HER MAJESTY THE QUEEN .....APPELLANT;

AND

ARTHUR McKAY .....RESPONDENT.

1953

*Dec. 2, 3.
*Dec. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Trial—Appeal—Jury's verdict set aside by appellate court—Crown appeals—Power of Supreme Court to restore verdict—The Criminal Code, R.S.C. 1927, c. 36, s. 1024—The Supreme Court Act, R.S.C. 1927, c. 36, s. 46.

The respondent, on evidence that was wholly circumstantial, was found guilty by a jury of unlawful assault with intent to rob. The Ontario Court of Appeal, Hogg J.A. dissenting, set the conviction aside on the ground that there was no evidence implicating the accused to go to the jury. The Crown appealed on the ground that the dissenting judgment was right in law.

Held: (Cartwright J. dissenting), that the appeal should be allowed and the order of the Court of Appeal set aside.

Held: also, (Kerwin J. dissenting), that an order should be made restoring the verdict of the jury.

Per: Taschereau, Kellock and Fauteux JJ.: The suggestion that a difference as to the person appealing, i.e. the Crown, or an accused, calls for a distinction in law as to this court's powers find no support either in the enactments defining them, (the *Criminal Code,* s. 1024; the *Supreme Court Act,* s. 46), or in the judicial pronouncements interpreting such enactments, *Manchuk* v. *the King* [1938] S.C.R. 341 at 349; *Savard and Lizotte* v. *the King* [1946] S.C.R. 20 at 33, 39; *Lizotte* v. *the King* [1951] S.C.R. 115. Since it does not appear that the verdict of the jury was unreasonable and this court being in as good a position to decide that question as the court below, it should, consonant with the diligence required in the proper administration of justice, do so.

Per: Kerwin J. (dissenting in part). The dissent was on the question of law—whether there was any evidence to go to the jury. Hogg J.A. was right in holding there was, but the majority of the Court having decided the contrary, did not determine the question raised in the respondent's notice of appeal, that even if there was such evidence the verdict should be set aside as unreasonable. It had the authority to do so whereas the jurisdiction of this court is strictly limited and the situation on an appeal by the Crown is different from that when the accused is the appellant and, therefore, the decision in *Fraser* v. *the King* [1936] S.C.R. 296, is not applicable. An order should therefore go that the case be remitted to the Court of Appeal in order that it may, if leave be given, pass upon the point, the only one upon which the respondent is entitled to its decision.

Cartwright J. dissenting, entertained doubts as to the jurisdiction of this court, as it seemed to him implicit in the reasons of the majority of the Court of Appeal, that they had held the conviction ought to be set aside under s. 1014(1)(*a*) of the *Criminal Code,* a ground of fact or of mixed fact and law. Dealing with the matter however on the assumption that the sole ground of the decision of the majority of the

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Court of Appeal was that there was no evidence to go to the jury and that the ground of dissent was that there was, he would have dismissed the appeal.

APPEAL by the Crown pursuant to the provisions of s. 1023 (3) of the *Criminal Code* from the judgment of the Ontario Court of Appeal (1), Hogg J.A. dissenting, which allowed the appeal of the accused from his conviction and directed an acquittal.

C. P. Hope, Q.C. for the appellant.

C. F. Scott for the respondent.

KERWIN J.: (dissenting in part):—After a joint trial with a jury, the respondent McKay, and Wood and Quinlan were convicted of having unlawfully assaulted a person with intent to rob. Wood did not appeal and on the appeal of McKay and Quinlan, counsel for the Crown admitted that there was no evidence to connect the latter with the offence charged, and the Court of Appeal therefore allowed his appeal and set aside his conviction. Judgment on McKay's appeal was reserved and ultimately the Court of Appeal by its judgment set aside his conviction and directed an acquittal with Hogg J.A. dissenting. From that judgment the Crown appeals.

Having considered the reasons for judgment of the majority, delivered by Laidlaw J.A., and those of the dissenting judge, I am of opinion that the dissent is on the question of law whether there was any evidence to go to the jury. I also conclude that Hogg J.A. was right in holding that there was legal evidence against the present respondent upon which the jury were entitled to find the respondent guilty.

