

CANADA / JUDGMENT

Morris v. The Queen

[1979] 1 SCR 405

COURT

Supreme Court of Canada

DECIDED

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Morris v. The Queen

Collection

Supreme Court Judgments

Date

1978-10-03

Report

[1979] 1 SCR 405

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; Pratte, Yves

On appeal from

Quebec

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Morris v. The Queen, [1979] 1 S.C.R. 405

Date: 1978-10-03

Phillip Morris Appellant;

and

Her Majesty The Queen Respondent.

1978: January 31; 1978: October 3.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law—Evidence—Cross-examining on previous convictions—Admissions by witness—Leave to question the accused on his record as a juvenile delinquent—Judge's charge to jury—Criminal Code, R.S.C. 1970, c. 34, ss. 306, 593, 609—Canada Evidence Act, R.S.C. 1970, c. E-10, s. 12—Juvenile Delinquents Act, R.S.C. 1970, c. J-3, ss. 3, 20(1), 26, 38.

Appellant, aged 19, was found guilty by the Court of Queen's Bench, Criminal Side, for the district of Montreal, consisting of a judge and jury, on a charge of breaking and entering with intent (s. 306 Cr.C.). He appealed to the Court of Appeal on the ground that the trial judge erred by allowing evidence of the cross-examination of appellant, in which he contradicted the evidence he had given in chief and admitted having been found guilty, under the Juvenile Delinquents Act, of offences, under the Criminal Code. The Court of Appeal affirmed the conviction; hence the appeal to this Court.

Held (Laskin C.J. and Spence, Dickson and Estey JJ. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Pigeon, Beetz and Pratte JJ.: Under s. 12 of the Canada Evidence Act and s. 593 Cr.C., the trial judge properly allowed in evidence the cross-examination of the appellant upon his record as a juvenile delinquent. The word "offence" as used in s. 12(1) of the Canada Evidence Act includes a delinquency consisting in a violation of the Criminal Code which is enforceable under the Juvenile Delinquents Act, and a finding of delinquency under this Act is equivalent to a conviction within the meaning of s. 12 of the Canada Evidence Act. The right to cross-examine a witness with the view of establishing the falsity of the evidence-in-chief should not be less absolute in the case of a former juvenile delinquent than in other cases. The admissions of the appellant during his cross-examination constitute sufficient proof of the delinquencies of which he was found guilty under the Juvenile Delinquents Act, without it being necessary to produce the official record. Moreover, nothing in the pre-sentencing report furnished to the trial judge indicated that these admissions were erroneous; this report in fact related to the penalties imposed on the appellant rather than to the findings of guilty made against him.

Further, so far as s. 593 Cr.C. is concerned, the appellant put his character in issue when he stated that he had never been convicted nor arrested; it was open to the Crown to contradict this proof of good character by proof of prior convictions.

So far as the judge's charge to the jury is concerned, even if the judge erred in stating that the appellant lied when he denied any previous arrest, this error, in the circumstances of the case, had no influence on the jury's decision not to believe the appellant.

Per Laskin C.J. and Spence, Dickson and Estey JJ., dissenting: By telling the jury that the accused had lied when he stated that he had never been arrested, the trial judge committed an error justifying a new trial. The record contained no evidence of an arrest. Even if it was concluded that the appellant had committed delinquencies as a juvenile delinquent, the Juvenile Delinquents Act does not allow such findings to be treated as convictions that can be proved in evidence under s. 593 Cr.C. A finding of juvenile delinquency under the Juvenile Delinquents Act is not equivalent to a conviction under the Criminal Code.

[R. v. Lalonde (1950), 11 C.R. 71, referred to; Jones v. Director of Public Prosecutions, [1962] A.C. 635, followed; Koufis v. The King, [1941] S.C.R. 481 followed; Attorney general of British Columbia v. Smith, [1967] S.C.R. 702, [1969] I.C.C.C. 244; R. v. Horsburgh, [1966] 1 O.R. 739; Krassman v. The Queen (1972), 8 C.C.C. (2d) 45; Adelphi Book Store Limited v. The Queen (1972), 8 C.C.C. (2d) 49; R. v. Grant (1936), 100 J.P. 324; R. v. Blaby, [1894] 2 Q.B. 170; R. v. Manchester Justices, [1937] 2 K.B. 96; Smith v. The Queen, [1959] S.C.R. 638 reversing (1958), 121 C.C.C. 103 (sub nom. R. v. Gerald X.); Tarlo's Estate (1934), 172 A. 139, 315 Pa. 321; Blaufus v. People (1877), 69 N.Y. 107, 25 Am. Rep. 148; Ward v. Sinfield (1880), 49 L.J.Q.B. 696; Stirland v. Director of Public Prosecutions, [1944] A.C. 315; R. v. Davison et al. (1974), 20 C.C.C. (2d) 424; R. v. McLean (1940), 73 C.C.C. 310; R. v. Sweet-Escott (1971), 55 C.A.R. 316; R. v. Baker (1912), 7 C.A.R. 252; R. v. Samuel (1956), 40 C.A.R. 8; R. v. St. Pierre (1974), 17 C.C.C. (2d) 489; R. v. MacDonald (1974), 27 C.R.N.S. 212; R. v. Triganzie (1888), 15 O.R. 294, referred to.]

APPEAL against a decision of the Court of Appeal of Quebec[1] affirming a guilty verdict handed down by a jury. Appeal dismissed, Laskin C.J. and Spence, Dickson and Estey JJ. dissenting.

Peter M. Gold, for the appellant.

Henry Keyserlingk, for the respondent.

The judgment of Chief Justice Laskin and Spence, Dickson and Estey JJ. was delivered by

SPENCE J. (dissenting)—This is an appeal from the judgment of the Court of Appeal for the Province of Quebec pronounced on the 17th of March 1975 by which judgment the said Court of Appeal dismissed an appeal from the conviction of the appellant after the verdict of a jury on the charge that he did

TO WIT: Phillip MORRIS à MONTREAL district MONTREAL on or about June 10th 1973, did unlawfully break and enter a place other than a dwelling house, to wit: a building situated at 6665 Saint-Jacques West, the property of K-Tel International Ltd., with intent to commit an indictable offence therein, committing thereby an indictable offence, according to section 306-1-a-e of the Criminal Code, against the form of the Statute in such case made and provided and against the Peace of Our Sovereign Majesty the Queen, Elizabeth the Second, Her Crown and Dignity.

Dated August 7, 1973.

The appellant was actually apprehended as he climbed out of a window of the subject premises in an attempt to leave them. Section 306(2) of the Criminal Code provides:

- (2) For the purposes of proceedings under this section, evidence that an accused
 - (a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or
 - (b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after

- (i) committing an indictable offence therein, or

- (ii) entering with intent to commit an indictable offence therein. Undoubtedly, in view of this provision and the above recited circumstance, counsel for the appellant called the appellant to give evidence. Normally, it would be expected that under such circumstances, the appellant would have very considerable difficulty in adducing evidence which would raise any reasonable doubt in the minds of the jury. There were, however, in the evidence adduced, a considerable number of facts which made it possible that the appellant's excuse for entry into the premises, i.e., that he had merely been seeking shelter from a heavy rainstorm and had unwittingly locked himself in the premises, might raise a considerable doubt. Therefore, as the learned trial judge, Hugessen A.C.J., said, in his charge to the jury:

...but it's going to come down to your assessment of the credibility of the accused.

