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Batary v. Attorney-General for Saskatchewan, [1965] S.C.R. 465

J. C. E. Wood

CRIMINAL LAW

Batary v. Attorney-General for Saskatchewan, [1965] S.C.R. 465.

CRIMINAL LAW — CORONER'S INQUEST — EXAMINATION OF PERSON CHARGED WITH MURDER AT INQUEST INTO THE DEATH IN QUESTION— WHETHER COMPELLABLE WITNESS.

Is a person charged with murder required to attend and give evidence at an inquest into the death of his alleged victim? Forty-five years ago the Ontario Court of Appeal decided that he was.[1] In *Batary v. The Attorney-General for Saskatchewan*[2] the majority of the Court[3] overruled the Ontario decision and held that an accused is not a compellable witness at such proceedings.

Batary and eight other men were each separately charged with the non-capital murder of Allan Thomas who died in Gaslyn, Saskatchewan on May 12, 1963. Immediately following the death of Thomas, the coroner called an inquest but it was closed and the jury discharged, as required by the terms of section 8a of the Coroners Act,[4] when the charges of murder were laid. On May 18, 1963, all the accused were released on bail and the preliminary hearing of the charges against them were set for June 12. As a result of an order made by the Attorney-General pursuant to section 8a of the Coroners Act, the inquest was re-opened on June 12, 1963, and on the same day the preliminary hearings were adjourned until after the conclusion of the inquest.

After a number of witnesses had been called and examined, counsel for the Attorney General announced that he intended to call Batary and each of the other accused to take the stand, whereupon their counsel objected. After hearing argument the coroner ruled that in view of the provisions of the Coroners Act he had no choice but to compel Batary and the other eight men charged with the murder to testify, but that they would be afforded the protection of both the Canada and Saskatchewan Evidence Acts. At the request of counsel for the appellant the coroner then adjourned the inquest *sine die,* and an application for prohibition was made before Bence C.J.Q.B.[5] Counsel argued that the Attorney-General was using the inquest as a device to obtain information to support the charges of murder against the nine men and that the compulsory examination of the accused would deprive him of the protection he now has of not being a compellable witness at his trial.

In dismissing the application, the learned Chief Justice relied on the leading case of *Rex v. Barnes,*[6] in which the Court of Appeal

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1 *Rex v. Barnes* (1921), 36 C.C.C. 40, 49 O.L.R. 374, 61 D.L.R. 623.
2 [1965] S.C.R. 465, 51 W.W.R. 449, 52 D.L.R. (2d) 125.
3 Taschereau C.J., Cartwright, Martland, Judson, Ritchie and Spence JJ.; Fauteux J. dissenting.
4 R.S.S. 1953, c. 106, as amended by 1960, c. 14. *Infra,* footnote 28.
5 *Sub nom., R. v. Nunn, Ex parte Batary,* [1963] 3 C.C.C. 312, 44 W.W.R. 473, 41 D.L.R. (2d) 444, 41 C.R. 337.
6 *Supra,* footnote 1.

for Ontario, held that an accused charged with manslaughter was a compellable witness at an inquest held to inquire into the victim's death.[7] Bence C.J.Q.B. found that the Coroners Act clearly requires that the accused give evidence, and the Canada Evidence Act[8] stipulates that he shall not be excused.

The Court of Appeal for Saskatchewan unanimously dismissed the appeal.[9] In a brief judgment, it affirmed the reasoning of Bence C.J.Q.B. and rejected the argument put forward for the first time at the appellate level, that the relevant sections of the Coroners Act were *ultra vires* of the provincial legislature.

The judgment of the majority of the Supreme Court, delivered by Cartwright J., considered first what the position of the appellant would be when called to take the witness stand, apart from the provisions of the Coroners Act. The learned Justice reasoned that the criminal law in force in Saskatchewan is that of England as it existed in 1870, except as altered by the Criminal Code or other federal statute. At that time a person accused of crime and the spouse of such person were incompetent to testify at trial either for or against the accused. The general policy of the law concerning the examination of accused persons was as set out in Stephen's History of the Criminal Law of England (1883),[10] where the author points out that the practice of questioning the prisoner, which had begun to die out following the Revolution of 1688, was all but eliminated by 1948 after which time the prisoner was "absolutely protected against all judicial questioning before or at the trial". The Court was not referred to any case in which an accused, awaiting trial on a charge of the murder of the person whose death was under investigation, was compelled to give evidence at the inquest. Having found no such exception to the rule as stated by Sir James Stephen, Cartwright J. concluded that under the law of England in 1870 a person charged with murder or manslaughter could not be compelled to testify at such an inquest, and he would only be compellable now if there had been a clear alteration in the law to this effect by an Act of the Parliament of Canada.

