

CANADA / JUDGMENT

## Wray v. R.

[1974] SCR 565

### COURT

Supreme Court of Canada

### DECIDED

28 February 1973

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1973-02-28

Report

[1974] SCR 565

### Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Wray v. R., [1974] S.C.R. 565

Date: 1973-02-28

John Wray (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1972: November 7; 1973: February 28.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Non-capital murder—Evidence—Probative value—Admissibility—Second trial—Evidence of voluntary surrender—Evidence of consciousness of innocence—Whether evidence admissible.

At his first trial, the appellant was tried on a charge of non-capital murder and was acquitted as a result of a direction of the trial judge to acquit. The acquittal was affirmed by the Court of Appeal. On a further appeal to this Court, a new trial was directed.

At the new trial, the judge refused to admit the evidence sought to be adduced by the appellant's counsel that the accused had been at large in the community since October 31, 1968, had not been under any legal requirement to remain within the jurisdiction and appeared without any legal compulsion for his second trial. It was submitted that this was evidence which was relevant to his state of mind as to whether or not he had a consciousness of guilt. The appellant was convicted and his conviction was affirmed by a majority judgment of the Court of Appeal. He appealed to this Court.

Held: The appeal should be dismissed.

Per Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence, Pigeon and Laskin JJ.: The Crown not having called any evidence to the effect that the appellant had attempted to evade justice in any way or that he had been brought into Court under compulsion, there appears to be no issue on which the isolated fact of the appellant having voluntarily submitted to justice can be relevant. The evidence of lack of flight and voluntary surrender has no probative value. There was no error in the ruling of the trial judge in refusing to admit it at the trial.

Per Hall J.: The evidence was admissible. Its weight is a different matter. However, the exclusion of the evidence did not result in any substantial wrong or miscarriage of justice.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the appellant. Appeal dismissed.

R.J. Carter, for the appellant.

C.M. Powell and E.F. Then, for the respondent.

The judgment of Fauteux C.J. and of Abbott, Martland, Judson, Ritchie, Spence, Pigeon and Laskin JJ. was delivered by

RITCHIE J.—This is an appeal from a judgment of the Court of Appeal for Ontario which affirmed the appellant's conviction on a charge of non-capital murder entered after a trial held before Mr. Justice Haines sitting with a jury at Toronto on November 13, 1970.

The appellant's appeal is brought under the provisions of s. 618(1)(a) of the Criminal Code on the basis of the dissenting opinion of Mr. Justice Jessup which is described in the formal order of the Court of Appeal in the following terms:

The Honourable Mr. Justice Jessup dissented therefrom...expressing the opinion that the appeal should be allowed and a new trial directed, on the following grounds, in law, namely that the learned trial judge was not justified in excluding the evidence sought to be adduced by the appellant's counsel.

The question of law so stated forms the basis of this appeal. Section 618(1)(a) of the Criminal Code reads as follows:

618. (1) A person who is convicted of an indictable offence other than an offence punishable by death and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents...

The question upon which Mr. Justice Jessup founded his dissent and upon which the appellant now alleges that the majority of the Court of Appeal erred, is confined to the ruling of the learned trial judge that the evidence sought to be adduced by appellant's counsel on cross-examination of a police officer to the effect that the appellant had surrendered voluntarily for his trial, was inadmissible. The majority of the Court of Appeal supported this ruling but in conformity with the views expressed by Mr. Justice Jessup, it is now alleged on behalf of the appellant that the exclusion of this evidence was an error requiring the conviction to be quashed and a new trial ordered.

It should be observed that this appellant was first tried for this offence in October, 1968, and was then acquitted as a result of a direction of the trial judge to acquit, this acquittal was affirmed in the Court of Appeal[2] for reasons which are now reported, but on a further appeal being taken to this Court[3], a new trial was directed on the 26th of June 1970, and the proceeding held before Mr. Justice Haines in November, 1970, was accordingly the second trial of the appellant on the same indictment.

There is no doubt that from the time of his acquittal on his first trial (31st October 1968) until his surrender in November 1970, the appellant was at large, free to go where he pleased, although after the second trial was directed he must have realized that his freedom was again in jeopardy.

At the trial before Mr. Justice Haines, appellant's counsel made the following submission:

My Lord, I propose to establish that since October, 31st, 1968, Mr. Wray has been at large in the community and has not been under any legal requirement to remain within the jurisdiction and that he did appear without any legal compulsion for his trial this Monday. In my submission, that

is evidence which is relevant to his state of mind as to whether or not he has a consciousness of guilt. The Crown in many cases where the accused has fled has adduced that evidence to establish a consciousness of guilt and, in my submission, by the same token, the lack of fleeing in the case of a charge of this nature is equally evidence of the lack of consciousness of guilt.

HIS LORDSHIP: DO you have any authority for that latter proposition?

MR. CARTER: It flows from the former proposition. There can be no doubt about the former proposition. What is sauce for the goose is sauce for the gander.

HIS LORDSHIP: Has any authority so stated?

MR. CARTER: None I have been able to find at the moment.

HIS Lordship: I don't think there is any.

The only ground alleged in the Notice of Appeal to this Court is:

That the learned Trial Judge erred in refusing to admit at trial evidence of lack of flight and voluntary surrender as evidence of a consciousness of innocence.

The basic issue in this appeal appears to me to be whether this evidence was relevant to any issue at the second trial and this in turn involves consideration of the question of whether it can indeed be said to constitute any "evidence of a consciousness of innocence".

No evidence was adduced to the effect that the appellant had attempted to evade justice in any way or that he had been brought into court under compulsion, and the Crown having called no such evidence, there appears to be no issue on which the isolated fact of the appellant having voluntarily submitted to justice can be relevant. His innocence being presumed in his favour at his trial, proof that he did not refuse to do what he was required to do by law does not, in my opinion, affect the issue of his guilt or innocence in one way or the other.