The appellant was nineteen years of age at the date of the alleged offence and the time of the trial. So soon as counsel for the appellant called that appellant as a witness, the following questions and answers were put:

Q. Mr. Phillip Morris, have you ever been convicted of a criminal offense?

A. No. None whatsoever.

Q. Have you ever been arrested before?

A. No.

Q. This is the first time?

A. Yes.

Q. This incident?

A. Yes.

After the appellant had given evidence-in-chief, he was cross-examined and at a certain point counsel for the Crown interrupted his examination, requested that the jury be excused, and then applied for the right to cross-examine the appellant upon his alleged record as a juvenile. After considerable argument, the learned trial judge ruled:

...so I'm prepared to admit, Mr. Keyserlingk, the question, or a series of questions if necessary, with regard to any conviction of the accused of an offence described in the Juvenile Delinquents Act. You can call the Jury back.

The following cross-examination of the appellant then took place: Q. Mr. Morris, you've mentioned to the Members of the Jury that you had never been previously arrested or convicted of any offence whatsoever. Is that correct?

A. Yes.

Q. Is it not a fact that in nineteen sixty-three, before the Juvenile Court, you were charged with and found guilty of attempted theft?

A. I don't remember.

Q. Is it not true that in nineteen sixty-nine you were charged again before the Juvenile Court, convicted of damages to third party's property, causing damages?

A. I don't remember exactly.

Q. O.K., do you remember if in nineteen seventy you were charged with and found guilty of theft and illegal possession, in nineteen seventy?

A. Yes.

Q. Do you remember if in nineteen seventy-two, before the Juvenile Court, that you were found guilty of breaking and entering?

A. Guilty.

Q. You were found guilty in nineteen seventy-two. Is that correct?

A. Yes.

Q. That would have been at the age of eighteen... seventeen?

A. Seventeen.

Upon the conclusion of the evidence, the learned trial judge charged the jury in what was, with respect, a remarkably correct yet brief charge referring to the question of the record in the following terms:

Now, just before terminating, I'd like to say one word about the accused's record, which was brought up too. First of all, it seems quite clear to me that in his evidence in chief, the accused lied. When he started out, the very first thing he said was that he had never been convicted. He had never been arrested. You can draw what conclusions you like from that. You may choose to think that he was frightened, didn't want to bring out before you the fact that he'd been in trouble with the police before, as a juvenile. You may choose to think that he felt that his record as a juvenile was not important or wasn't covered by what was asked of him. You may also choose to think that even if he deliberately lied on that subject, that what he told you in the rest of his

testimony was the truth. You're the entire Judges of this. It would equally be within your realm, in your power, to come to the conclusion that having lied to you on this matter, which you may think is important, that the rest of his story is pretty doubtful. That's your decision to make. The only thing I would ask you to do, and I'm sure that your common sense will tell you this, I would ask you to be very careful not to convict the accused simply because he's been convicted before. Our whole system proceeds on the basis that a man pays his debt to society when he's convicted, and when he comes back into society, that debt is paid and he's not made to pay it twice or three times or four times. So you can take that record of his into account when you're assessing his credibility, and you may feel it's a great importance, but I would not want you to convict a man simply because he has previously been convicted.

The jury rendered a verdict of guilty and the learned trial judge, after hearing representations as to sentence, to which I shall refer hereafter, sentenced the appellant to three months' suspended sentence to the 3rd of May 1974 and required him to report to a probation officer every two weeks together with other terms of probation.

The appellant appealed to the Court of Appeal for the Province of Quebec and his appeal was dismissed as I have outlined.

Leave to appeal to this Court was granted by the order of the Court pronounced on the 21st of June 1975. Although that order was general, the only issue argued before this Court was as to the propriety of permitting the cross-examination of the appellant upon his alleged record, as I have recited it aforesaid, and also the propriety of the learned trial judge's charge to the jury upon that topic. I have come to the conclusion that the conviction cannot stand.

In the first place, it was said that the accused, the present appellant, lied when he swore that he had never been arrested. I have quoted the learned trial judge's charge thereon and I emphasize again the words:

First of all, it seems quite clear to me that in his evidence in chief, the accused lied. When he started out, the very first thing he said was that he had never been convicted. He had never been arrested.

(The underlining is my own.) I deal first with the statement that the appellant lied when he said he had never been arrested. It will be seen that the appellant did state quite plainly in examination-in-chief that he had never been arrested. Then, in cross-examination by Crown counsel, the appellant affirmed that he had made that statement. In subsequent cross-examination, the accused appears to have admitted that he had been "convicted", a subject on which I shall comment later, but he was never again asked if he had been arrested. So that at the close of the trial, the only evidence as to whether or not the accused had been arrested, as distinguished from convicted, was his own statement that he had not been arrested. There is nothing impossible in such a situation. The acts with which the appellant was charged (I am using the most indefinite word intentionally) were of a minor nature in the case of a juvenile and it is quite within the realm of possibility that he should have been summonsed to appear before the Juvenile Court judge, but not arrested, or even brought before the Juvenile Court by his father

who seems to have been always present. Therefore, in so far as the learned trial judge expressed to the jury the opinion that the accused had lied when he said he had never been arrested, such charge was plainly incorrect. The only evidence before the court was his own, in chief, that he had not been so arrested. The matter is important because when the learned trial judge reported to the Court of Appeal dealing with his subsequent discovery of the facts in reference to the so-called record, he said:

If this fact had been made known to me while the case was still in the hands of the jury, I might have taken a different attitude although I do not think so. In my view the accused had opened the door to evidence of his bad character by attempting to lead evidence of good character and the jury were entitled to know that he had perjured himself in his evidence in chief when he stated that he had never been arrested.

Even if there had been no virtue in the balance of the argument to this Court by counsel for the appellant, I would have felt that this fault was sufficient to have required a new trial.

Secondly, even presuming that there had been no reference in either the examination-in-chief or the cross-examination, or in the charge to the jury, to arrest, I am of the opinion that the reference to the so-called “convictions” of the appellant, when he was a juvenile, was in error and was a fatal fault.

It is quite evident that when counsel for the Crown cross-examined the accused, the present appellant, he must have had before him a statement of the accused’s juvenile record. Such a document was not tendered to the court at that time because of the accused’s apparent agreement with the allegations made by Crown counsel that he had on various occasions been “convicted”. Upon sentence, however, counsel for the Crown produced a document which was marked as Ex. S-1, which purports to be a record signed by “A.M. Racine, Acting Clerk, Social Welfare Court” which reads as follows:

[TRANSLATION]

Montreal, January 30, 1974.

RE: Phillip Morris

Files

Offences

Judgments

2213/67

AUTOMOBILE THEFT & CONCEALMENT

15-5-67 Adjourned Sine Die

3471/67

THEFT & CONCEALMENT

8-5-67 Placement at Boys' Farm & Training School 12-8-68 Placement of 8-5-67 cancelled

680/70

THEFT & CONCEALMENT

30-1-70 Case adjourned Sine Die

2839/72

BREAK. AND ENT. WITH INTENT

16-6-72 Sine Die

A.M. Racine Acting Clerk

AMR/jt

Social Welfare Court

It will be noted that as to the former offences set out on this so-called record, there are no convictions registered. In the first, third and fourth, the disposition would appear to be sine die adjournment, and in the second, the accused had been placed in a boys' farm and training school on the 8th of May 1967 but on the 12th of August 1968 that placement had been cancelled. Again, there is nothing surprising as to this disposition. Section 16 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3, provides:

16. The court may postpone or adjourn the hearing of a charge of delinquency for such period or periods as the court may deem advisable, or may postpone or adjourn the hearing sine die.