It was submitted to the Court that the combined effect of sections 2, 4(1) and 5 of the Canada Evidence Act,[11] and sections 448 and

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7 Only Meredith C.J.C.P. would have placed any limitation on the right of the Crown to question such a witness. *Infra*, p. 322.

8 R.S.C. 1952, c. 307.

9 *Sub nom. Batary v. Nunn* (1964), 46 W.W.R. 331, 42 C.R. 306, [1964] 2 C.C.C. 211.

10 Vol. 1, pp. 440, 441.

11 *Supra*, footnote 8:

2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

4. (1) Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or

[Footnote continued on page 319.]

488(3) of the Criminal Code[12] had altered the law in this way. Cartwright J. disagreed with this submission and stated that the effect of these sections of the Canada Evidence Act, in their present form, was to give to a person charged with crime the right to be a witness in his own defence. It was not to enable the prosecution to call him as a witness. The decision of the majority in *Gosselin v. The King*[13] which would have rendered the accused and his spouse not merely competent but compellable, is no longer the law as it was decided before the Act was amended by 1906, 6 Ed. VII, c. 10, s. 1 by the insertion of the words "for the defence" after the word "witness". He continued:

> Section 5 does not purport to say who shall or shall not be compelled to take the witness stand. It deals with the rights and obligations of a witness who is already on the stand. It does not protect him from the use against him of the answers he makes in the proceedings in which he makes them but only in "proceedings thereafter taking place".[14]

It is true that the verdict of a coroner's jury alleging that the accused has committed murder or manslaughter

> . . . would not constitute an adjudication that the accused was guilty but equally the decision of the justice presiding at the preliminary hearing that the accused should be committed for trial is not such an adjudication. It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words of an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.[15]

It is submitted that, although the decision of the majority as to the applicable law apart from the provisions of the Saskatchewan Coroners Act is correct, the reasoning of Cartwright J. fails to answer

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may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

12 S.C. 1953-54, 2-3 Elizabeth II, c. 51.

448. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter but he has not been charged with the offence, the coroner shall

(a) direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible before a justice, or

(b) direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.

(2) Where a corner makes a direction under subsection (1) he shall transmit to the justice the evidence taken before him in the matter.

(3) . . . No person shall be tried upon a coroner's inquisition.

13 (1903), 33 S.C.R. 255, 7 C.C.C. 139.

14 *Supra*, footnote 2, at p. 476 (S.C.R.).

15 *Ibid.*

those cogent arguments which proved decisive in the Ontario Courts in *Rex v. Barnes,* in the Saskatchewan Court of Appeal, and which were the basis of the dissenting judgment in the present case.

Fauteux J. maintained that the competency and compellability of a person to be called as a witness must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness and not with reference to some other proceeding. A person charged with a crime and awaiting trial can be compelled to give evidence in a civil proceeding arising out of the events which led to the criminal charge against him.[16] Where two or more persons are either jointly or separately indicted and are proceeded against separately "it is settled law that none is regarded as an accused person or a party in the trial against the others."[17] One of those indicted who is not on trial is a compellable witness for either the prosecution or the defence at the trail of any of his co-accused. This rule was fully discussed by the Nova Scotia Supreme Court in *Re Regan*[18] where it was pointed out that Regan was not

> . . . an *accused person* in the proceedings against Tanner, and the provisions of the Common Law and statute rendering an accused person on his trial not compellable as a witness for the prosecution against himself are therefore not applicable to him.[19]

Fauteux J. reasoned that these provisions of the law would likewise not apply to proceedings at an inquest and he quoted Culliton C.J.S., in the Court of Appeal with approval:

> While a Coroner's Court is a criminal Court of record, it is a court of inquiry, not of accusation, and the verdict of a coroner's jury does not bind any person whose conduct may be involved in its findings and does not, in any way, constitute any adjudication of rights affecting either person or property. There is no accused and there are no parties. . . . Notwithstanding that the accused has been charged of an offence arising out of the death being investigated, he appears at the inquest as a witness and, as such, is bound by the provisions of s. 5(1) of the Canada Evidence Act.[20]