In an appeal by the Crown to this Court an accused may raise the other grounds of law taken by him before the Court of Appeal. The respondent argued that he was at least entitled to a new trial because of alleged defects in the trial judge's charge to the jury but I think there was no such defect. The trial judge put it to the jury as to whether the respondent had access to the "hide" or secret closet, and in my opinion that was sufficient without the necessity of referring to the question of possession of the "hide". It was also contended that the trial judge had charged the jury

(1) [1953] O.R. 774.

that the Crown had proven beyond any doubt that the signatures which appear on some of certain writings were McKay's signatures. This is based upon the absence in the transcript of the word "no" but, in any event it is quite clear from what immediately follows that the trial judge was not saying that to the jury but in fact something diametrically opposite. Finally, there is no substance in the argument that the trial judge failed to deal adequately with the case against the respondent as distinct from the case against Wood. The appeal should therefore be allowed and the order of the Court of Appeal set aside.

However, in his notice of appeal to the Court of Appeal the respondent asked leave to appeal on questions of fact. After deciding that there was no evidence to go to the jury, the Court of Appeal did not proceed to determine that, even if there was evidence, the verdict should be set aside on the ground that it was unreasonable. They had the authority so to do but our jurisdiction is strictly limited. In considering the proper order to be made on an appeal by the Crown, the situation is far different from that when the accused is the appellant and, therefore, in my opinion the decision in *Fraser* v. *The King* (1), is not applicable, even though, here as there, the evidence against the accused be purely circumstantial. There is nothing in the record to indicate that the respondent's application to the Court of Appeal for leave to appeal on questions of fact was granted, and the proper judgment appears to me to be to remit the case to that Court in order that it may, if leave had been given, or will be given, pass upon the question as to whether the verdict was unreasonable in the light of all the evidence. That is the only point upon which the respondent will have a right to a decision of the Court of Appeal.

The judgment of Taschereau, Kellock and Fauteux JJ. was delivered by:—

FAUTEUX J.:—For the reasons given by my brother Kerwin, I agree that the appeal of the Attorney General should be allowed and the order of the Court of Appeal set aside.

With respect, however, to the order to be then made by this Court, I think that the verdict of the jury should be restored.

(1) [1936] S.C.R. 296.

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As to authority to make such an order, I have no doubt. The relevant terms of s. 1024 of the *Criminal Code* and of s. 46 of the *Supreme Court Act* are:—

1024:—The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of a conviction or for granting a new trial, or otherwise . . . as the justice of the case requires.

46:—The Court may . . . give the judgment . . . which the court whose decision is appealed against, should have given . . .

In *Manchuk* v. *The King* (1), Sir Lyman Duff, delivering the judgment of the majority, said at page 349:—

There remains for consideration the grave question as to the order that ought to be made by this Court. We have concluded, after full consideration, that, by force of section 1024, coupled with the enactments of the *Supreme Court Act,* this Court has authority, not only to order a new trial, or to quash the conviction and direct the discharge of the prisoner, but also to give the judgment which the Court of Appeal for Ontario was empowered to give in virtue of s. 1016(2);

In *Savard and Lizotte* v. *The King* (2), Taschereau J., speaking for the majority, stated at page 33:—

La question de droit qui donne juridiction à cette Cour, qui en réalité la saisit du litige, est formulée par la Cour du Banc du Roi, mais le remède qui doit être apporté, quand elle est jugée fondée, est du ressort de cette Cour, qui peut et doit alors rendre l'ordonnance que requiert la justice. (*Manchuk* v. *The King* (1)).

The view of Kellock J., on the point, is thus expressed at page 49:—

While the existence of a dissent on a question of law, as provided by section 1023, is a condition precedent for an appeal to this Court, in a case like the present, this Court, once seized of the appeal is not limited to the remedy considered appropriate in the dissent, but has complete jurisdiction to direct the remedy which, in its opinion, the Court appealed from ought to have granted.

In *Lizotte* v. *The King* (3), Cartwright J., delivering the judgment of the Court, said at the bottom of page 135:—

In my opinion, once this court reaches the conclusion, on one or more of the points properly before it, that there has been error in law below it is unfettered in deciding what order should be made by the views expressed in the Court of Appeal.

It is true that in each of these cases, the appeal, contrary to what is the situation in the present instance, was entered by the accused and not by the Crown. But the suggestion that this difference as to the person appealing calls for a distinction in law as to the powers of this Court finds, in

(1) [1938] S.C.R. 341. (2) [1946] S.C.R. 20 at 33.
(3) [1951] S.C.R. 115.

my respectful view, no support, either in the enactments defining them or in the above judicial pronouncements interpreting such enactments.