Counsel were agreed that a sine die adjournment was a frequent method of disposition in the juvenile court. Despite this fact, counsel for the Crown, in his cross-examination, which I have quoted above, on several occasions, put to the accused the question "you were charged with and found guilty" and undoubtedly left the impression with everyone in the courtroom that he was having the accused admit the convictions.

The accused, the present appellant, was then nineteen years of age and there is no reason to believe that he was sufficiently versed in court procedure to know and appreciate that he had not been convicted but that the court had merely adjourned the disposition of the case to a day unstated. I do not think that one may rely on this ground of admission at all in the light of the statement in Ex. S-1 over the signature of the Clerk and I am of the opinion that that Ex. S-1 was part of the record properly before the Court of Appeal and should have been considered on the appeal. For this reason alone, I would be of the opinion that the conviction could not stand.

It is the submission of counsel for the appellant that even if the appellant's admission on cross-examination had been correct and that he had been found guilty of various acts of juvenile delinquency those facts could not be proved against him as convictions. The learned trial judge, in permitting the cross-examination, relied on s. 593 of the Criminal code which provides:

593. Where, at a trial, the accused adduces evidence of his good character the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

and also on s. 12 of the Canada Evidence Act, R.S.C. 1970, c. E-10, which provides:

12. (1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.
- (2) The conviction may be proved by producing
 - (a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and
 - (b) proof of identity.

The Criminal Code section provides that when at trial the accused adduces evidence of good character, the prosecutor may adduce evidence of previous conviction of the accused for any offence. (The underlining is my own.) Section 12 of the Canada Evidence Act permits a witness to be questioned as to whether he had been convicted of any offence. (The underlining is my own.)

Counsel for the Crown submitted very forcefully that when the accused, here appellant, had given the evidence-in-chief, which I have recited above, he had put his character in issue and brought himself exactly within s. 593. There are three decisions of the Court of Appeal for Ontario upon this subject: R. v. MacDonald[2]; R. v. St. Pierre[3] and R. v. Merolla, decided on the 19th of April 1974. I have not the report of the latter case but it is cited and discussed in MacDonald where Arnup J.A. adopted Dubin J.A. in St. Pierre. There, dealing with a case where counsel for the accused led in chief evidence of prior convictions and had been stopped by the learned trial judge, he stated:

I do not think that by responding to those questions which are put to the accused for admittedly tactical reasons it can be said that he has put his character in issue. His questions and answers with respect to his past criminal record should be viewed in the same light as if they were brought out in cross-examination.

Of course, as Arnup J.A. pointed out, if the answers should be considered as if they had been brought out in cross-examination, then the learned trial judge would have had to have warned the jury that they could be considered only on the question of credibility and not as character evidence. Whether or not the circumstance that the questions as to record were put first in examination in chief rather than later by the Crown in cross-examination has the effect ascribed by Arnup J.A. and Dubin J.A. in the cases cited, I am still of the opinion that when the questions are put to the accused, as distinguished from any witness, which *R. v. Bradbury*[4], was concerned with, then what may be adduced in reply thereto is governed by the provisions of s. 593 of the Criminal Code and, in plain words, that section permits only proof of convictions. As I have said, here, in fact, there were no convictions nor any findings of guilt of delinquency, but, even if there had been the latter, I am of the opinion that such findings could not be considered as “convictions” within s. 593.

The Juvenile Delinquents Act, in s. 3, provides:

3. (1) The commission by a child of any of the acts enumerated in the definition “juvenile delinquent” in subsection 2(1), constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.
- (2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision. Section 20(1) of the same statute sets out in exact detail the power of the court when a child is “adjudged to be a juvenile delinquent”. The section provides:
 20. (1) In the case of a child adjudged to be a juvenile delinquent the court may, in its discretion, take either one or more of the several courses of action hereinafter in this section set out, as it may in its judgment deem proper in the circumstances of the case:
 - (a) suspend final disposition;
 - (b) adjourn the hearing or disposition of the case from time to time for any definite or indefinite period;
 - (c) impose a fine not exceeding twenty-five dollars, which may be paid in periodical amounts or otherwise;
 - (d) commit the child to the care or custody of a probation officer or of any other suitable person;
 - (e) allow the child to remain in its home, subject to the visitation of a probation officer, such child to report to the court or to the probation officer as often as may be required;
 - (f) cause the child to be placed in a suitable family home as a foster home, subject to the friendly supervision of a probation officer and the further order of the court;
 - (g) impose upon the delinquent such further or other conditions as may be deemed advisable;

- (h) commit the child to the charge of any children's aid society, duly organized under an Act of the legislature of the province and approved by the lieutenant governor in council, or, in any municipality in which there is no children's aid society, to the charge of the superintendent, if there is one; or
- (i) commit the child to an industrial school duly approved by the lieutenant governor in council.

It is to be noted that the court is given many options but those options do not include or even refer to the conviction of the child or to the sentence of the child and it can only be concluded that it was the express policy of Parliament that a child found to be a juvenile delinquent should not be stigmatized as one who had been convicted and should not be subject to a sentence. This again is demonstrated in the words appearing in s. 38 of the Juvenile Delinquents Act: and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

I also cite Attorney General of British Columbia v. Smith^[5], and particularly the words of Fauteux J., as he then was, at p. 710.

It is true that s. 26 of the Juvenile Delinquents Act commences with the words "No juvenile delinquent shall, under any circumstances, upon or after conviction..." but I am of the opinion that the use of the word "conviction" in that section cannot have the effect of depriving such sections as s. 3 and s. 20, to which I have referred, of their plain meaning which bars conviction and substitutes a finding of guilt of the offence of delinquency. I, therefore, am of the opinion that even if there had been findings of delinquency as to the appellant made when he was a juvenile, and there were not, then such findings could not be considered "convictions" for the purpose of permitting evidence as to them to be adduced by virtue of s. 593 of the Code.

It was also the submission of counsel for the appellant that the findings of juvenile delinquency, even if they had been made and as I repeat they were not, were not offences within the meaning of that word in s. 593 of the Code or s. 12 of the Evidence Act. There is much strength in the submission of counsel for the appellant on this point but I do not think it necessary to come to any determination on it in view of the opinion I expressed as to the three points with which I have dealt.

Therefore, I would allow the appeal. Such a result would naturally be followed by an order for a new trial. In this case, however, the appellant was convicted and sentenced on the 1st of February 1974. The sentence was only a three months' suspended sentence with probation thereafter and a note to the effect that there might be a further order for probation at the end of the three months. It is now 1978. Under these circumstances, I see no practical value of a new trial whatever result there may be from such process. I would quash the conviction.

The judgment of Martland, Ritchie, Pigeon, Beetz and Pratte JJ. was delivered by

PRATTE J.:—I have had the advantage of reading the reasons for judgment prepared for delivery by my brother Spence, and contrary to him, I am of the opinion that this appeal should be dismissed.

The facts giving rise to this appeal are generally outlined in the reasons of my brother Spence; I do not propose to repeat them except when I feel it desirable for a better understanding of these reasons or where my understanding of the facts is different from his.

The main issue in this appeal is as to whether the cross-examination of the appellant in which he contradicted the evidence he had given in chief and admitted having been found guilty of a certain number of delinquencies under the Juvenile Delinquents Act was properly allowed by the trial judge under both s. 12 of the Canada Evidence Act and s. 593 Cr.C.