In the light of these statements the learned Justice found himself forced to conclude:

> Subject only to some specific statutory exceptions of which none applies at a Coroner's inquest, no one—other than a person charged of an offence, on the occasion and at the time at which he is actually proceeded against for that offence—is excused from being called to give evidence on the ground that the answers he might give may tend to incriminate him. If a co-accused, of which the prosecution is not actually proceeded with, under the *Criminal Code,* in the criminal Courts, is a compellable and competent witness when called to testify in the prosecution of another co-accused, *a fortiori* a person, whether charged or not with an offence, is a compellable and competent witness at a Coroner's inquest where no one is regarded by law as an accused, at and for the purpose of that inquest, prior to the very time of its conclusion.[21]

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16 *Re Ginsberg* (1917), 40 O.L.R. 136, 38 D.L.R. 261 (Ont. C.A.).
17 *Supra,* footnote 2, at p. 481.
18 [1939] 2 D.L.R. 135, (1939), 13 M.P.R. 584, 71 C.C.C. 221.
19 *Ibid.,* at p. 598 (M.P.R.), *per* Graham J.
20 *Supra,* footnote 9, at p. 335 (W.W.R.).
21 *Supra,* footnote 2, at p. 488.

At first reading it is difficult to accept the decision of the majority; the arguments in the dissenting judgment cannot be ignored. It is submitted, however, that the conflict between the positions of Cartwright J. and Fauteux J. is more apparent than real. The judgments seem irreconcilable only because neither discussed the real issue before the Court. It is undoubtedly true that no person charged can be compelled to give evidence in criminal proceedings directed against him, but he can be called to testify at any other civil or criminal proceeding. The authorities would also support the statement that a coroner's inquest is an inquiry at which no one is in law an accused person against whom criminal proceedings are directed.[22] It is suggested that the question which should have been considered in some detail is whether the proceedings in this case could properly be defined as an 'inquest'. Is it correct to state that certain proceedings are not directed against any person so as to give him the status of a "person accused" merely because those proceedings are held before a coroner?

The function of a coroner's inquest is to enquire how a human being came by his death in order to discover whether anyone appears to be responsible for the events which caused it. If, as a result of this inquiry, evidence is adduced which would indicate that some person is criminally responsible for the death under investigation, the jury may, by their verdict, allege that he committed murder or manslaughter. If such a verdict is rendered the coroner is required by s. 448 of the Criminal Code to compel that person to appear before a justice. The object of the inquest is to discover facts and to decide whether those facts will support such an allegation, in order that the person implicated may be brought before the Courts to answer to the charge against him. It is the function of the Criminal Courts then to decide his guilt or innocence with respect to this charge.

In his decision in *Rex v. Barnes*,[23] Orde, J. discussed the difference between an inquest and proceedings after someone has been charged in connection with the death in question. There he stated

> . . . in view of the fact that an inquest is primarily intended to get early evidence as to the persons responsible for the death of the deceased, when as here the authorities have already determined that the evidence points to Barnes' guilt, and he is formally committed for trial upon the charge, to endeavour to compel him to give evidence in another proceeding and thereby virtually to examine him for discovery, comes with a shock to one's sense of fair play, and seems to be a serious inroad upon the principle that the burden of establishing the guilt of a person charged with a crime falls upon the Crown. To say that the incriminating answers cannot be used against the accused upon his trial really begs the question. The Crown may, by means of this oppressive power, extract evidence from an accused which, while not admissible in evidence against him upon his trial, may nevertheless furnish the Crown with certain information which might enable the Crown by means of other evidence to convict the accused. Of course, a person suspected of but not yet charged with the crime is in exactly the same position if called upon to give evidence before the coroner's jury when afterwards prosecuted for the

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22 *Wolfe v. Robinson*, [1962] O.R. 132, 31 D.L.R. (2d) 233.
23 *Supra*, footnote 1, at p. 45 (C.C.C.), 628 (D.L.R.), 378-9 (O.L.R.).

> offence, but the fact that in the one case, the authorities have already fixed upon the alleged guilty party, and in the other are merely seeking to discover him, impresses upon one's mind the lengths to which section 5 may go if resorted to by the Crown.

