*5 Her Majesty’s Advocate.— v Alfred John Monson and Another.—

No. 2.

High Court (Court of Justiciary)

22 December 1893

(1893) 21 R. (J.) 5

Lord Justice-Clerk.

23 Dec. 1893

Representation

- Her Majesty’s Advocate.— Sol.-Gen. Asher — Strachan, A.-D. — J. A. Reid, A.-D. — Lorimer, A.-D. — Baxter.

- Alfred John Monson and Another.— Comrie Thomson — John Wilson — Findlay.

Procedure—Proof—List of productions—Photograph.—Procedure—Proof—Question tending to prove crime not charged—Competency.—Procedure—Proof—Hearsay—Fugitive.—Procedure—Precognition of witnesses.—

Held that it was incompetent to examine a witness as to the likeness in a photograph which could not be produced, not being in the list of productions.

In a trial for murder, the prosecutor proposed to ask a witness whether a certain document which was pertinent to the case and which bore the name of the witness as a signature was in fact signed by him, the suggestion being that the signature was forged by the prisoner.

Held that as the crime of forgery had not been charged against the prisoner the question was *incompetent* .

Of two persons charged with the crime of murder, one disappeared and was declared an outlaw. During the trial which proceeded against the other, the prosecutor stated that he had without success exhausted all possible resources for finding the fugitive, and he proposed to elicit from a witness who knew him a statement made by the fugitive to the witness shortly after the alleged murder.

Held that the evidence was *incompetent* , in respect (1) that statements made in the panel’s absence could not be evidence against him; and (2) that the failure to find a person did not make hearsay evidence as to statements made by him competent.

Opinion per Lord Justice-Clerk that where the interests of the public in the punishment of crime or the interest of a prisoner charged with crime call for the ascertainment of facts, it is the duty of witnesses on either side to give information to the other side.

Alfred John Monson and Edward Sweeney *alias* Davis *alias* Scott, were charged upon an indictment which set forth as follows:—"(1) That you, having formed the design of causing by drowning the death of Windsor Dudley Cecil Hambrough, sometime residing at Ardlamont House, aforesaid, now deceased, did in execution thereof bore or cause to be bored in the side of a boat, the property of Donald M'Kellar, boat-hirer, Tighnabruaich, Argyleshire, a hole, and having plugged or closed said hole, you did, on 9th August 1893, induce the said Windsor Dudley Cecil Hambrough to embark along with you, Alfred John Monson, in the said boat on the said date; or on 10th August 1893, you, Alfred John Monson, in execution of said design, did in Ardlamont Bay, in the Firth of Clyde, while the said boat was in deep water, remove, or caused to be removed, the plug from said hole, and admit the water into and did sink the said boat, whereby the said Windsor Dudley Cecil Hambrough was thrown into the sea; and you, Alfred John Monson, and *6 Edward Sweeney *alias* Davis *alias* Scott did thus attempt to murder him; (2) that on 10th August 1893, at a part of a wood situated about 360 yards or thereby in an easterly or north-easterly direction from Ardlamont House aforesaid, you, Alfred John Monson, and Edward Sweeney *alias* Davis *alias* Scott did shoot the said Windsor Dudley Cecil Hambrough, and kill him, and did thus murder him; and you, Edward Sweeney *alias* Davis *alias* Scott being conscious of your guilt in the premises, did abscond and flee from justice."

The trial took place before the Lord Justice-Clerk and a jury on 12th December 1893 and following days.

Scott disappeared soon after the alleged murder and failed to appear at the diet.

Counsel for the Crown moved that letters of fugitation should be granted and sentence of outlawry was pronounced against Scott.

During the course of the trial, which proceeded against Monson alone, and which resulted in a verdict on 23d December of not proven, the following questions of competency arose and were disposed of.

A witness adduced by the Crown deponed, in examination in chief, that he had seen Scott at Ardlamont. Being asked further—"(Q.) Have you seen Scott since the occasion you mentioned? (A.) No. (Q.) Have you been shewn a photograph by Inspector Stewart and Inspector Greet?"

Comrie Thomson objected, and argued;—To the question put there was no objection, but if it was proposed to follow up that question by asking—"Do you recognise whose photograph it is?" that was incompetent. The photograph not having been produced, the defence had had no opportunity of examining it, and could not cross-examine upon it.

The Solicitor-General stated that he was prepared to prove that the Crown had not discovered the photograph until after the indictment had been served, and therefore too late to be made a production.