Before dealing with this problem however it is appropriate to consider first the submission of the appellant that whatever the merits of the decision of the trial judge, as to the admissibility of the cross-examination of the appellant upon his record as a juvenile, the verdict cannot stand because there is no proper evidence of the appellant ever having been found guilty of any delinquency. If this proposition were valid, it would necessarily follow that, contrary to the view expressed by the trial judge in his charge, the appellant did not lie in his examination in chief and a new trial clearly ought to be ordered.

It is well established that a conviction does not need to be proven by the production of the official record; it is just as validly proven by the admission of the convicted party. This method is indeed impliedly recognized by s. 12 of the Canada Evidence Act which provides for an alternate, albeit not exclusive, method of proving a prior conviction that is denied by the witness (*Rex v. Lalonde*[6]). A conviction that is admitted by a witness does not need to be otherwise proven and such evidence ought not to be disregarded except possibly in exceptional circumstances showing clearly that the admission was made in error. Human beings are not prone to admit their weaknesses and it is not to be feared that a witness will admit lightly to a conviction which was not entered against him; the reluctance of the appellant here in admitting his convictions bears out this very human trait. Wigmore, *On Evidence*, Chadbourn revision, Vol. 4, No. 1270 (at p. 656) writes as follows: “That there is any real risk of reaching an erroneous result by taking the witness’ own admission against his credit, extracted on cross-examination, is impossible; there is in such a case no need to insist upon a copy:...”.

In *Jones v. Director of Public Prosecutions*[7], Lord Morris of Borth-y-Gest, when making reference to the proof of the commission by the accused of an offence other than that charged, spoke thus at p. 685: “The admission of the accused when asked questions in cross-examination would be proof and there is no essential requirement that proof should be given in any other way...”. In *Koufis v. The King*[8], Taschereau J., as he then was, writing for the majority of the Court said with reference to s. 12 of the Canada Evidence Act, at p. 489: “If the accused admits having committed the offence, the answer, being a collateral one, is obviously final”.

Here, when he was cross-examined on his record before the Juvenile Court, the appellant initially remembered having been found guilty of theft and illegal possession in 1970 and of breaking and entering in 1972 when he was 17; he denied any recollection of having been found guilty of attempted theft in 1963 and of damage to a third party's property in 1969. Upon being further questioned by the Crown and without any apparent reason therefor, the appellant suddenly recovered his memory and admitted the two convictions of 1963 and 1969. Here is the whole cross-examination of the appellant:

Q. Mr. Morris, you've mentioned to the Members of the Jury that you had never been previously arrested or convicted of any offence whatsoever. Is that correct?

A. Yes.

Q. Is it not a fact that in nineteen sixty-three, before the Juvenile Court, you were charged with and found guilty of attempted theft?

A. I don't remember.

Q. Is it not true that in nineteen sixty-nine you were charged again before the Juvenile Court, convicted of damages to third party's property, causing damages?

A. I don't remember exactly.

Q. O.K., do you remember if in nineteen seventy you were charged with and found guilty of theft and illegal possession, in nineteen seventy?

A. Yes.

Q. Do you remember if in nineteen seventy-two, before the Juvenile Court, that you were found guilty of breaking and entering?

A. Guilty.

Q. You were found guilty in nineteen seventy-two. Is that correct?

A. Yes.

Q. That would have been at the age of eighteen... seventeen?

A. Seventeen.

Q. And how old were you when you were alleged to have gone into the building itself, under the circumstances that have been referred to, was this at the age of nineteen?

A. Yes.

Q. And you say that you don't remember the earlier convictions that I referred to? Could you tell the Members of the Jury, then, what you do remember, as to how... for what alleged incident you were found guilty?

A. I remember being convicted of breaking and entering when I was a juvenile, nineteen seventy-two I think.

Q. And theft in nineteen seventy, and illegal possession do you remember that?

A. No.

Q. What, for instance, do you remember, other than the breaking and entering?

A. That's all I remember. It happened so long ago. Q. I see. Nineteen seventy you don't remember going to Juvenile Court?

BY HIS LORDSHIP:

He says he remembers nineteen seventy and nineteen seventy-two, Mr. Keyserlingk.

BY MR. HENRY R. KEYSERLINGK

ATTORNEY FOR THE PROSECUTION:

He says he only remembers the breaking and entering.

BY THE WITNESS:

I can't remember exactly what happened, nineteen seventy, that day.

Q. Would it be accurate to say that you would have been convicted of theft and illegal possession in nineteen seventy?

A. Yes.

Q. And that in nineteen sixty-nine, with regards to causing damages to a third party's property...

A. Yes.

Q. And to nineteen sixty-three, for attempted theft?

A. Yes.

Q. Thank you. No further questions.

In short, in his cross-examination, the appellant admitted four offences; it is my view that these must be taken as proven.

It was, however, argued before us that these admissions of the appellant should be disregarded because they would be contrary to the information contained in a document produced as exhibit S-1 by the Crown as a presentence report and which allegedly shows that the appellant was never found guilty of any offence as a juvenile.

This submission, on the part of the appellant, finds its source in the following expression of opinion of the learned trial judge in his report to the Court of Appeal, pursuant to s. 609 Cr.C.:

There is, however, one point about this appeal which concerns me. As stated above, the accused admitted, on cross-examination, that he had been convicted as a juvenile delinquent. In the face of such an admission, no further proof of his convictions seemed to me to be necessary or desirable. However, after the verdict and before sentence, there was produced as exhibit S-1 a copy of the accused's Juvenile Court record. This document indicates that technically there were no convictions registered against the accused and that, even though he was confined for some time at the Boys' Farm at Shawbridge, all the charges against him had been continued sine die without any formal disposition being made. If this fact had been made know[n] to me while the case was still in the hands of the jury, I might have taken a different attitude although I do not think so. In my view the accused had opened the door to evidence of his bad character by attempting to lead evidence of good character and the jury were entitled to know that he had perjured himself in his evidence in chief when he stated that he had never been arrested.

If I was wrong in ruling as I did, the evidence in question was clearly of great significance to the jury and in my respectful opinion there must be a new trial.

This exhibit S-1 was not before the Court of Appeal; speaking for the Court, Chief Justice Tremblay had this to say: [TRANSLATION] "Exhibit S-1 is not in the joint record and I am quite doubtful that it prevails over the formal admissions of appellant".

This exhibit has now been located and is part of the record before us. I can find nothing in the document that would tend to support the view expressed by the trial judge in his report and which is now being urged upon us.

This document, exhibit S-1, reads as follows:

[TRANSLATION]

Montreal, January 30, 1974.

RE: Phillip Morris

Files

Offences

Judgments

2213/67

AUTOMOBILE THEFT & CONCEALMENT

15-5-67 Adjourned Sine Die

3471/67

THEFT & CONCEALMENT

8-5-67 Placement at Boys' Farm & Training School 12-8-68 Placement of 8-5-67 cancelled

680/70

THEFT & CONCEALMENT

30-1-70 Case adjourned Sine Die

2839/72

BREAK. AND ENT. WITH INTENT

16-6-72 Sine Die

A.M. Racine Acting Clerk

AMR/jt

Social Welfare Court It should first be observed that this document makes no reference to the 1963 and 1969 convictions that were admitted by the appellant in his cross-examination; on the other hand, the two 1967 offences shown in exhibit S-1 were not referred to at the trial and this includes the offence in respect of which the accused was placed at the Boys' Farm & Training School. The two offences in 1970 and 1972, which were rather readily admitted by the appellant in his cross-examination, appear last on this exhibit. It is contended that this document shows that all charges against the appellant were adjourned sine die without the appellant ever having been found guilty of an offence as a juvenile. This contention is erroneous. First of all, the document does not purport to give the complete juvenile record of the appellant; it omits the offences of 1963 and 1969 which have been admitted by the appellant in his cross-examination. I therefore fail to see how the document can, in any way, be used to rebut the evidentiary value of the admissions of these two offences.

