R. v. *Vetrovec*[1]: Criminal Law—The Accomplice Corroboration Rule

Case Summary

The appellants were charged (along with seven others) with conspiracy to traffic in heroin. The issue arose in connection with the testimony of Langvand, an accomplice of the accused.

The Trial Judge instructed the jury that although they could convict on the testimony of an accomplice, it was dangerous to do so, unless his testimony was corroborated. The Trial Judge then charged the jury on the meaning of corroboration and stated that the only rational conclusion was that Langvand was an accomplice. The Appellants appealed on the basis that the Trial Judge erred by finding that certain evidence was capable of having a corroborative effect.

The British Columbia Court of Appeal held that the evidence outlined by the Trial Judge could be characterized as corroborative evidence on the basis that it tended to connect the accused with the crime charged.

The Supreme Court of Canada, in dismissing the appeal, reviewed and rejected the Accomplice Corroboration Rule.

Background

As Audrey Wakeling has pointed out:

> Those rules of corroboration which we have, with the exception of perjury and treason, are relatively recent inventions of the judiciary and the legislature based on experience that certain kinds of witnesses are unreliable or that in specified causes of action too frequently insufficient evidence is adduced . . . Many of the modern rules requiring corroboration started as rules of prudence in the English courts. With respect to accomplice testimony the original question was whether an accomplice was a competent witness at all. Once he was received as a witness and the realization developed that there were qualitative differences among the testimony of different witnesses trial judges began to warn the jury, to discourage a conviction founded solely on the uncorroborated testimony of an accomplice. The rule that such a warning should be given was a rule of practice only, and failure to give it would not result in a conviction being quashed until the passing of the Criminal Appeals Act in 1907. As Lord Reading said in *R.* v. *Baskerville* in 1916:

[1] *R.* v. *Vetrovec* [1982] 1 S.C.R. 811.

> This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation, this court has held that, in the absence of such a warning by the judge, the conviction must be quashed.[2]

The Accomplice Corroboration Rule arose in consequence of the danger of convicting a person upon the unconfirmed testimony of a criminal. What was required was some supporting evidence which would aid in determining the truth of the accomplice's story so that it would be considered safe to act upon.[3]

The "rule," as discussed in *R.* v. *Baskerville*,[4] was adopted in Canada in *Horsburgh* v. *The Queen*[5] (a case involving allegations of sexual immorality against an ordained Minister). The children in that case were called as witnesses for the Crown. The Supreme Court of Canada found that the Trial Judge had erred in holding that the children were not accomplices, and by not giving a warning to the jury. The Court stated:

> It is now settled law that in a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the Judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.[6]

In order to understand the development of the "rule", and the effect of *R.* v. *Vetrovec*, the rationale behind the rule, as well as the criticisms, should be considered.

Many of the most common and important requirements for a corroborative, or cautionary, instruction have been justified on the same grounds that the ancient rules with respect to the incompetence of witnesses were justified. Put simply, it was felt that an accomplice would be unreliable. One of the dangers of accepting the testimony of an accomplice was that, even if a man was certain to be found guilty, he might seek the avoidance or reduction of his punishment by assisting the Crown in prosecuting the accused. Another danger in accepting the testimony of an accomplice was that where the witness was proved to be an accomplice, he may attempt to show that his participation in a crime, as compared to those charged, was of a minor nature. A third reason for requiring the accomplice corroboration rule was that the accomplice would probably be a close acquaintance of the person who actually committed the crime, and as such, would much rather see an innocent person convicted than a friend. The final rationale for the rule, which was more prevalent in the earlier cases, is based on the moral guilt of the witnesses, i.e., that a witness who has himself committed a crime, should not be believed.[7]

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[2]*Corroboration in Canadian Law* (Toronto: Carswell, 1977), at 10-11.

[3]*R.* v. *Baskerville* [1916] 2 K.B. 658, at 664-665.

[4]*Ibid.*, at 658.

[5][1967] S.C.R. 746.

[6]*Ibid.*, at 754.

[7]J. D. Heyden, "The Corroboration of Accomplices" (1973), *Crim. L. Rev.* 264 at 265-6.

One of the major advantages of the "rule" is that it provides protection for the accused from false accusations. The effect of a warning is to alert the jury to the unreliability of accomplice evidence. However, the "rule" has been criticized.[8]

There are four major arguments levelled against the mandatory requirement of a corroborating warning. First, the caution that must be given to the jury can, in some cases, become so complicated that it impedes, rather than assists, a jury in evaluating the evidence. Second, the complexity of the warning leads to judicial errors, resulting in appeals. Third, in some cases, motive to give perjured testimony is not present or apparent, yet the warning is still required. The rule determines—in advance of the testimony, and in ignorance of the particular facts surrounding the case, including the accomplice's own credibility—that an accomplice's testimony may be unreliable. Fourth, the rule assumes that the jurors will more likely be misled by the testimony of an accomplice, than by another witness who may have a more compelling reason to mislead.