Argued for the Crown;—It would be competent to ask a witness,—"Did you see a person with A on such and such an occasion; and if so, do you recognise that person?" and then to ask A, "What was the name of the person with you on such and such an occasion?" A photograph was on this question of evidence in no different position from a person. The defence could suffer no hardship, the photograph and the witnesses being here.

Lord Justice-Clerk.—

I have no hesitation in holding that no questions can be asked about a photograph which cannot be produced. A photograph would have been a perfectly proper production to be made in this case, and if produced, it could have been used for any competent purpose; but this is a photograph which it is admitted cannot now be produced. It is one of the advantages of our law that a person accused of a crime is entitled to notice of the articles produced against him, and certainly if a photograph is to be founded upon as part of the prosecutor's case, that photograph ought to be given notice of.

It would be a singular thing to allow evidence as to a photograph simply because it could be proved that the prosecutor did not recover it in sufficient time to produce it. It is not maintained that he can now produce it. That he should be allowed to lead evidence as to what is practically the contents of an article which he cannot be allowed to produce in evidence—that is to say, a likeness shewn by the photograph—is out of the question. It would be to place the defence under every disadvantage as regards preparation of the case or cross-examination at the trial.

2. A large part of the evidence adduced by the Crown upon the question *7 of motive was directed to shew that for a considerable period prior to the alleged murder Monson had been in very great financial straits, and that he had a substantial interest in compassing the death of the deceased; that the negotiations for obtaining a lease of Ardlamont had been conducted by Monson himself, and that he had obtained it when he was absolutely without funds. The lease bore to be signed by the factor of the proprietor, by Monson and Cecil Hambrough, and by Adolphus Frederick James Jerningham, Cecil Hambrough's trustee. The suggestion of the Crown was that Monson had forged the name of Jerningham.

In these circumstances, counsel for the Crown put the lease into Jerningham's hands, and proposed to ask him if it contained his signature.

Counsel for the panel objected to the competency of the question.

Argued for the Crown;—The question fell to be allowed. The whole circumstances of the case must go to the jury—the prisoner's financial position, his relations with the deceased, and the circumstances under which he came to be at Ardlamont. It was highly important to know how he came to be in possession of the house and shootings. The question which was disallowed in the case of *Her Majesty's Advocate* v. *Pritchard* [1] was not disallowed on the ground that it related to a crime not charged in the indictment, but on the ground that the answer could have no bearing on the crime charged. Here the question which it was proposed to put had a close bearing on the crime with which the panel was charged, and ought, therefore, to be allowed. It fell within the rule upon which the other question in *Pritchard's* case was allowed.

Argued for the panel;—The question was clearly incompetent. In *Pritchard's* case the Crown were allowed to prove, as an incidental fact tending to establish motive, that the panel had been guilty of gross misconduct. The Crown was not, however, allowed to lead proof of the crime of procuring abortion. If the panel was here to be charged with forgery, that crime should have been libelled. He had no notice of it, and was therefore not prepared to meet it.

Lord Justice-Clerk.—

This question which has been raised by the prosecutor—the question of putting it to Mr Jerningham whether the signature attached to this lease is his signature or not—is a very important one indeed, and I do not know that in the form in which it occurs here it has ever occurred in a case before. As regards all circumstances tending relatively to throw light on the particular offence charged in the indictment—all ordinary circumstances—which cannot be made matter of criminal charge, it is not necessary in the ordinary case for the public prosecutor to give any notice of them. A person charged with a crime is under the necessity along with his advisers of preparing for every ordinary matter which may be relevant to the charge, and I think that is well illustrated in the case of *Pritchard* .

That was a case where the crime charged was poisoning a wife, and it was held competent to ask a witness whether the prisoner had been having relations of improper intimacy with his female servant, that not being a matter which could have been made the subject of a criminal charge, and being one which might be proved as an incidental fact tending to establish motive; but when it was further proposed to ask the question whether the prisoner in those circumstances had used means to procure premature delivery, that was not allowed. That was *8 a suggestion of crime, and crime with which the prisoner might have been charged in the indictment, thus giving him notice that he had to meet that charge. I do not think that that case is exactly parallel to this.