As to the four offences listed in the exhibit and which include those in 1970 and 1972 that were admitted by the appellant, the opinion of the trial judge that: "all the charges were continued sine die without any formal disposition being made" totally ignores the meaning of the word "Sentences" which heads the last column on the exhibit. In matters pertaining to Canadian penal legislation, the French word "sentence" is the equivalent of the English word "sentence"; both have the same meaning and are used in reference to the determination and pronouncement of punishment or like action following a finding of guilt; both words are utilized to define the fate or punishment of a person who has been adjudged guilty, (see Websters' Dictionary of Synonyms Vo "sentence"). The definition of the English word "sentence" as given in Black's Law Dictionary, revision 4th ed., is applicable to the French word "sentence" as used in Canadian criminal legislation:

The judgment formally pronounced by the court or judge upon the defendant after the conviction in a criminal prosecution, awarding the punishment to be inflicted. Judgments formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to this meaning.

With this in mind, it appears clearly that the actions described under the heading “Sentences” in exhibit S-1 relate to the issue of the penalty following a finding of guilt rather than to the issue of guilt of the “délits” themselves. In other words, the information given in summary form in the column “Sentences” purports to describe the steps taken by the Juvenile Court pursuant to s. 20(1) of the Juvenile Delinquents Act after the appellant has been “adjudged to be a juvenile delinquent”, i.e. after he has been found guilty of a violation of a provision of the Criminal code. What this column shows is that in all cases but one, the Court postponed making a decision as to what course or courses of action, among those enumerated in s. 20(1) of the Act, it would take in respect to the appellant who had already been found to be a delinquent as a result of having committed the offences listed in the second column headed “Délits”. Confirmation for this view is found in the supplementary material that was filed before us at the time of the hearing of this appeal under s. 67 of the Supreme Court Act and which was accepted on a limited basis, i.e. for the sole purpose of allowing us to obtain a clear understanding as to the import of exhibit S-1. This material shows that the appellant admitted each one of the four charges laid against him and listed in exhibit S-1; it further shows that in respect of the third offence the decision to commit the appellant to the Boys’ Farm & Training School was taken pursuant to s. 20(1) of the Juvenile Delinquents Act after the court had come to the conclusion that “the child is a juvenile delinquent”. It is worth noting that such a decision could not have been validly taken under s. 16 of the Act, under which the authority of the Court is limited to postponing or adjourning the hearing of a charge of delinquency; in effect the measures envisaged by s. 20(1) of the Act may not be taken by the Court until after the juvenile has been found to be a delinquent, i.e. guilty of the offence with which he has been charged.

With respect, I find nothing in the record that is in contradiction with the admissions made by the appellant in his cross-examination and which could be construed to be in support of the views expressed by the trial judge in his report. The evidence is that the appellant committed a number of violations of the provisions of the Criminal Code as a result of which he was found to be a juvenile delinquent; in respect of one offence he was committed to a juvenile school and in respect of the other offences the “sentence” was adjourned sine die.

Such being the case, I now come to consider the main issue in the appeal which is as to whether the cross-examination of the appellant upon his record as a juvenile was admissible in evidence under s. 12 of the Canada Evidence Act or under s. 593 Cr.C. The trial judge allowed the cross-examination under both provisions and his decision was affirmed by the Court of Appeal.

Dealing first with s. 12 of the Canada Evidence Act, it reads in part as follows:

12. (1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

It is submitted by the appellant that this section is not applicable in the premises on two grounds, namely: (i) a delinquency is not an offence within the meaning of this expression as used in s. 12; and (ii) a finding of delinquency is not to be construed as a conviction for the purposes of s. 12. It would follow, according to the appellant, that barring the application of s. 593 Cr.C., the cross-examination of the appellant was illegally admitted as evidence, because it was not legally admissible under s. 12(1).

As to the first ground, it should first be observed that the word “delinquency” which is described as an offence in ss. 3 and 22(1) of the Juvenile Delinquents Act embraces within its meaning two categories of acts; the first category includes acts that are in violation of “any provision of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality” (Juvenile Delinquents Act, s. 2(1)), or, as Fauteux J. put it in *Attorney General of British Columbia v. Smith*[9], at p. 710, that are “punishable breaches of the public law, whether defined by Parliament or the Legislatures”; the second category includes sexual immorality or other similar form of vice which, while not illegal in the case of adults, should be repressed in the case of juveniles.

Leaving aside the delinquencies of the second category that I have mentioned above, the Juvenile Delinquents Act does not prescribe any special rule of human conduct for juveniles; the Criminal Code and the other statutes referred to above are applicable to juveniles and non-juveniles alike. Essentially, the Juvenile Delinquents Act does not create any offence; the offence results from the violation of another statute which, in the case at bar, is the Criminal Code. But, when the offence is committed by a juvenile, a particular method of enforcement is prescribed: the usual type of penalty imposed in criminal matters, i.e. imprisonment or fine, intended to act as a deterrent of wrongful action, is generally replaced by various courses of action left at the discretion of the Court and designed to provide the child with such care, education and protection as he requires in order to rehabilitate himself and mature into a law-abiding citizen. The Act “provides a special procedure for the discipline and treatment of children outside of the ordinary criminal courts, although their delinquencies may be offences under the Criminal Code” (per Laskin J.A., as he then was, in *R. v. Horsburgh*[10], at pp. 756 and 757). In *Attorney General of British Columbia v. Smith*, supra, Fauteux J., as he then was, speaking for the Court, rightly pointed out at p. 708 that: “The primary legal effect of the Juvenile Delinquents Act,..., is the effective substitution, in the case of juveniles, of the provisions of the Act to the enforcement provisions of the Criminal Code or” of any other relevant statute.

In that case, the main question was as to whether the Juvenile Delinquents Act, R.S.C. 1952 c. 160, which to all intents and purposes is identical with the corresponding existing legislation, was intra vires the Parliament of Canada as being legislation in relation to criminal law. In coming to the conclusion that the Act was intra vires, Fauteux J. made some interesting comments as to the nature of the legislation and of the substitution of the type of punishment effected thereby; at p. 708, he said:

...a reference to the preamble, appended to the Act when originally adopted in 1908, 7-8 Edward VII, c. 40, as well as to the interpretation section and the main operative provisions of the Act, will show that this substitution of the provisions of the Act to the enforcement provisions of other laws, federally or provincially enacted, is a means adopted by Parliament, in the proper exercise of its plenary power in criminal matters, for the attainment of an end, a purpose or object which, in its true nature and character, identifies this Act as being genuine legislation in relation to criminal law.