As to the appropriateness of this order in the present case, I am equally satisfied. The initial question which this Court had affirmatively to answer in order to reach the conclusion that the appeal should be allowed, was whether, contrary to the view of the majority in the Court below, there was, in the record, legal evidence upon which a jury was entitled to find the respondent guilty. The evidence being wholly circumstantial, the question, in the light of the classical direction to the jury as laid down by Alderson B., in the *Hodge's* case (1), was, more precisely, whether a jury could be satisfied "not only that those circumstances were consistent with his having committed the act, but also that the facts were such as to be inconsistent with any other *rational* conclusion than that the prisoner was the guilty person."

In the consideration of the question, the reasonableness of a verdict of guilty based upon such evidence is not, to say the least, a foreign matter. On an exhaustive review of the evidence, it does not appear that the verdict of the jury was unreasonable.

In this view, it would not, in my opinion, be consonant with the diligence required in the proper administration of justice in criminal matters to return this case to the Court of Appeal in order that it may pass on that question, i.e., whether the verdict is unreasonable, which this Court is in as good a position as the former to determine.

The appeal should be allowed and the verdict of the jury restored.

CARTWRIGHT J. (dissenting):—The respondent was tried jointly with one Woods and one Quinlan before Le Bel J. and a jury and all three were convicted on the charge that "on or about the 12th of November, 1952, being armed with offensive weapons, they did unlawfully assault Gordon Robinson, an employee of the Canadian Bank of Commerce, with intent to rob him of the property of the Bank then in his charge or custody as such employee;"

(1) (1838) 2 Lew. C.C. 227.

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The respondent and Quinlan appealed to the Court of Appeal for Ontario. Counsel for the Crown stated that in his opinion there was not sufficient evidence to support the verdict against Quinlan and the Court of Appeal being of the same opinion thereupon allowed his appeal and directed his acquittal. The Court later delivered judgment in the case of the respondent allowing his appeal and directing his acquittal. Hogg J.A., dissenting, would have dismissed the appeal.

It is common ground that the evidence against the respondent was wholly circumstantial. During the argument I entertained doubts as to our jurisdiction, which have not been completely dispelled, as it seemed to me to be implicit in the reasons of the majority, delivered by Laidlaw J.A. and concurred in by Mackay J.A. that in their opinion the conviction ought to be set aside under s. 1014(1)(*a*) of the *Criminal Code,* that this ground was one of fact or of mixed fact and law, and would not be invalidated by reason of its being held, as was done by Hogg J.A., that there was sufficient evidence for the consideration of the jury to justify the refusal of the learned trial judge to direct a verdict of acquittal.

As, however, the majority of this Court are of opinion that we have jurisdiction, I propose to deal with the matter on the assumption that, as was argued by counsel for the appellant, the sole ground of the decision of the majority of the Court of Appeal was that there was no evidence to go to the jury and that the ground of dissent was that there was such evidence. It is too late to question the rule that whether or not there is any evidence (as distinguished from sufficient evidence) to support a verdict is a question of law.

On this assumption, I am of the opinion that the appeal should be dismissed.

The learned counsel for the Crown at the trial made it clear in his opening address that he was proceeding on the theory that there was evidence from which the jury could properly find that, shortly after the robbery, the respondent was, jointly with Woods, in possession of certain articles of a highly incriminating nature (the most important being a key taken from the bank during the robbery) which were found by the Police in "a hide" reached through a concealed

door in a closet opening off a room in the flat of which Woods was the tenant. As I read the reasons of the Court of Appeal the real difference between the view of the majority and that of Hogg J.A. was as to whether there was evidence from which the jury could infer that the respondent had joint possession of such articles.

After reviewing the relevant evidence Laidlaw J.A. says in part:—

> There was no evidence that he (the respondent) had any rights of access to that hide, and no evidence from which it could be found that he had possession or the right of possession, jointly or otherwise, to it.

After a similar review Hogg J.A. says in part:—

> The question before this Court is whether the circumstances which I have outlined, furnished any evidence from which the jury could draw an inference that the appellant had joint possession with Woods of the aforesaid articles . . .

The learned Justice of Appeal goes on to decide that there was evidence from which the jury could draw such inference.

I do not think that any useful purpose would be served by my again reviewing the evidence. After a careful consideration of all of it I find myself in agreement with the conclusions of the majority in the Court of Appeal (i) that there was no evidence from which the jury could infer that the respondent had possession of the incriminating articles in "the hide", and (ii) that, lacking the basis for such a finding of possession, the other circumstances relied upon by the Crown could not be found to be inconsistent with any other rational conclusion than that the accused was guilty.

I would dismiss the appeal.

Appeal allowed and verdict of jury restored.

Solicitor for the appellant: *W. C. Bowman.*

Solicitor for the respondent: *Murray Kamin.*