In that particular case what was proposed to be asked could have had no connection with the question which was being tried. The question of the undue familiarity had to do with the question that was being tried. The question of the prisoner having tried to get rid of the consequence of that intimacy could have had nothing to do with it except to throw suspicion upon him as regards the charge upon which he was brought to the bar—suggesting that if he could do the one thing he might do the other—and the Court disallowed it. That is not the case we have here. This is a pure case of a criminal charge under which, as indicating the history which led up to the charge, it is proposed to ask whether a particular document which is pertinent to the case was not signed by the person whom it appears to have been signed by, and therefore is a forgery. Now, if it is a forgery, whoever forged it, or was a party to forging it, it is a criminal act; and if it was thought of sufficient importance in this case to prove that this document was a forgery, then that might have been done by making a charge of forgery, and I must say, in this case no one could have had the very slightest doubt, that it would have been not wrong to make such a charge, if the charge could be proved. If the charge had been made, the prisoner, through his advisers, would have made all preparations to meet it, but his legal advisers have no notice of any such charge, and it is impossible for them at this stage competently to bring forward evidence to meet it. This document was produced by the Crown and laid before the prisoner, but it was not alleged in the indictment that the prosecutor proposed to prove that the document was a forged document. I am of opinion that it would not be safe to allow such a question, which would tend to prove a very serious crime—one of the most serious crimes known to the law—as part of the incidents of a charge of another kind. It appears to me that the only right and proper course is to make that serious crime also

matter of a charge, if the public prosecutor considers it to be of such importance to his case, as regards the history of the other crime, that he wishes to have it proved. I have therefore come to the conclusion that I must refuse to allow this question to be put.

3. It was proved that on 10th August, the morning upon which the deceased had met his death, he had started on a shooting expedition accompanied by Monson and another man. The latter had, as stated, left Ardlamont a few hours after the tragedy, and the police had been unable to arrest him. In these circumstances the Crown endeavoured to prove that the man, who was described and known under the name of Scott by witnesses residing at Ardlamont, was the same person as a man Davis or Sweeney, who was proved to be a betting-agent in London. They led evidence to shew that they had made every effort in vain to find Scott; that Monson and Davis or Sweeney were associated in betting transactions, and were in the habit of meeting in various hotels and public-house bars in London prior to the date of the alleged murder; that Davis had left London for the north on or about 7th August, and that the person known as Scott had arrived at Ardlamont on the 8th.

Sydney Russell of London, a bookmaker, was examined by the Crown, and stated that on the 16th or 17th of August Davis, who was well known to him as a brother bookmaker, appeared at his house in London looking fatigued and ill. *9

Counsel for the Crown then proposed to ask the witness to repeat a statement made to him on the occasion by Davis.

Counsel for the panel objected to the question.

Argued for the Crown;—The evidence led established that the direct evidence of Davis in the matter was entirely beyond the power of the prosecution. Every possible effort had been made in vain in order to find him. There were then only two alternatives—either the evidence of what Davis said must be lost altogether, or it must be taken from some person to whom Davis made the statement. The rules of evidence admitted hearsay or secondary evidence in the cases of dead persons, insane persons, and persons imprisoned as captives of war in a foreign country. [2] The principle of this rule was just that such evidence was the best evidence available under the circumstances, and that it was better to take it than none at all. Such evidence had been admitted in the case of *Robina Burnet* , [3] which was directly in point, the question being there, as here, whether a person known by a certain name was in reality the same as a person known by another name.

Argued for the panel;—It was not proved that the man Sweeney or Davis was the man who was at Ardlamont, and it was not proved that Davis was dead; on the contrary, the witnesses examined on the point deponed that to the best of their belief the man was alive, and had started on a voyage to Australia for his health. In these circumstances, the case did not fall within the well-known exceptions in which hearsay evidence was admitted. Until a person was proved to be dead or permanently insane, the Crown was not producing the best evidence. The best evidence did not mean the best evidence which happened to be available. In *Burnet's* case it was a letter and not a hearsay statement which was admitted. In any event, what Davis said in the absence of the panel was not evidence against the latter.

Lord Justice-Clerk.—

It is quite plain that if this man Scott, Sweeney, or Davis, had been at the bar, it would have been competent to ask this question, and it is equally plain that if the question had been asked and answered, it would have been my duty, as protecting the interests of the prisoner now at the bar, to tell the jury that they could not give any weight to what another prisoner might have said outwith his presence, and that it could only be evidence against that other prisoner himself.

Therefore, taking the case on the footing that Sweeney, Davis, or Scott was at the bar there could be no doubt of the law applicable to the case. Neither the question asked nor the answer given in the conversation between the witness and Sweeney could be evidence against Monson.