And referring to the operative provisions of the Act, he added at p. 710:

They are directed to juveniles who violate the law or indulge in sexual immorality or any other similar form of vice or who, by reason of any other act, are liable to be committed to an industrial school or a juvenile reformatory. They are meant,—in the words of Parliament itself,—to check their evil tendencies and to strengthen their better instincts. They are primarily prospective in nature. And in essence, they are intended to prevent these juveniles to become prospective criminals and to assist them to be law-abiding citizens. Such objectives are clearly within the judicially defined field of criminal law.

In the case at bar, the delinquencies adjudged against the appellant all consisted in violations of various provisions of the Criminal Code. We are not therefore concerned here with delinquencies of the second category or even with a delinquency that, although in the first category, would consist in the violation of a federal statute other than the Criminal Code or of a provincial statute or of any by-law or ordinance of any municipality.

The question that stands up for determination is therefore quite narrow: it is whether the word “offence” as used in s. 12(1) of the Canada Evidence Act includes a delinquency consisting in a violation of the Criminal Code which is enforceable under the Juvenile Delinquents Act rather than under the Code itself.

Both the Criminal Code and the Juvenile Delinquents Act were passed by Parliament under its authority to legislate in respect to criminal law and procedure in criminal matters; the same is true of s. 12 of the Canada Evidence Act in so far as it applies to criminal proceedings.

It would, in my opinion, be most extraordinary to say the least if Parliament, in using as broad a word as “offence” in a statute applicable to criminal proceedings, had intended to designate something less than the offences that are truly criminal in nature and which as such Parliament has the full exclusive legislative authority to create and regulate pursuant to its criminal law-making power contained in s. 91, head 27 of the B.N.A.A.; there is no indication of any such intention in the Canada Evidence Act or in any other relevant piece of legislation. The historical background of s. 12(1) provides no support either for the theory that a distinction ought to be made between the same violations of the law on the sole basis of the method of punishment.

In brief, the expression “any offence” in s. 12(1) clearly includes an offence that is a violation of the Criminal Code when it is punishable under the Code; in the absence of any expressed legislative intent to the contrary, I cannot logically bring myself to the view that the same expression excludes the same violation when it is punishable under the Juveniles Delinquents Act which, like the Code, is “genuine legislation in relation to criminal law”.

I express no opinion as to whether the meaning of the word “offence” as used in s. 12(1) of the Canada Evidence Act should otherwise be restricted so as to exclude certain kinds of delinquencies. The appellant has referred us to two decisions: *Krassman v. The Queen*[11] by the Alberta Supreme Court, Appellate Division, and *Adelphi Book Store Limited v. The Queen*[12], by the Saskatchewan Court of Appeal. Neither one of these two decisions has any application to the case at bar; they are both concerned with the extent to which certain provisions of the Criminal Code are applicable to offences created by other federal statutes, and not with the scope of the Canada Evidence Act.

The second ground advanced by the appellant is that a finding of delinquency under the Juvenile Delinquents Act is not to be construed as a conviction for the purposes of s. 12 of the Canada Evidence Act; therefore, a person who has been found guilty of delinquency could not be said to have been “convicted”. This submission of the appellant is based on the fact that a Juvenile Court is, under the Act, empowered to adjudge a child to have committed a delinquency and not to convict a child of having committed a delinquency.

It is true that in the Juvenile Delinquents Act, a finding of guilt is not usually described as a “conviction”. But it does not necessarily follow that by apparently avoiding the use of the expression “conviction”, Parliament has intended to confer upon the juvenile courts, with respect to the assessment of guilt, a power that is substantially different from the power “to convict”. This goes to the meaning of both expressions.

The word “conviction” is not a term of art that is applicable only to Criminal Code offences punishable in the manner provided in the Code. When used in a statute, its meaning varies depending on the context in which it is found; it may or may not include the imposition of a penalty. Generally, however, a “conviction is where a person is found guilty of an offence” (Jowitt’s Dictionary of English Law, 2nd ed. Vo “conviction”). The verb “to convict” is defined in the Oxford English Dictionary as follows: “To prove (a person) guilty of an offence which makes him liable to legal punishment”. The definitions contained in Funk and Wagnalls New Standard Dictionary are along similar lines. Also, it has been said that the expression is broad enough to include a plea of guilty (*R. v. Grant*[13]; *R. v. Blaby*[14], per Hawkins J., at p. 172; *R. v. Manchester Justices*[15]). In *Smith v. The Queen*, the word “conviction” was used both in this Court[16] and in the Manitoba Court of Appeal[17] to designate the decision of a juvenile court declaring a juvenile to be a delinquent.

The meaning of the verb “to adjudge” is broader than and includes that of “to convict”; generally, “to adjudge” means to pronounce judicially and one of its meanings is to sentence or condemn; Black’s Law Dictionary, 4th ed., Vo “adjudge”:

ADJUDGE. To pass on judicially, to decide, settle, or decree, or to sentence or condemn. *People v. Rave*, 364 Ill. 72, 3 N.E. 2d 972, 975.

Webster's Third New International Dictionary:

1(a) To decide or rule upon as a judge or with judicial or quasi-judicial powers; ... (b) to pronounce judicially... 2. archaic, To sentence or condemn (a person) to some punishment.

Funk & Wagnalls New Standard Dictionary of the English Language:

1. To award or bestow by formal decision;... 2(1) To give a judicial decision concerning; adjudicate upon; decide judicially.

In general use, adjudge does not always imply that the decision given is final. Judges of inferior courts, or arbitrators and referees, adjudge of matters sometimes transmitted to superior courts for final adjudication... 3. To decree; sentence; condemn; as King Charles was adjudged to die. In some cases, the word "adjudged" has been held to be synonymous with "convicted":

Tarlo's Estate[18], at p. 140.

Blaufus v. People[19], at p. 111.

And in Old English law, the word "adjudged" was sometimes used to mean "sentenced" (Arch-bald, *Criminal Pleading and Evidence*, 19th ed., at p. 400).

In my opinion, therefore, the power of the juvenile court to adjudge guilt is equivalent to the power of an ordinary criminal court to convict and I cannot see any essential difference between the power to adjudge a person guilty of an offence and the power to convict a person of the same offence. With respect, I find no merit in the submission of the appellant that a finding of delinquency should not be construed as a conviction for the purposes of s. 12 of the Canada Evidence Act.

The appellant has also submitted that applying s. 12(1) to a juvenile record would violate the intent and spirit of the Juvenile Delinquents Act, and would run contrary to the objectives of the statute, as expressed in the preamble to the Juvenile Delinquents Act of 1908 (c. 40) and as reflected in s. 38 of the present Act.

The aim of the Juvenile Delinquents Act is that juvenile offenders should be assisted and reformed rather than punished; it is therefore desirable that juvenile offenders, when reformed, should be given some degree of protection against being dragged back into the criminal class by the automatic operation of the law made for ordinary criminals. But, whatever be the virtue of these objectives and the desirability of their being attained, they cannot by themselves justify putting on s. 12(1) an interpretation that cannot otherwise be supported and which would effectively prohibit the cross-examination of a former juvenile on his juvenile record when, in his examination in chief, he has given erroneous information as to such record. I do not know of any valid reason that makes it imperative or even desirable that erroneous evidence given by former juvenile delinquents should have to be unchallengeable in cross-examination. A law that would

encourage the successful suppression of truth could hardly be said to be conducive to the rehabilitation of delinquents, be they juvenile or not. If a witness does not speak the truth, the higher interests of justice require that the truth be told to the jury “in order that they may understand the kind of witness they have before them” (Ward v. Sinfield[20], at p. 697, per Lopes J.).

