

ordered that the trial of the prisoner Blais should be proceeded with separately and apart from that of the other prisoner, as to whom the indictment was again traversed to a future sittings.

Blais was accordingly tried and was convicted. In his charge to the jury the trial Judge commented upon the fact that Finnessey, who was shewn by the evidence to have been an associate of Blais, and to have taken part in aiding the latter to commit the outrage for which he was tried, had not been called either for the prosecution or the defence. "Finnessey," he said, "the associate, acting all along with this prisoner, presumably his friend, is not called at all. Finnessey might have thrown some light possibly one way or the other, if called either by the Crown or by his friend the prisoner, upon this transaction. He was not called. We are in the dark as to what Finnessey might have said. We have not any contradiction by Finnessey. We have the girl's positive statement as to what Finnessey did and said in association with the prisoner."

E. Mahon, for the prisoner, contended that Finnessey was "a person charged" within the meaning of sec. 4 of the Canada Evidence Act, 1893, which enacts that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person; and that the trial Judge, in the comments referred to, had infringed the provision of sub-sec. 2 of sec. 4, which enacts that the failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or counsel for the prosecution in addressing the jury.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER and GARROW, J.J.A., MULOCK, C.J., and BRITTON, J.), was delivered by

OSLER, J.A.:—We are of opinion that the trial Judge committed no error in referring to the failure of the Crown or the prisoner to call Finnessey as a witness, and that leave to appeal should not be granted.