. mean: central committee):

AGENDA OF 1st C.C.: meeting of the different persons responsible for the F.L.Q. The role of the C.C. was

> not to make decisions, but the main persons responsible make the decisions INDIVIDUALLY. [Capital letters in the text.]

96 After a careful consideration of the evidence, I cannot escape the conclusion that the interpretation which leads to compatibility with a rational conclusion other than the guilt of the accused, *i.e.*, his innocence, is not contrary to reason.

97 Therefore, since it is just as compatible with the innocence or the guilt of the accused, the evidence does not take on the characteristics of reasonable certitude attached to circumstantial evidence before the Judge should be satisfied that the evidence might, in law, open the way to a guilty verdict by the jury.

98 Consequently, after applying the principles that I tried to draw from the jurisprudence, we must conclude that the verdict rendered against the appellant cannot and must not be upheld.

99 In fact, the appellant had presented a request for a directed verdict of acquittal (p. 3704) that the trial Judge rejected (p. 3733). There is a strong contrast with the attitude sanctioned by the Supreme Court of Canada in *R. v. Comba* (1938), 70 C.C.C. 205 at p. 238, [1938] 3 D.L.R. 719, [1938] S.C.R. 396:

> We agree with the majority of the Court of Appeal, whose reasons for their judgment we find convincing and conclusive, that the learned trial Judge ought, on the application made by counsel for the prisoner at the close of the evidence for the Crown, to have told the jury that in view of the dubious nature of the evidence, it would be unsafe to find the prisoner guilty and to have directed them to return a verdict of acquittal accordingly.

100 Also the Court of Appeal of British Columbia decided in *R. v. Knox*, [1968] 2 C.C.C. 348 at p. 356, 62 W.W.R. 8:

> As stated, defence counsel had requested a directed verdict of acquittal at the conclusion of the Crown's case and the learned trial Judge refused to so direct. The defence called no evidence and the case was then submitted to the jury for consideration.
>
> The defence now submits that the learned trial Judge was in error in refusing to direct the jury as requested and that this Court should now direct an acquittal of the appellant...

101 Page 360:

> In view of the foregoing facts I agree with the submission made by Mr. Toy, defence counsel, that the learned trial Judge erred and should have directed a verdict of acquittal as requested in view of the dubious nature of the evidence.

102 For these reasons, the accused must benefit from this situation in which the second condition of *Hodge's Case* cannot be fulfilled, and therefore he must be acquitted.

103 I feel especially comfortable at arriving at this conclusion as there is every reason to believe that two seriously irregular factors, among others, have contributed to alter the opinion that the jury should have had of the evidence: they are the admission as evidence of ex. P-56 and the Judge's account of the case to the jury.

(i) the admission as evidence of ex. P-56

104 The importance of this document, in the eyes of the Crown, is unquestionable: it is one of the two main exhibits on which the Crown's case is based (p. 3822):

> Now, gentlemen, the exhibit that I consider the most important here. They are all important but surely the most important is the memorandum which contains a confession. It is the agenda.

105 And for six pages Crown counsel discusses this document (pp. 4161-6).

106 And since it is not a signed document, bearing no mark of origin, the least that the appellant could ask was that the Crown brought to the trial legal evidence and that he could cross-examine the author. What happened?

107 On December 11th, at the very end of a trial that had lasted since November 10th without any substantial interruptions the Crown calls back as a witness Lieutenant-Detective Julien Giguère, who had already testified on November 26th, 27th and 28th and on December 9th and 10th, and makes the witness produce the above-mentioned document, trying to attribute it to Faulkner. Crown counsel does not hide the fact that it is an attempt to lead indirect evidence at least:

108 Page 3594: "Here, Mr. Vallieres is going to say to you in a few minutes that Faulkner be brought here. We are not interested in bringing hostile witnesses."

109 At the beginning the Court did not seem opposed to the appellant's request to let the Crown hear Faulkner:

> THE COURT
>
> All you have to do is to get Faulkner.
>
> MR. GIROUARD:
>
> It is possible your Lordship.