There is indeed a distinction which must not be overlooked between cross-examination as to prior convictions which is governed by s. 12.1, and cross-examination which is aimed at weakening the evidence given in chief by exposing the errors, omissions or contradictions of the testimony of the witness or by eliciting from him statements contrary to his own evidence.

Cross-examination as to prior convictions is not directly aimed at establishing the falsity of the witness's evidence; it is rather designed to lay down a factual basis—prior convictions—from which the inference may subsequently be drawn that the witness' credibility is suspect and that his evidence ought not to be believed because of his misconduct in circumstances totally unrelated to those of the case in which he is giving evidence. The evidentiary value of such cross-examination is therefore purely inferential.

By comparison, where the cross-examination is directed at eliciting from the witness answers that are contrary to his evidence-in-chief, the attack on credibility is no longer based on an inference of unreliability of the witness, but on the actual proof of the witness's unreliability in the case itself, as established by the contradiction between various portions of his evidence. This type of cross-examination is essential if the search for truth is ever to be successful.

Cross-examination would become pointless if it were not available to attempt to prove the falsity of the evidence given in chief. In *Jones v. Director of Public Prosecutions*[21], Lord Devlin said, at p. 708: “If a witness cannot be cross-examined to test the veracity and accuracy of his evidence-in-chief, he cannot be cross-examined at all:...”.

In *Stirland v. Director of Public Prosecutions*[22], the proposition was laid down by the Lord Chancellor, Viscount Simon at p. 326, that the accused “may... be cross-examined as to any of the evidence he has given in chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not entitled to be believed on his oath.” It is true that in *Jones v. D.P.P.* (ibidem), doubts were expressed by some of their Lordships as to the generality of this proposition, but those were based exclusively on the wording of proviso (f) of s.1 of the Criminal Evidence Act, 1898 which has no counterpart here. I have therefore no reservation that the rule enunciated in *Stirland* is a correct statement of the law as it exists here.

In *R. v. Davison et al.*, [23], Martin J.A., speaking for the Ontario Court of Appeal, properly said at p. 444:

I conclude that, save for cross-examination as to previous convictions permitted by s. 12 of the Canada Evidence Act, an accused may not be cross-examined with respect to misconduct or discreditable associations unrelated to the charge on which he is being tried for the purpose of leading to the conclusion that by reason of his bad character he is a person whose evidence ought not to be believed. Cross-examination, however, which is directly relevant to prove the falsity of

the accused's evidence does not fall within the ban, notwithstanding that it may incidentally reflect upon the accused's character by disclosing discreditable conduct on his part.

It is true that there is a theory according to which the trial judge would, under s. 12(1), enjoy a discretion under which he could disallow questions about previous convictions that, in his considered opinion, would have no relevancy to the veracity character of the witness and would therefore not assist the jury in assessing his credibility, or possibly would have a probative value as to the credibility of the witness that would be vastly outweighed by the prejudice that it would raise against him: *R. v. McLean*[24]; see also Phipson, 12th ed., Nos. 1601 & 1605; *R. v. Sweet-Escott*[25].

I need not express my opinion as to the merit of this theory; it is sufficient to say that even if the trial judge has a discretion under which he may disallow questions about previous convictions, such discretion, whatever its scope, ought not, in my view, to be exercised so as to forbid cross-examination which is aimed at eliciting from the witness some admissions that would tend to establish the lack of veracity of some portions of his examination-in-chief.

The right to cross-examine with the view of establishing the falsity of the evidence-in-chief should not be less absolute in the case of a former juvenile delinquent than in that of a former non-juvenile delinquent. By such cross-examination, the credibility of the former juvenile delinquent is not attacked because of his delinquency, but because of the fact that, when no longer a juvenile, he lied in his examination in chief: this is an entirely different situation and the protection that is afforded to a juvenile cannot be assumed to extend to entitling him not to speak the truth under oath.

Finally, I would like to add that the history of the development of the rule of evidence now expressed in s. 12 of the Canada Evidence Act and which finds its statutory origin in s. 6 of the Criminal Procedure Act of England of 1865, 28-29 Vict., c. 18, confirms that the rule was not intended to restrict the scope of cross-examination as to credit or otherwise and ought not therefore to be so construed as to prevent cross-examination on a matter that has been opened up by the examination-in-chief of the witness, be he the accused (see *Koufis v. The King*[26], per Kerwin J., at p. 487).

I am therefore of the opinion that, in the circumstances of this case, the cross-examination of the appellant upon his record as a juvenile delinquent came within s. 12(1) of the Canada Evidence Act and was properly allowed in evidence. There remains for me to deal with a matter that arises out of the manner in which the trial judge charged the jury as to the previous record of the appellant.

In his examination-in-chief, the appellant testified in part as follows:

Q. Mr. Phillip Morris, have you ever been convicted of a criminal offense?

A. No. None whatsoever.

Q. Have you ever been arrested before?

A. No.

In his cross-examination, which I have reproduced at length, the appellant admitted convictions of four criminal offences while he was a juvenile.

That there is a contradiction between the evidence of the appellant in his cross-examination and in his examination-in-chief is plain; indeed, such contradiction is admitted by the appellant.

It is therefore not surprising that the trial judge should have charged the jury that the basic problem facing them was as to the credibility of the appellant:

It really, in my view, gentlemen, is going to come down... this doesn't bind you, what I say, but it's going to come down to your assessment of the credibility of the accused. You observed him, watched him when he testified before you, you observed his demeanour, his manner, his facial expression. It's up to you to decide whether you feel that he's telling you the truth.

Subsequently, the trial judge spoke as follows:

Now, just before terminating, I'd like to say one word about the accused's record, which was brought up too. First of all, it seems quite clear to me that in his evidence in chief, the accused lied. When he started out, the very first thing he said was that he had never been convicted. He had never been arrested. You can draw what conclusions you like from that.

In the rest of his charge, the judge made no reference to any arrest of the accused but only to his record as a juvenile and his convictions as such.

It is suggested that the charge contains a fatal error in that the trial judge would have said that the appellant lied when he denied any previous arrest, while there is no evidence of any such arrest. I do not agree with this suggestion.

It is undoubtedly true that there is no direct evidence that the appellant was ever arrested if the word "arrest" is interpreted to mean the apprehension or detention of a person by another in order that the former may be brought into court to answer for the offence with which he is charged; but, I am not convinced that in the context of this trial, the word "arrest" was used by the trial judge in such a technical sense.

Furthermore, a brief reading of the charge shows that the trial judge did not actually say that the appellant lied when he denied any previous arrest. In the first part of the relevant portion of the charge the trial judge stated his own opinion that the accused lied in his examination-in-chief. Then, he proceeded to state accurately what the accused had said, i.e. that he had never been convicted, that he had never been arrested; but he did not stop there; he continued to say: "You can draw what conclusions you like from that." This last sentence does, in my mind, qualify the statement of the trial judge that the accused lied and leaves the question open as to whether the judge meant that the accused lied on one count or on both counts.

In my view, however, it is not necessary to rule on the meaning of the charge in that particular respect. Even if the judge had clearly and erroneously stated that the appellant lied when he denied any previous arrest, I cannot conceive that in the circumstances of the case at bar such statement would have had any influence on the decision of the jury. The evidence of the appellant was not believed by the jury because he unequivocally lied, not only in his examination-in-chief, as pointed out by the trial judge, but also in his cross-examination which the judge did not mention; whether he lied as to his convictions or his arrest or both would not have made him more or less believable to the jury. When the jury reached its verdict, the evidence of the accused was still very fresh in its mind: the whole of the trial from the swearing in of the jury to the verdict was completed within a day. They necessarily remembered that the cross-examination of the appellant bore exclusively on his prior convictions without any reference being made to his arrest.

