1948
*Dec. 14
1949
*Jan. 7

HIS MAJESTY THE KING.....APPELLANT;

AND

FRANK JOSEPH MORABITO.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial judge sitting alone acquitting on reasonable doubt at close of Crown's case—No election by accused as to adducing evidence—Appeal on question of law—Criminal Code ss. 839, 944, 1013(4).

The accused, on a charge of unlawful possession of a drug, was tried by a judge sitting without a jury under Part XVIII of the Criminal

(1) (1914) 11 Cr. App. R. 45 at 49.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

Code. At the close of the case for the Crown, the accused, before making his election to call or not to call evidence, moved to dismiss for lack of "sufficient evidence which could legally and properly support a conviction". The trial judge thereupon dismissed the charge because of reasonable doubt arising upon the evidence of the Crown. The majority in the Court of Appeal upheld the acquittal.

Held: The trial judge having the same power as to acquitting or convicting as a jury and no more, could only have decided whether or not there was evidence upon which the jury might convict. The question of reasonable doubt did not arise at that stage.

Held: In the light of the evidence which the Crown submitted, the case could not have been withdrawn from the jury nor could it have been submitted to the jury until it was known that the evidence had been completed.

The King v. *Hopper* (1915) 2 K.B. 431; *The King* v. *Comba* [1938] S.C.R. 396; *Perry* v. *The King* 82 Can. C.C. 240 and *The King* v. *Olsen* 4 C.R. (Can.) 65 referred to.

APPEAL by the Crown from a judgment of the Court of Appeal for Ontario (1) dismissing (Roach J.A. dissenting) the appeal of the Crown from the decision of Parker J. dismissing the charge against respondent for unlawful possession of a drug.

N. L. Mathews K.C. for the appellant.

N. Borins K.C. for the respondent.

KERWIN J.:—For the reasons given by Mr. Justice Roach (1), the appeal should be allowed and a new trial directed.

TASCHEREAU J.:—I agree that this appeal should be allowed and a new trial directed.

The judgment of Rand, Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal should, in my opinion, be allowed for the reasons given by Mr. Justice Roach (1) in his dissenting judgment in the court below. The correctness of that judgment is emphasized by the position taken in this court by counsel for the respondent who contended that, had he failed in the application made by him to the trial judge, he considered that he still had the right, should

(1) [1948] 3 D.L.R. 513; O.R. 528; 91 Can. C.C. 210.

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he so elect, to call evidence on behalf of the defence. His argument, as presented to this court therefore, involved the proposition that, at the close of the case for the prosecution, the trial judge had the right to try the case on the evidence adduced by the Crown, and if he came to the conclusion not that he could, but that he would convict, then there should be another trial upon that evidence together with any further evidence called on behalf of the accused. Needless to say, no authority was cited in support of this contention.

In *Metropolitan Rly. Co.* v. *Jackson* (1), Lord Cairns said:

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct.

This statement of the law is, of course, not limited to civil actions. It is equally applicable to a criminal as to a civil proceeding; *Regina* v. *Lloyd* (2); *The King* v. *Hopper* (3).

The learned trial judge did not, in my opinion, keep these functions distinct. The fact that he was sitting without a jury made no difference. He had the same power as to acquitting or convicting as a jury would have had; section 835. He had no additional power. By section 944(1) it is provided that if an accused person is defended by counsel, such counsel "shall", at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused and if he does not thereupon announce such intention, counsel for the prosecution may make his address.

The learned trial judge, upon the conclusion of the case for the Crown asked counsel for the defence if he were calling any evidence. That question was not answered, but a motion to dismiss for lack of "sufficient evidence which *could* legally and properly support a conviction" was made. It is clear, I think, that no other application

(1) (1877) 3 App. Cas. 193 at 197.
(2) (1890) 19 O.R. 352 at 357.
(3) (1915) 2 K.B. 431.

could have been made at that stage in the absence of an election on the part of the defence to call or not to call evidence. Had a jury been present, the learned trial judge could have done no more, on the application of the defence, than have decided whether or not there was evidence upon which the jury might convict; *The King* v. *Comba* (1). Had he ruled adversely to the Crown in the present case he would clearly, in my opinion, have been wrong in law in the light of the evidence which the Crown had submitted; *Girvin* v. *The King* (2). He would have had no right, as he in fact did, to proceed to weigh the evidence until all the evidence was in. The decisions are uniform.