110 Then the Court called back the jurors and suggested the document be introduced. Giguère then produced "a photocopy of the photocopy" of a document he had found on Laquerre and he added, through the repeated objections by the appellant and before the jury.

111 Page 3605: "Later on, your Lordship, I met Mister Faulkner and I showed him the document and he recognized it."

112 The Judge then stated:

113 Page 3608: "It is final, it is introduced, I do not say that it is produced, I shall decide this afternoon if it is going to be produced.

114 In the afternoon, the Judge rejected the appellant's objections to the production of the document (pp. 3632-6). Then, adding to the difficult situation, the Judge prohibited the appellant from cross-examining. As a matter of fact, the witness had stated that he had shown the document to Faulkner and that the latter had recognized it. Naturally, to this testimony was linked the appellant's question, to wit: in his presence and in the presence of the accused, Faulkner had stated in Court that "it was a pack of lies" (p. 3638 and following). But the

Court welcomed the Crown's objection, stating:

115 Page 3640: "Objection maintained. You will not have Mr. Faulkner testify through the witness."

116 Yet, it was exactly the procedure followed by the Crown.

117 In my opinion, from beginning to end, this episode was tainted with a fundamental flaw. First of all, the Crown relied on a judgment of the English Court of Appeal in *R. v. Whitaker* (1914), 10 Cr. App. R. 245, 30 T.L.R. 627. In his report to our Court, the judge cites the Supreme Court of Canada in *Cloutier v. The King* (1939), 73 C.C.C. 1, [1940] 1 D.L.R. 553, [1940] S.C.R. 131. None of these judgments applies to the present case. The statement of the co-conspirator — verbal in the *Cloutier* case, written in the *Whitaker* case — were the object of direct evidence which justified their introduction in the record. Here the Crown goes a long way round: he produces the photocopy of a photocopy of an anonymous document and because it was found on an alleged co-conspirator, he claims to link it to a third through the account of a conversation between the latter and the investigating officer. In my opinion, the rules of evidence are being stretched in an unacceptable way.

118 The trial Judge declared that the author "can be no other than Faulkner, from the context" (p. 4162). But in a case of this kind where everything depends on circumstantial evidence, it seems to me to be very dangerous to jump to such a conclusion and to attribute with authority an anonymous document to a certain person rather than another, especially when direct evidence is available.

119 On this subject, the trial Judge imposed on the appellant the burden of calling the alleged author of the document:

120 Page 4165:

> The Defense only had to hear Faulkner. The Crown did not have to do so. It is clear — And you will understand why. The Crown did not call Faulkner because the Crown did not trust Faulkner, but if Faulkner had been called by the Defense, he would have been cross-examined by the Crown.

121 Here again, there was imposed on the defence an intolerable obligation in a criminal matter and the Crown was allowed to build circumstantial evidence on a very fragile and unacceptable basis.

122 Let us add the prohibition to cross-examine the witness, who had produced the document, on his most important answer, and we have an extremely prejudicial situation for the accused contrary to all legal rules. I have no doubt that this document P-56 introduced by the Crown counsel and by the trial Judge, played a leading part in helping the jury to arrive at their conclusion.

123 There is no need therefor to add that if this element of prime importance for the prosecution is excluded from the Crown's evidence, the "circumstantial" theory is weakened and the accused is given a more solid ground for acquittal.

(ii) the Judge's charge to the jury

124 Considered as a whole, this charge is more a charge for the Crown than an impartial account of the two theories. The appellant was right to complain that his defence had not been presented to the jury as he had the right to expect and that the jury only heard, for all practical purposes, one bell ring at the end of this long trial: *R. v. Henderson* (1968), 91 C.C.C. 97, [1942] 2 D.L.R. 121, [1948] S.C.R. 226.

125 Also, the Judge introduced in his charge uncalled-for remarks which, each time, could only help belittle further the defence in the mind of the jurors. A few examples will suffice (the emphasis is added).