Furthermore, the jury could not but have been unfavourably impressed by the lack of candor of the appellant during his cross-examination. Indeed, it is clear that throughout his cross-examination and in spite of his early denials, the appellant had a complete recollection of the various offences of which he had been found guilty as a juvenile; nothing that was said to him during his short cross-examination could have refreshed his memory and yet he suddenly acknowledged two offences which he could not remember a few moments before.

The admissions made by the appellant at the end of his cross-examination made it so plain that he lied in his examination-in-chief and also at the beginning of his cross-examination that I find it impossible to believe that the reference by the trial judge to the arrest of the accused, if it were wrong, had any influence whatsoever on the decision of the jury to disbelieve the appellant. I cannot convince myself either that twelve reasonable men, properly instructed, would have believed the evidence of the appellant.

I find confirmation for this view in the fact that the alleged error on the part of the trial judge was not raised as a ground of appeal by the appellant in his notice of appeal to the Court of Appeal or in his factum in this Court. It is plain that appellant did not feel that the reference of the judge to the denial by the appellant of any prior arrest, although it might have been inaccurate, carried any weight with the jury.

The above makes it unnecessary to consider whether the cross-examination of the appellant was admissible under s. 593 Cr.C. However, since the views expressed by my brother Spence in this regard are contrary to those of the trial judge and of the Court of Appeal, I feel that the following observations are in order.

I agree with the trial judge and the Court of Appeal that the appellant put his character in issue when he stated that he had never been convicted nor arrested; these statements were nothing but an attempt on his part to lead evidence of good character. By projecting the image of a law-abiding citizen, the appellant's purpose could only have been to show that because of his character he was not likely to have committed the offence with which he was charged.

In *R. v. Baker*[27], the accused had given evidence that for four years he had been earning an honest living; this, in the opinion of the Court of Criminal Appeal, was evidence of good character which laid him open to cross-examination as to character.

In *R. v. Samuel*[28], the Court of Criminal Appeal found that someone charged with larceny had put his character in issue when he gave evidence with regard to two previous occasions in which he had returned lost property to its owner. Referring to this evidence and to the questions leading to it, the Lord Chief Justice spoke thus, at pp. 10 and 11:

Of course, if a man has done that, it is an indication that he is an honest person.

...

...the only object of those questions could be to induce the jury to say: "This man is one of those people who, if he finds property, gives it up; in other words, he is an honest man." That was obviously the purpose of the questions, and I certainly could not give any colour to the suggestion that all they mean is that the appellant is a man who, if he finds property, gives it up. The short answer to that is that if a prisoner puts his character in issue, he puts his whole character in issue, not such parts as may be convenient to him, leaving out the inconvenient parts. In the opinion of the court, it is clear that those questions did put the appellant's character in issue. He was asking the jury to assume that he was a man who dealt honestly with property which he found. Therefore, it was perfectly legitimate for counsel for the prosecution to put to him in cross-examination his previous convictions.

Discussing the problem as to the kind of evidence that would qualify as character evidence, Cross, *On Evidence*, 4th ed., wrote as follows at p. 367: Generally speaking the accused's own evidence of his character takes the form of allusions to his innocent or praiseworthy past, and the decisions certainly do not indicate any great reluctance on the part of the courts to hold that he has put his character in issue by such a reference. A man's allegations concerning his regular attendance at mass, his assertion that he had been earning an honest living for a considerable time, and his affirmative answer to the question whether he is a married man with a family in regular work have been treated as instances in which...

the accused has put his character in issue.

It has been submitted that the appellant did not put his character in issue when he gave evidence as to his good behavior because this evidence would have been given in chief for "tactical reasons" within the meaning of the rule adopted by the Court of Appeal for Ontario in *R. v. St. Pierre*[29]; *R. v. Merolla*, April 19, 1974, unreported and *R. v. MacDonald*[30]. This rule, whatever may be its validity when the accused admits prior convictions in his examination-in-chief, can have no application when he denies any conviction; the rationale for the rule is that it is less damaging to the credibility of an accused to bring out his record of past convictions in examination-in-chief than to have the matter dealt with by the Crown in cross-examination; such rationale is simply not applicable where the evidence of the accused tends to prove his good behavior rather than his misconduct. With respect, I find no merit in this submission.

I cannot agree either with the suggestion that evidence of good character can be rebutted solely by proof of prior convictions. Whenever the accused puts his character in issue, it is open to the Crown to prove the bad character of the accused, i.e. that his general reputation or actual moral disposition is bad. While this is often done by the proof of prior convictions, this is not, by any means, the only form of evidence of bad character that is permissible. Section 593 Cr.C. has never been constructed so as to restrict solely to prior convictions the evidence of bad character that can be made against the accused, and I do not agree that it should. Indeed, the object of this provision of the Code is quite the opposite: it is to insure that prior convictions will be allowed as evidence of bad character although they offend the rule that bad character cannot generally be proven by specific acts of misconduct (1953) 11, *The Cambridge Law Journal*, at p. 377, “Is the Prisoner’s Character Indivisible?” per R.N. Gooderson; *R. v. Triganzie*[31]; it is also to permit, contrary to the rules of evidence respecting collateral matters, the proof of prior convictions otherwise than through the cross-examination of the accused and in spite of any denial on his part.

I would dismiss the appeal.

Appeal dismissed, LASKIN C.J. and SPENCE, DICKSON and ESTEY JJ. dissenting.

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Solicitor for the respondent: Henry R. Keyserlingk, Montreal.

[1] [1975] C.A. 365.

[2] (1974), 27 C.R.N.S. 212.

[3] (1974), 17 C.C.C. (2d) 489.

[4] (1973), 14 C.C.C. (2d) 139.

[5] [1967] S.C.R. 702, [1969] 1 C.C.C. 244.

[6] (1950), 11 C.R. 71.

[7] [1962] A.C. 635.

[8] [1941] S.C.R. 481.

[9] [1967] S.C.R. 702.

[10] [1966] 1 O.R. 739.

[11] (1972), 8 C.C.C. (2d) 45.

[12] (1972), 8 C.C.C. (2d) 49.

[13] (1936), 100 J.P. 324.

[14] [1894] 2 Q.B. 170.

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- [15] [1937] 2 K.B. 96.
- [16] [1959] S.C.R. 638.
- [17] (1958), 121 C.C.C. 103 (sub nom. R. v. Gerald X.)
- [18] (1934), 172 A. 139, 315 Pa. 321.
- [19] (1877), 69 N.Y. 107, 25 Am. Rep. 148.
- [20] (1880), 49 L.J. Q.B. 696.
- [21] [1962] A.C. 635.
- [22] [1944] A.C. 315.
- [23] (1974), 20 C.C.C. (2d) 424.
- [24] (1940), 73 C.C.C. 310.
- [25] (1971), 55 C.A.R. 316.
- [26] [1941] S.C.R. 481.
- [27] (1912), 7 C.A.R. 252.
- [28] (1956), 40 C.A.R. 8.
- [29] (1974), 17 C.C.C. (2d) 489.
- [30] (1974), 27 C.R.N.S. 212.
- [31] (1888), 15 O.R. 294.
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