

CANADA / JUDGMENT

Demeter v. R.

[1978] 1 SCR 538

COURT

Supreme Court of Canada

DECIDED

31 May 1977

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Demeter v. R.

Collection

Supreme Court Judgments

Date

1977-05-31

Report

[1978] 1 SCR 538

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Demeter v. R., [1978] 1 S.C.R. 538

Date: 1977-05-31

Peter Demeter (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1977: February 28; 1977: March 1; 1977: May 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Evidence—Hearsay evidence—Admissibility of alleged confession by deceased declarant—Whether statement adverse to declarant's interests—Criminal law—Decisions relative to sequestration of jury—Not a question of law.

Appellant was charged with murder. The Crown case was that appellant had procured some unknown person to kill his wife. Appellant sought to introduce evidence that a person unconnected with him had confessed to the murder of the wife. That person was an escaped convict who had died prior to the trial and the witness, Dinardo to whom he had confessed indicated that he would not have given the evidence implicating his friend had the friend still been alive. The trial judge excluded the confession as hearsay evidence. At the commencement of the trial and thereafter during the course of the trial, the trial judge refused application by the defence that the jury be sequestered but subsequently on his own motion ordered that the jury be sequestered. Appellant was convicted and his subsequent appeal was dismissed. Leave to appeal to the Supreme Court was granted in respect of two questions, First, whether the Court of Appeal had erred in holding that the trial judge had not erred in initially refusing to sequester the jury and later doing so rather than declaring a mistrial and, second, whether the Court of Appeal had erred in holding that the trial judge had not erred in ruling that the evidence of the confession by the deceased Eper was inadmissible.

Held: The appeal should be dismissed.

Per Laskin C.J. and Spence J.: In the circumstances the alleged confession by Eper, since deceased, was not admissible. The question of whether or not a statement made against the declarant's penal interest rather than his pecuniary or proprietary interest should be admissible can be left open as to its total tenor to be dealt with on another occasion. There could well be circumstances when the whole intent in adducing such a statement is to show that the declarant and not the accused had committed the physical act where the statement should be admissible and of very considerable probative weight despite the fact that in his statement the declarant might advance justification for his act.

Per Martland, Judson, Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ: Appeals to the Supreme Court under s. 618(1)(b) are limited to questions of law. The decision of the trial judge was not on a question of law and the judgment of the Court of Appeal did not raise a question of law. The Supreme Court was therefore without jurisdiction to consider that issue. The Court is not precluded from reaching such a conclusion by the fact that leave to appeal was granted in respect of the question.

The confession by Eper did not meet the necessary requirements for admissibility. Even on the assumption that it is not necessary that the interest to which such statement is adverse must be a proprietary or pecuniary one, there was nothing in the evidence to show that when Eper made the statement it was contrary to his interest either penal or pecuniary. It was a statement by an escaped criminal under sentence of life imprisonment to a man with a long criminal record who had been his accomplice in crime for many years.

[R. v. Warner, [1961] S.C.R. 144; The Sussex Peerage (1844), 11 Cl. & Fin. 85, 8 E.R. 1034; Scolari v. United States (1969), 406 F. (2d) 563; Ward v. H.S. Pitt & Co.; Lloyd v. Powell Duffryn Steam Coal Company, [1913] 2 K.B. 130; Lloyd v. Powell Duffryn Steam Coal Company, [1914] A.C. 733 referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal by the appellant from his conviction on a charge of noncapital murder. Appeal dismissed.

Edward L. Greenspan and Mark Rosenberg, for the appellant.

J. David Watt, for the respondent.

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

SPENCE J.—I have had the opportunity to consider the reasons for judgment to be delivered by my brother Martland. I agree with him that the appeal should be dismissed and, in the main, I am in accord with the reasons which he expresses.