As the learned trial judge indicated, the submission made on behalf of the appellant does not appear to find any support in the case law in this country or in England, but appellant's counsel relied on excerpts from certain writers of text books on the law of evidence of which the most favourable to his contention is to be found in Wills on Circumstantial Evidence, 7th ed., page 277, where it is said:

Since falsehood, concealment, flight and other like acts are generally regarded as indications of conscious guilt, it naturally follows that the absence of these marks of mental emotion, and still more a voluntary surrender to justice when the party had the opportunity of concealment or flight, must be considered as leading to the opposite presumption, and these considerations are frequently urged with just effect, as indicative of innocence...

Under certain circumstances "falsehood, concealment, flight and other like acts" by a man accused of murder may no doubt carry with them the implication that he had some reason for attempting to evade justice, and taken together with other evidence, may constitute strong indicia of a guilty conscience and be admissible on this ground, but with the greatest respect for

the learned author, I cannot agree that, particularly when no such evidence is adduced, the opposite conclusion is to be drawn from evidence of failure of the accused to run away in the face of such a charge, and I venture to say that the notion of any “presumption” of innocence being raised by the isolated fact that a man surrendered voluntarily for his trial when he was under a duty to do so, is quite unknown to our law. As the learned trial judge told the jury, an accused person, after his arraignment and plea of “not guilty” is presumed to be innocent, and while proof of his flight or attempted flight might well be accepted as some evidence to rebut this presumption, in the absence of such evidence, I am, as I have indicated, unable to see that proof of his having come into court of his own accord adds anything to the presumption to which he was entitled in any event.

It does appear to me, however, that if the Crown had adduced evidence of the appellant having attempted to evade justice and having been brought to trial under compulsion, then proof that he appeared voluntarily might be relevant and admissible to counteract any inference of “consciousness of guilt” which might arise from that evidence.

In the course of his reasons for judgment in the Court of Appeal, Mr. Justice Arnup made reference to the view expressed by Wigmore in his work on evidence in Vol. II, page 293 which was the principal authority relied on by appellant’s counsel. The passage cited reads as follows:

If guilt leaves the psychological mark which we term ‘consciousness of guilt’, and if this is available as evidence, then the absence of that mark (which for want of a better term may be spoken of as ‘consciousness of innocence’) is some indication of the absence of guilt, i.e. of not having done the deed charged. No Court seems to repudiate the proposition; but the tendency to reject evidence of a consciousness of innocence is rather due to a distrust of the inference from conduct to that consciousness, since the conduct is often feigned and artificial.

Mr. Justice Arnup also points out that evidence of this kind appears to have been rejected in many United States authorities and the effect of these authorities appears to me to be well summarized in 16 Corpus Juris (1918) at page 533, paragraph 1067 where it is said:

Refusal to Flee. Where the state does not seek or offer to prove flight, it is improper to receive evidence on the part of defendant that he voluntarily surrendered, or that he did not flee or become a fugitive from justice, or that he refused to fly, even though he had an opportunity to do so or was advised to do so after suspicions against him were excited. Where, however, testimony has been introduced by the prosecution to show flight as evidence of conscious guilt, evidence that accused notified the sheriff of his desire to submit himself to custody is admissible, as is also evidence that he voluntarily returned from another state, or that he talked with officers and made no attempt to escape.

The present case is one where no evidence whatever was called for the defence and no attempt was made by the prosecution to introduce any evidence of consciousness of guilt through flight, attempted flight or other means of evading justice. In these circumstances, as I have indicated, the appellant's voluntary appearance at his trial does not necessarily give rise to any inference except that he was doing what the law required and furthermore, as Mr. Justice Arnup points out in the course of his reasons for judgment in the Court of Appeal at page 383:

...there may be a large number of reasons why an accused, although under suspicion, refrained from flight and (as in this case) voluntarily surrendered for his trial. It would not be a long step from the proposition advanced here to the stage where it would be submitted that an inference of innocence could be inferred from the fact that the accused was at large on only nominal bail and could easily have fled the jurisdiction without other than minor pecuniary loss.

As I have indicated, I am of opinion that the evidence of lack of flight and voluntary surrender now sought to be introduced has no probative value and that there was no error in the ruling of Mr. Justice Haines in refusing to admit it at the trial.

For all these reasons I would dismiss this appeal.

HALL J.—I agree that this appeal should be dismissed. I wish, however, to deal with the question of the admissibility (as distinct from the weight) of the evidence which the trial judge rejected. The evidence which counsel for the appellant sought to introduce is set out in the reasons of my brother Ritchie and as well the discussion between His Lordship and Mr. Carter.

Haines J. refused to admit the proffered evidence, it seems to me, principally on the ground that there was no reported precedent on the point. I do not see the law as being in such a frozen state that new arguments or propositions are to be rejected if no reported case can be cited to support them. In my view the evidence was admissible. Its weight is a different matter. The fact that the exclusion of the evidence did not, in my view, result in a substantial wrong or miscarriage of justice cannot be regarded as a bar to the admission of evidence which can be classified as constituting "evidence of a consciousness of innocence". I think the statement to be found in *Wills on Circumstantial Evidence*, 7th ed., p. 277, quoted by my brother Ritchie in his reasons is a sound proposition and not one to be rejected out of hand as unknown to our law. The fact that the proposition has not been articulated in a reported decision is of no consequence.

Appeal dismissed.

Solicitor for the appellant: R.J. Carter, Toronto.

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

[1] [1971] 3 O.R. 843, 4 C.C.C. (2d) 378.

[2] [1970] 2 O.R. 3, [1970] 3 C.C.C. 122.

[3] [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673.

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