126 1. Page 4184:

> There are circumstances in life when it is difficult to do one's duty; there are circumstances in life when it is more difficult to do one's duty and, gentlemen, I shall be truthful: the present matter might be one of those cases. You have been going home every night for six weeks. I never heard that you were inconvenienced; that you were annoyed; that you received telephone calls; *here, I set aside the defense*, gentlemen, I never heard that *someone* tried to influence you. I hope that if it had happened I would have been informed.
>
> I know one person whom *someone* tried to influence: the person who is speaking to you, but that *someone* was not successful. *Someone* tried, not with threats, but *someone* tried to influence me. *Someone* posed as someone else; *someone* wanted to make some suggestions, not give me orders. *Whoever* it was, knows that I take suggestions from my criminal code and from my conscience and nowhere else. *Once again I do not blame the defense, I forbid you to take it into account*. I do not know where it comes from, but I want it to be known: there are still judges who cannot be influenced.

127 Those are remarks tinted with the greatest ambiguity: the defence risked to suffer the most serious prejudice.

128 2. Page 4189:

> So often I hear it said that the Crown has no case to win that I wonder whether we shouldn't be honest and say that the Crown should lose all its cases. That is what is really meant.
>
> What is important, gentlemen, is that justice triumphs and for justice to triumph I hope there are still some cases where the Crown has the right to win a cause.

129 It is a direct invitation to link the conviction of the accused with the triumph of justice. Coming from a Judge, these statements must have become, for the jury, of capital importance to the detriment of the elementary rights of the accused: the Judge was implicitly directing the jury to a guilty verdict based not on evidence, but on feelings.

130 3. Page 4188:

> If you say that he is only guilty of manslaughter, *I have the discretion of the sentence*. I have the right to take into account the time spent by the accused in jail. Gentlemen, *I have the right to do so, I do not say to you that I will do it because I cannot influence you*. Be satisfied to know that I have the right to do so. I do not want you to give an approximate verdict; I want your verdict to be based on the truth as you see it. *I have the right to do so*. I have to tell you that *in practice it is done and I am a human being like anyone else*.

131 There is only one possible interpretation to this text and the appellant is justified to object. In the case of *McLean v. The King* (1933), 61 C.C.C. 9 at pp. 13-4, [1934] 2 D.L.R. 440, [1933] S.C.R. 688, the presiding Judge had expressed to the jury remarks of a similar nature:

> You need not concern yourselves with the penalty that is attached to this or to any offence. It does not follow that because a man is convicted on a capital charge that he will necessarily be hanged. It is true that the

> Criminal Code of Canada makes it incumbent upon the Court to pronounce the sentence of death but the responsible officers of the Crown may in their wisdom if they see fit commute that sentence. In any case that responsibility is theirs and not yours or mine. The oath which you have taken calls upon you to decide this case upon the evidence which you have heard from this witness box and upon nothing else. And I need scarcely add you need have no moral fear about doing your duty whether that duty leads you to conviction or to acquittal.

132 The Supreme Court of Canada decided, in the context of this particular trial, that these remarks did not cause the accused any prejudice; but the Supreme Court did not refrain from commenting on them in a most unfavourable way:

> We have no doubt that the reference to the executive clemency was an unfortunate one. There was not the least ground for supposing that a verdict against the accused founded on the evidence adduced and on a proper charge would be interfered with. Such a reference could not assist the jury in performing their duty to decide the issue of fact before them, and there is always some risk that a suggestion that the verdict is to be reviewed may result in some abatement of the deep sense of responsibility with which a jury ought to be brought to regard their duty in passing upon any criminal charge, and, pre-eminently, when the offence charged is murder, to which the law attaches the capital penalty. Such observations as those addressed to the jury by the counsel for the defence can always, if they seem likely to be harmful, be counteracted without resorting to suggestions which may mislead the jury into a misconstruction of their own duty.

133 Therefore, considered as a whole and in its less acceptable parts, the charge of the trial Judge probably contributed to the conviction of the appellant. If he had followed the traditional rules sanctioned by our jurisprudence, the verdict would have probably been different.

134 Considered separately and by themselves the objections relating to ex. P-56 and relating to the Judge's charge should allow the ordering of a new trial.