With respect, it is submitted that the sole function of a coroner's inquest is to discover the alleged guilty party in order that a charge may be subsequently laid. Once the authorities become aware that a crime has been committed, and on a reasonable and probable belief in his guilt, have charged some person with murder or manslaughter, no inquest is necessary. If it can be assumed that legal proceedings are generally conducted to some end, proceedings before a coroner in such circumstances could only be an effort to obtain evidence for some reason other than to determine whether an allegation should be made. The only reasonable conclusion is that the object of such an inquiry is to elicit evidence to prove the guilt or innocence of the person charged, and the proceedings then would be in fact a step in the prosecution of the accused at which he could not be compelled to testify.

If these arguments are valid then a proper coroner's inquest could be held after a charge of murder had been laid, only if it were necessary to determine whether any persons other than those accused were responsible for the death. In *Rex v. Barnes,* Meredith C.J.C.P. stated:

> On principle, therefore, it is not lawful, or proper, to examine the appellant in the coroner's Court in any way regarding the charge which is pending against him, as long as he is in jeopardy in respect of it. But he may, in my opinion, be examined as a witness in regard to the guilt of any other person, so long as the examination does not touch in any way the charge against him.[24]

In theory the Supreme Court might have accepted the result reached by Meredith C.J.P.C.; in fact it decided between the practical alternatives.

There is no doubt that the coroner's inquest is an effective means of accumulating information which is necessary for the protection of society. To enable it to function some individual rights must be sacrificed to the needs of the state. Its usefulness would be severely limited if anyone who was implicated in any way in connection with the death under investigation could refuse to testify. In his judgment Fauteux J. mentioned that if Batary had been merely a suspect, not yet charged, he would clearly have been a compellable witness. On the other hand, the fact that the inquiry conducted by the coroner should not be unduly restricted, does not justify the use of such proceedings to achieve an end which should be gained by other means. The Crown has a duty to ensure "that justice is so administered that the public confidence in the fairness of its administration may be maintained unimpaired."[26] It must operate within a framework of

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[24] *Ibid.*, at p. 51 (C.C.C.), 633 (D.L.R.), 385 (O.L.R.). It might well be argued that because such proceedings could only be directed toward discovering facts which would establish grounds for an allegation that persons not yet charged had committed a crime, the guilt or innocence of anyone already charged would not be relevant.

[25] *Supra,* footnote 2, at p. 480.

[26] *Supra,* footnote 13, at p. 391 (S.C.R.), *per* Mills J.

procedural rules devised to strike a just balance between the rights of the individual and the collective power of the state. The rules may be changed from time to time as the needs of society change but if the Crown is to keep the confidence of the public they must not be evaded. To permit an inquiry before a coroner to be held after its object had been achieved in order to deprive the accused of a right specifically reserved to him would be to encourage such an evasion.

The second main problem facing the Supreme Court in this case was whether Batary was compellable to give evidence before the coroner's court by reason of the provisions of the Saskatchewan Coroners Act.[27] In the Court of Appeal the appellant had argued that sections 8a,[28] 15[29] and 20 of the Act are beyond the powers of the provincial Legislature in that they relate to "Procedure in Criminal Matters", a subject within the exclusive jurisdiction of the Parliament of Canada by virtue of section 91(27) of the British North America Act, 1867.

In deciding this question Chief Justice Culliton adopted the definition used by Macdonald C.J.A. in *In Re Public Inquiries Act*[30] to the effect that "Criminal Matters" are proceedings in the criminal Courts and "Procedure" means the steps to be taken in prosecutions or other proceedings in such Courts. Culliton C.J.S. concluded that the impugned sections of the Coroners Act which purport to regulate

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[27] *Supra*, footnote 4.

[28] Enacted 1960, c. 14, s. 2.

8a. (1) Where a person has been charged with a criminal offence arising out of a death, an inquest touching the death shall be held only upon the direction of the Attorney General.

(2) Where during an inquest any person is charged with a criminal offence arising out of the death, the coroner shall discharge the jury and close the inquest, and shall then proceed as if he had determined that an inquest was unnecessary, provided that the Attorney General may direct that the inquest be reopened.

[29] Rep. and sub. 1960, c. 14, s. 3.

15. (1) The coroner and jury shall at the first sitting of the inquest view the body unless a view has been dispensed with under section 9 and 10, and the coroner shall examine on oath, touching the death, all persons who tender their evidence respecting the facts and all persons who in his opinion are likely to have knowledge of relevant facts.

(2) Subject to subsection (3), no person giving evidence at the inquest shall be excused from answering a question upon the ground that the answer thereto may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature, but if he objects to answering the question upon any such ground he shall be entitled to the protection afforded by section 5 of the *Canada Evidence Act* and by section 33 of *The Saskatchewan Evidence Act*.