Particularly, I agree that under the circumstances which existed in the present case the alleged confession by Eper, since deceased, which Dinardo testified Eper had made to him, is not admissible. I shall be dealing on another occasion with the general question of whether or not a statement made against the declarant's penal interest rather than merely his pecuniary or proprietary interest should be admissible but, for the present purposes, I desire to leave open the question as to the total tenor of such statement. I can well understand occasions when the whole intent in adducing such statement from the witness who heard it from the lips of the deceased declarant is to show that the declarant and not the accused had committed the physical act and that therefore a statement made by the deceased declarant that he had committed the physical act should be admissible and of very considerable probative weight despite the fact that in his statement the declarant might advance some allegation, for instance, an allegation that he acted in self-defence.

I, therefore, agree that the appeal should be dismissed.

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

MARTLAND J.—This appeal is from the judgment of the Court of Appeal for Ontario, which dismissed the appellant's appeal from his conviction on a charge of non-capital murder. Leave to appeal to this Court was granted in respect of two questions, which are defined in the order granting leave to appeal, as follows:

- (1) Did the Court of Appeal of Ontario err in holding that the trial Judge did not err in refusing to sequester the jury as sought on several occasions by defence counsel and in sequestering the jury after the trial had gone on for about six weeks instead of declaring a mistrial?
- (2) Did the Court of Appeal of Ontario err in holding that the trial Judge did not err in holding that a confession by the deceased Eper to the witness, exonerating the accused, was inadmissible? The trial lasted for 51 days and a great deal of evidence was presented. The facts are set forth in the reasons for judgment of the Court of Appeal, which are reported in (1976), 10 O.R. (2d.) 321. It is not necessary to review them save insofar as they relate to the questions in issue.

1. Sequestration of the Jury.

At the commencement of the trial application was made on behalf of the appellant that the jury be sequestered. This application was refused. Similar applications were made during the course of the trial on a number of occasions. They were unsuccessful. Subsequently the trial judge, on his own motion, ordered that the jury be sequestered.

The relevant provision of the Criminal Code is s. 576(1):

The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

The trial judge exercised this discretion by permitting the jury to separate, until the time when he decided no longer to permit them to do so. His failure to sequester the jury at the commencement of the trial was raised as a ground of appeal before the Court of Appeal and was rejected.

In my opinion the decision of the trial judge on this question was not a decision on a question of law. If the Court of Appeal had considered that this decision by the trial judge had resulted in a miscarriage of justice, it would have had the power to deal with the matter under s. 613(1)(a)(i) of the Criminal Code, but the Court did not so find. On an appeal to this Court under s. 618(1)(b) the Court is limited to the consideration of "any question of law". In my opinion the decision of the trial judge as to sequestration of the jury was not on a question of law, and the judgment of the Court of Appeal confirming that decision does not raise a question of law. This Court is, therefore, without jurisdiction to consider that issue. The fact that leave to appeal was granted in respect of this question does not preclude the Court from reaching this conclusion. (*R. v. Warner*[2]).

2. Refusal to admit the confession of the deceased Eper.

The facts giving rise to this issue are as follows. The case for the Crown was that the appellant had procured some unknown person to kill the appellant's wife. The appellant sought to introduce evidence through the witness Dinardo that one Eper, who was apparently unconnected with the appellant, had confessed to the murder of the appellant's wife. Eper was an escaped convict, who had been serving a sentence for life at the time of his escape, and who had died prior to the trial. Dinardo was his friend and testified that he would not have given evidence implicating Eper in the murder if Eper had still been alive. The trial judge excluded the alleged confession as being hearsay evidence.

The submission of counsel for the appellant is that this evidence was admissible by reason of the exception to the hearsay rule in respect of declarations against interest. The Court of Appeal defined the issue thus raised in the following passage from its judgment:

At common law an oral or written declaration against pecuniary or proprietary interest by a deceased declarant has been long held to be admissible to prove the fact declared. In excluding that part of Dinardo's evidence the learned trial Judge followed *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 8 E.R. 1034, where it was laid down by the House of Lords that a declaration against penal interest is not admissible. The appellant argued that this Court should not follow *The Sussex Peerage* and should follow some earlier English decisions of Courts lower than the House of Lords where declarations against penal interest had been held to be admissible. Alternatively, the appellant argued that the declarations in question were admissible as against pecuniary interest on the basis that admission of the killing subjected Eper to a possible action under the Fatal Accidents Act.