In summary, the law prior to *R.* v. *Vetrovec* dictated that where a witness testifying for the prosecution might be found to be an accomplice, the Trial Judge was required to give the jury a corroboration warning. It was necessary to put the warning to the jury with almost mathematical precision, with no regard to the nature of the charge, the circumstances of the case, or the personality of the accomplice. The proper procedure was for the Trial Judge to direct the jury on: (1) what an accomplice is, (2) if they found the witness to be an accomplice, that it would be unsafe to convict upon his uncorroborated testimony, (3) that they *may* convict upon his uncorroborated testimony if they are satisfied beyond a reasonable doubt that he is telling the truth, (4) what corroboration is, (5) what evidence is *capable* of being corroborative, and (6) that they must be satisfied beyond a reasonable doubt of the guilt of the accused before they can convict.[9]

The Principal Case

Mr. Justice Dickson, speaking for a unanimous Supreme Court of Canada, expressly indicated that he intended to review and to reassess the general common law (as opposed to statute law) principles relating to corroboration, as they applied to accomplices.[10] He was of the opinion that the corroboration of accomplices was one of the most unnecessarily complicated and technical areas of the law, and thus required reform.[11]

The rationale for re-evaluating the law of accomplice corroboration was perceived by the Court to be twofold. First, was "the increasing length

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[8]Law Reform Commission of Canada, "Evidence: Corroboration: A Study Paper prepared by the Law of Evidence Project," Ottawa (1975), at 5-10.

[9]*Supra*, footnote 2, at 105.

[10]*Supra*, footnote 1.

[11]*Ibid.*, at 816.

and complexity of criminal trials", particularly in the area of white collar crime; and second, was an "apparent trend" in the English courts, as well as the Canadian courts, to overcome the technicalities surrounding the concept of corroboration and to "return to the conceptual basics."[12]

The Court indicated that there was nothing in the evidence of an accomplice which should automatically render his testimony untrustworthy. As Dickson J. states:

> To construct a universal rule singling out accomplices, then, is to fasten upon this branch of the law of evidence a blind and empty formalism.[13]

In discarding the Accomplice Corroboration Rule, the Court found that there were at least three difficulties associated with the *Baskerville* decision (upon which the rule was based) as follows: (1) it tends to confuse the reason behind the warning, (2) the law surrounding the term "corroboration" has become increasingly complex and technical, and (3) the *Baskerville* definition is unsound in principle.[14]

The Court was cognizant of the fact that the effect of the judgment in *R.* v. *Vetrovec* would be to allow the Trial Judge much more discretion in deciding whether or not a jury should be warned concerning the dangers of convicting solely upon the testimony of an accomplice.[15] The Court stated that, *inter alia*, rather than attempting to categorize a witness, identifying corroborative evidence, and warning the jury; the Trial Judge should be concerned with the credibility of the witness. If in the opinion of the Trial Judge, the credibility of the wintess is questionable, then the Trial Judge has the discretion to warn the jury accordingly, in any case. If on the other hand, the Trial Judge concludes that the credibility of the witness is unimpeachable, then regardless of whether the witness is technically an accomplice, the Trial Judge would not have to give a warning to the jury.

The Court in *Vetrovec* extended the common sense approach, which is outlined in the case of *Warkentin et. al.* v. *The Queen*[16], and cited with approval the dicta of de Grandpre J. in the following manner:

> Corroboration is not a word of art. It is a matter of common sense. In recent years, this Court has repeatedly refused to give a narrow legalistic reading of that word and to impose upon trial judges artificial restraints in their instructions to juries or to themselves.[17]

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[12] *Ibid.*, at 819.

[13] *Ibid.*, at 823.

[14] *Ibid.*, at 824.

[15] *Supra*, footnote 1.

[16] [1977] 2 S.C.R. 355.

[17] *Ibid.*, at 374.

The effect of *R.* v. *Vetrovec* on the Accomplice Corroboration Rule can be clearly stated by quoting Dickson J.

> The Law of Corroboration is unduly and unnecessarily complex and technical. I would hold that there is no special category for "accomplices". An accomplice is to be treated like any other witness testifying at a criminal trial and the judge's conduct, if he chooses to give his opinion, is governed by the general rules.[18]

Conclusion

R. v. *Vetrovec* does have an important impact on criminal law practice. However, despite first appearances, the Supreme Court of Canada has taken a cautious approach to this troublesome problem. While abandoning the necessity for a strict application of the Accomplice Corroboration Rule, discretion has been left in the Trial Judge to give a corroboration warning where it is felt that such a warning is desirable. In the final analysis, what has really changed is that the warning is no longer mandatory.

MALCOLM J. MacKILLOP*

[18]*Supra*, footnote 1, at 830.

*B.A., L.L.B. (U.N.B.). Now with Mercer, Spracklin, Heywood & McKay; St. John's, Newfoundland.