(3) Before a person gives evidence at the inquest subsection (2) shall be read to him by the coroner.

(4) A person giving evidence at the inquest may be represented by counsel who may examine and cross-examine witnesses called at the inquest and may on behalf of his client take the objection mentioned in subsection (2).

20. Counsel appointed by the Attorney General to act for the Crown, at an inquest may attend thereat and may examine or cross-examine the witness called, and the coroner shall summon any witness required on behalf of the Crown.

[30] (1919), 48 D.L.R. 237, 3 W.W.R. 115, 27 B.C.R. 361, 33 C.C.C. 119.

proceedings at an inquest do not relate to steps to be taken in a prosecution or other criminal proceeding, but rather to the "Administration of Justice Within the Province", a provincial matter under section 92(14) of the British North America Act, 1867.

It will be noticed that this conclusion is in direct conflict with that of the Ontario Court of Appeal in *Wolfe v. Robinson.*[31] In holding that no one other than the coroner, the jurors and the Crown Attorney or counsel representing the Attorney General has any right to cross-examine witnesses at an inquest,[32] Schroeder J. stated, in *obiter dicta,* that

> The Coroner's Court being a criminal Court of record, only the Parliament of Canada has authority to enact legislation as to the Rules of Practice and Procedure to be followed in that forum in accordance with the provisions of s. 91(27) of the *British North America Act.* . . . [Apart from ss. 448, 488, 648 and 649 of the *Criminal Code*] . . . there is no other Federal legislation now in force affecting that office, and Parliament has not seen fit to enact nor has it authorized the enactment of Rules of Practice and Procedure applicable to a Coroner's inquisition. The Provincial Legislature has not done so and, indeed, if it had the legislation would be *ultra vires* of that legislative body.[33]

The Supreme Court did not decide between these two conflicting views of the law. Indeed, there was no need for the Court to consider the nature of proceedings at a coroner's inquest. If proceedings before a coroner in which some person charged with murder in connection with the death under investigation, is compelled to give evidence as to his guilt or innocence cannot properly be termed an inquest, then the question of the validity of legislation purporting to regulate proceedings at an inquest is beside the point. In fact, the decision of the majority of the Supreme Court did not reverse the Court of Appeal on the ground that the regulatory sections of the Coroners Act were *ultra vires* of the provincial legislature.

In this part of the judgment Cartwright J. confined his remarks to legislation which could be construed as an attempt to require an accused to take the stand. After comparing the wording of section 15 of the Act with that of the section which was repealed in 1960, he concluded that the Legislature did intend to render a person charged with murder compellable to give evidence at the inquest on the body of his alleged victim. He then stated that any legislation which purported to force such a person to testify in this way or

> . . . to abrogate or alter the existing rules which protect a person charged with crime from being compelled to testify against himself, is legislation in relation to the Criminal Law including the Procedure in

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[31] *Supra,* footnote 22.

[32] The Ontario Coroners Act, R.S.O. 1960, c. 69, has no section similar to s. 15 of the Saskatchewan Act.

[33] *Supra,* footnote 22, at p. 137. Thus in Ontario, prior to this decision of the Supreme Court, a person charged with murder was not only a compellable witness at the inquest on the body of his alleged victim, but he was deprived of the right to examine or cross-examine any other witness. His counsel had no more rights in the coroner's court than any other member of the public.

> Criminal Matters and so within the exclusive legislative authority of the Parliament of Canada under head 27 of s. 91 of the *British North America Act*.[34]

Taken at face value, this conclusion begs the question if the existing rules only protect a person charged with crime from being compelled to testify against himself in proceedings directed against him. If, however, as has been argued above, proceedings before a coroner at which the person charged with murder is compelled to give evidence are not an inquiry but a step in the prosecution of the accused, those proceedings would clearly be procedure in criminal matters. It is submitted that this premise must be implied in the judgment, and that the validity of provincial legislation relating to procedure in a properly constituted coroner's inquest remains questionable.

The decision in the present case will be welcomed by all who believe that the Crown should be required to obtain convictions by proper means. The use of legal procedure to achieve an end other than that for which it was conceived is an abuse of that procedure. The role of the coroner's inquest is to inquire, discover and allege that a crime has been committed. The prosecution of an accused should be confined to those courts which are concerned with determining his guilt or innocence.

J. C. E. Wood*