All that has usefully been said to date in denial or support of the appellant's first contention can be found by referring, on the one hand, to *The Sussex Peerage* and the very thoughtful and learned judgment of the South Australia Supreme Court in *Frits van Beelen* (1974), 9 S.A.S.R. 163, and, on the other hand, to *Wigmore on Evidence*, 3rd ed. (1974) p. 349, para. 1476; *Hines v. Commonwealth* (1923), 117 S.E. 843, and the dissenting judgment of Mr. Justice Holmes in *Donnelly v. U.S.* (1913), 228 U.S. 243.

It has generally been accepted as the law of England since *The Sussex Peerage* case that the exception to the rule excluding hearsay evidence in respect of declarations made against interest is confined to statements made against pecuniary or proprietary interest and does not permit evidence of a statement by a deceased person against his penal interest.

The leading authority in the United States is the decision of the Supreme Court of the United States in the *Donnelly* case, referred to above, in which the majority of the Court followed *The Sussex Peerage* case. Mr. Justice Holmes, who, along with two other members of the Court dissented, pointed out in his reasons that the confession of the murder by the deceased which was sought to be put in evidence was "coupled with circumstances pointing to its truth". Counsel for the appellant has cited to us a number of cases in which State Courts have extended the exception to the hearsay rule to include statements against penal interest. On the other hand, the United States Court of Appeal, Ninth Circuit, in *Scolari v. United States*[3], when requested to

exercise authority to decline to follow the Donnelly case refused to do so.

The Court of Appeal in the present case, while pointing out that it was not bound by The Sussex Peerage case and thus would be free to choose between the two opposing contentions, was of the view that the facts of the present case did not make it necessary or propitious to settle the law. The Court held that, even if a declaration against penal interest was not necessarily inadmissible, the confession of Eper in question here was not a declaration against penal interest. The reason for so holding is stated as follows:

At the time of both the alleged declarations in question in this case Eper was an escaped convict under sentence of life imprisonment. In the result, he could not be sentenced to a consecutive sentence so that there could be no penal consequence for the crime admitted to which he was vulnerable: *R. v. Sinclair* (1972), 6 C.C.C. (2d) 523. The completely uncertain effect on his prospects of parole in the event of another conviction is too remote and uncertain to be regarded as a penal consequence. In addition, at the time of the declaration to Dinardo he and Eper had been accomplices in crimes for many years and Dinardo, on his evidence, was acting as an accessory after the fact in assisting concealment of evidence of the crime declared. Dinardo testified he would not have given his evidence if Eper were alive.

The Court of Appeal enunciated a number of principles which would have to be applied in determining whether a declaration is against penal interest which, in its view, would have to be applied in addition to those applicable in determining whether a declaration is against pecuniary or proprietary interest. They are as follows:

1. The declaration would have to be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result. In *Sussex Peerage* the Lord Chancellor would not have admitted the declaration in any event of the rule because it was made to the declarant's son. In ordinary circumstances where a declaration is made for instance to an unestranged son, wife or mother, the psychological assurance of reliability is lacking because of (sic) risk of penal consequences is not real and the declarant may have motives such as a desire for self-aggrandizement or to shock which makes the declaration unreliable.
2. The vulnerability to penal consequences would have to be not remote.
3. "...the declaration sought to be given in evidence must be considered in its totality. If upon the whole tenor the weight is in favour of the declarant, it is not against his interest": *Re Van Beelen*, p. 208; *R. v. Agawa* (1975) 11 O.R. (2d) 176.
4. In a doubtful case a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused.
5. The declarant would have to be unavailable by reason of death, insanity, grave illness which prevents the giving of testimony even from a bed, or absence in a jurisdiction to which none of the processes of the Court extends. A declarant would not be unavailable in the

circumstances that existed in *R. v. Agawa*. These furnish a valuable guide for consideration in the event that this Court should determine that a declaration against penal interest is not to be held inadmissible under the rule against the reception of hearsay evidence. In the present case, however, it is my opinion that the confession by Eper did not meet the requirements necessary for the admission of a declaration made against pecuniary or proprietary interest.