135 In this case, however, I have put them forward to show how they concur in reinforcing my first belief: if the slag is eliminated and we examine the case as a whole legally administered, the evidence *a fortiori* cannot lead to the unique conclusion of the guilt of the appellant but, on the contrary, it is equally compatible with his innocence of the specific offence that he was charged with, to wit, that he had incited or encouraged the explosion of a bomb at La Grenade's on May 5, 1966.

136 In my opinion the appeal must be allowed, the conviction quashed and the accused acquitted.

II The Crown's appeal against sentence

137 It is evident that this appeal must be declared void.

138 *Appeal allowed; acquittal entered.*

END OF DOCUMENT

Date of Printing: Aug 15, 2012

KEYCITE

R. v. Vallieres, 15 C.C.C. (2d) 241, 1973 CarswellQue 201 (C.A. Que., Feb 28, 1973)

History

Direct History

=> 1 **R. v. Vallieres,** 15 C.C.C. (2d) 241, 1973 CarswellQue 201 (C.A. Que. Feb 28, 1973) **(Judicially considered 4 times)**

Negative and Cautionary Citing References (Canada)

Distinguished in

2 R. v. Parrot, 106 D.L.R. (3d) 296, 51 C.C.C. (2d) 539, 1979 CarswellOnt 1515, 27 O.R. (2d) 333 (Ont. C.A. Nov 22, 1979) (Negative Treatment Available) **(Judicially considered 15 times)**

Date of Printing: Aug 15, 2012

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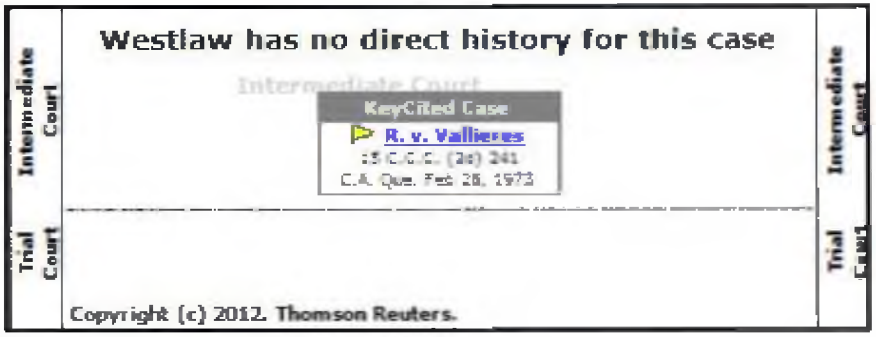
R. v. Vallieres, 15 C.C.C. (2d) 241, 1973 CarswellQue 201 (C.A. Que., Feb 28, 1973)


Intermediate Court
Trial Court
Westlaw has no direct history for this case
Intermediate Court
KeyCited Case
R. v. Vallieres
15 C.C.C. (2d) 241
C.A. Que. Feb 28, 1972
Intermediate Court
Trial Court
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Citing References

Negative and Cautionary Cases (Canada)

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1 R. v. Parrot, 106 D.L.R. (3d) 296, 51 C.C.C. (2d) 539, 1979 CarswellOnt 1515, 27 O.R. (2d) 333 (Ont. C.A. Nov 22, 1979) **(Judicially considered 15 times)**

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Considered in

2 R. v. Leahy, 238 N.S.R. (2d) 391, 2005 CarswellNS 513, 757 A.P.R. 391, 68 W.C.B. (2d) 61, 2005 NSPC 52, [2005] N.S.J. No. 488 (N.S. Prov. Ct. Aug 26, 2005) **(Judicially considered 1 time)**

3 R. v. Pleich, 55 C.C.C. (2d) 13, 1980 CarswellOnt 44, 16 C.R. (3d) 194, [1980] O.J. No. 1233 (Ont. C.A. Jul 30, 1980) **(Judicially considered 55 times)**

Referred to in

4 R. v. Savoy, 1997 CarswellBC 2675 (B.C. S.C. Dec 04, 1997) **(Judicially considered 1 time)**

Secondary Sources (Canada)

5 Crankshaw's Criminal Code of Canada 465§10, Evidence - General