The only remaining question is whether, in view of the fact that this man Sweeney might have been a competent witness in this case, if the Crown had chosen to use him, they can, in the circumstances in which they are now placed, prove a statement that he has made. It is a well-established rule of law that you are not entitled to ask a witness to state what was said by another person, if that person is alive and may speak for himself. There is a relaxation of this *10 rule in the case of persons who are dead, and there is apparently—I do not know on what authority—a relaxation also in the case of a person who is hopelessly insane. From a person in this position it is as impossible to get evidence as it is from a dead person; and therefore it is held that if you can prove what the person said, it may be admitted as evidence, subject of course to the observation that it is evidence at second hand. Another case has been referred to. That is the case of a prisoner of war confined in a foreign country, whom it is impossible for the litigant requiring his evidence to examine. This was decided in a civil case, and, of course, the same absolute strictness may not always be applied in civil proceedings as is observed in protecting the interests of a prisoner charged with crime. But as regards these two cases—the case of an insane witness and the case of one who is a prisoner of war—it is quite plain that the difficulty of the prosecutor does not consist just in this, that he cannot find the witness. He knows where the witness is in both cases, and is able to prove in the case of the insane person that if he were put into the witness-box he could not give any trustworthy testimony; and in the case of the prisoner of war, that owing to the absence of intercourse between the two states, the war prisoner could not be got at to give evidence. The place where the witness was, was known, and the reason why he could not be examined was known in both these cases.

But here the reason given by the Crown for their failure to produce Sweeney as a witness is that they have not been able to find him. Now, it is a new idea to me, as a principle of law, that you are entitled to take secondary evidence of a witness whom you cannot find, and I certainly would not decide that any such secondary evidence should be led unless there was very strong authority laid down by my predecessors in this Court for such a course. It seems to me, on the face of it, that it would be a most dangerous principle. If parties are unable to find a witness, that is a misfortune to the litigant, and a misfortune to which he must just submit. To say that if Sweeney had been found he might have been a competent witness is to state no ground for allowing hearsay evidence of what he said. If the Crown had him and made him a witness his credibility could be tested by cross-examination, and by the observation of the jury of his way and manner in giving his evidence. It is the failure of the prosecutor to find him that makes all this impossible.

I have been referred to the case of *Burnet and Masterton* . That case was certainly a very peculiar one, and the point to be brought out was an incidental one only. Here it is a crucial

point, viz., the identification of the absent accused person with the person who was at Ardlamont on the occasion in question. I do not therefore think the cases parallel. But if they were, I am bound to say that I have heard the volume of the reports in which this particular report of the case of *Burnet* appears spoken of by those who knew its history as not being the best authority in law reporting, and I should have liked to have had a much fuller report, and one on which I could go with greater confidence. I cannot be sure that on such a report I would be safe to act. It certainly seems to me that in that case the Court went very far indeed outside of the ordinary rule, although there may have been good grounds for so doing. On the whole matter, I have come to the conclusion that I ought not to allow this question to be put.

4. Professor Matthew Hay, of Aberdeen University, was examined as *11 a skilled medical witness for the defence, and in cross-examination admitted that by the express direction of the panel's legal advisers he had refused to give any information to the Crown.

The Solicitor-General complained that in refusing to allow the Crown to precognosce the witnesses for the panel, the legal advisers of the panel had acted contrary to the usual practice in such cases. A ruling was asked for future guidance.

Counsel for the panel stated that they had not desired to precognosce the Crown witnesses.

Lord Justice-Clerk.—

It seems to me that nothing could be done more prejudicial to either side, than that in a criminal case before a jury, the advisers of a party should direct their witnesses not to allow themselves to be precognosced. I think it is a grievous mistake. I consider it to be the duty of every true citizen to give such information to the Crown as he may be asked to give in reference to the case in which he is to be called; and also that every witness who is to be called for the Crown should give similar information to the prisoner's legal advisers, if he is called upon and asked what he is going to say. I do not say there is any blame attaching to anyone connected with this case, and the witness was quite right to do as he was told. I have no doubt that the legal advisers of the prisoner acted conscientiously. But I have been asked to express my view, and it is that every good citizen should give his aid, either to the Crown or to the defence, in every case where the interests of the public in the punishment of crime, or the interests of a prisoner charged with crime, call for ascertainment of facts.

Representation

- Crown Agent — Davidson & Syme, W.S. —Agents.

*12