In *Rex* v. *Perreault* (3), counsel for the defence moved for a non-suit at the conclusion of the case for the Crown and *before declaring that he had no witnesses,* on the ground that a fact material to the Crown's case had not been proved. The Crown thereupon moved to reopen its case to supply this lack. Langlais J. in the Superior Court of Quebec said at p. 237:

> Counsel for the defence could have declared that he had no evidence to offer and then he would have raised this question of lack of an essential element in his pleading (argument), . . . and then I would have been obliged to declare to the jury that this element was lacking.

In *Perry* v. *The King* (4), in the Supreme Court of Prince Edward Island, on appeal from a summary conviction, Campbell C.J. said at p. 242:

> On the conclusion of the evidence for the respondent, counsel for the appellant has moved that the appeal be allowed, as no *prima facie* case of guilt had been proved against the appellant. No authorities were cited to indicate just what cogency of proof is required to establish a *prima facie* case at that stage, and I have not run across any case in which the point was settled. I presume, therefore, that, in order to put the accused on his defence, a Judge or Magistrate sitting alone need find only such evidence as would entitle the Crown, in a jury case, to have the facts left to the decision of the jury. In other words, the criterion would be whether the evidence is such as a jury might, in the absence of contradiction or explanation, reasonably and properly convict upon. This view is supported by the wording of the Code, s. 726, which provides that the Justice shall consider the whole matter after hearing what each party has to say and the witnesses and evidence adduced. The Justice or Judge, therefore, apparently does not exercise the function of a jury until both sides have completed their case; and the question of proof beyond reasonable doubt *does not arise at this stage.*

(1) [1938] S.C.R. 396.
(2) (1911) 45 S.C.R. 167 at 169.
(3) (1941) 78 Can. C.C. 236.
(4) 82 Can. C.C. 240 at 242.

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I do not think, in view of section 944, made applicable to the case at bar by section 839, that the lack of any inference to be drawn from section 726 affects the relevancy of the above decision.

Again in *Rex* v. *Olsen* (1), also an appeal from a summary conviction, a magistrate had dismissed the charge at the conclusion of the case for the Crown *without calling upon* the defence. The case, like that at bar, involved a charge under sec. 4(1) (*d*) of the *Opium and Narcotic Drug Act*, 1929. The British Columbia Court of Appeal unanimously set aside the acquittal. O'Halloran J.A. said at p. 66:

> I am of opinion, with respect, that the Crown in the circumstances here made out a case warranting conviction in the absence of any defence which might have been disclosed if the defence had been called upon. But the learned magistrate dismissed the case without calling upon the defence. With respect the case ought not to have been dismissed as it was. I must conclude there was no proper trial in the true legal sense.

To borrow the language of Viscount Sankey, L.C., in *Woolmington* v. *Director of Public Prosecutions* (2):

> . . . it is not till the end of the evidence that a verdict can properly be found . . .

In the words of section 944(2) it is only when *all* the evidence is concluded that counsel for the defence, or the accused himself, as the case may be, may sum up the evidence. The public has an interest in the proper trial of accused persons and I do not think that the fact that counsel for the Crown at the trial apparently failed to realize at the time that the learned trial judge was going beyond the application made to him should, in the circumstances, be allowed to influence the result, particularly in view of the fact that the position of the respondent in this court, as already mentioned, is that the stage had never been reached when he had elected whether he would or would not call evidence. Had the question put to him with respect to that matter been insisted upon, and evidence been called, the case could only have been disposed of on the whole of the evidence; *The King* v. *Joseph Power* (3); *Rex* v. *Lenton* (4).

The case on the Crown's evidence could not have been withdrawn from the jury nor could it have been submitted

(1) 4 C.R. (Can.) 65.
(2) [1935] A.C. 462 at 481.
(3) (1919) 1 K.B. 572.
(4) [1947] O.R. 155.

to the jury until it was known that the evidence had been completed. Counsel for the respondent tells us he does not yet know whether or not the evidence was complete.

In my opinion there must be a new trial.

Appeal allowed; new trial directed.

Solicitor for the appellant: *N. L. Mathews.*

Solicitor for the respondent: *N. Borins.*