Those requirements were stated by Hamilton L.J. in *Ward v. H.S. Pitt & Co.*; *Lloyd v. Powell Duffryn Steam Coal Company*[4], at p. 137. The judgment of the Court of Appeal was reversed on other grounds by the House of Lords in *Lloyd v. Powell Duffryn Steam Coal Company*[5], but on this issue the views of Hamilton L.J. were supported by two of the Law Lords and no dissent therefrom was expressed by the other two Law Lords who sat on the appeal. The requirements are listed as follows:

1. It is essential that the deceased should have made a statement of some fact, of the truth of which he had peculiar knowledge. The rule applies only to statements as to “acts done by the deceased and not by third parties” (per Sir R. Phillimore in *The Henry Coxon* (1878) 3 P.D. 156, 158). It does not extend to cover statements made by a deceased person of what others had told him (Tindal C.J. and Lord Campbell in *Lord Trimlestown v. Kemmis* (1843) 9 Cl. & F. 749, 780, 785).
2. It is essential that such fact should have been “to the deceased’s immediate prejudice,” that is against his interest at the time when he stated it. If it may be construed for his interest or against it (*Massey v. Allen*) (13 Ch. D. 558) or may only be against his interest in certain future events (*Ex parte Edwards*) (14 Q.B.D. 415) it is inadmissible.
3. It is essential that the deceased should have known the fact to be against his interest when he made it, because it is on the guarantee of truth based on a man’s conscious statement of a fact, “even though it be to his own hindrance,” that the whole theory of admissibility depends. It is “a necessary element, that the subject-matter of the declaration...must have been within the direct personal knowledge of the person making the declaration” (per Lord Selborne L.C. in *Sturla v. Freccia* (1880) 5 App. Cas. 623, 633); “to support the admissibility it must be shewn that the statement was, to the knowledge of the deceased, contrary to his interest” (per Fletcher Moulton L.J. in *Tucker v. Oldbury Urban Council* (1912) 2 K.B. 317, 321).
4. It has long been held that the interest to which the statement must be adverse must be a pecuniary one or, which is only a species of the same genus, a proprietary one. A statement would not be against interest if only generally criminatory; one “which might in some way or other injuriously affect the interest of the party” (per Lord Lyndhurst L.C., Lords Brougham and Denman in the *Sussex Peerage Case* (11 Cl. & F. 85, 110, 111)), or which might be prejudicial to reputation or social consideration.

Even on the assumption that it is not necessary to meet the requirement numbered 4, the confession in this case does not meet the requirement numbered 3. There is nothing in the evidence to show that when Eper made his statement to Dinardo that he apprehended or had any cause for apprehension that it was contrary to his interest, either penal or pecuniary. This was a statement made by an escaped criminal under sentence of life imprisonment to a man with a long criminal record, who had been his accomplice in crime for many years. In fact Dinardo stated in evidence that he would not have given his evidence if Eper were alive.

In these circumstances the confession did not meet the requirements for admissibility of a declaration by a deceased person, and in my opinion the Court of Appeal was right in holding that it was properly rejected as evidence by the trial judge.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Greenspan, Gold & Moldaver, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

[1] (1976), 10 O.R. (2d) 321.

[2] [1961] S.C.R. 144.

[3] (1969), 406 F. (2d) 563.

[4] [1913] 2 K.B. 130.

[5] [1914] A.C. 733.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/4361/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/demeter-v-r-1977>

Prepared on 27 October 2026 · Esheria