REGINALD STUART LAMPARD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968
*Dec. 11
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal—Fraudulent manipulations of stock exchange transactions—Acquittal at trial on finding that criminal intent not proved—Inference as to intent a question of fact—Criminal Code, 1953-54 (Can.), c. 51, ss. 325(a), 584.

The appellant, who had been in the brokerage business for many years, was acquitted on an indictment containing 29 counts charging that he, with intent to create a false or misleading appearance of active public trading in securities, effected transactions through the Canadian Stock Exchange in certain securities which involved no change in the beneficial ownership of those securities, contrary to s. 325(*a*) of the *Criminal Code*. The trial judge, having concluded that the appellant had intentionally effected the transactions in question, held that the Crown had not proven beyond a reasonable doubt that the appellant intended to create a false and misleading appearance of active public trading. The Court of Appeal set aside the verdicts of acquittal, held that the facts were not in dispute and that the only inference that could be drawn from them was that the appellant intended to create the false and misleading appearance. This, in the view of the Court of Appeal, raised a question of law so as to give the Crown a right of appeal under s. 584 of the *Criminal Code*. The accused appealed to this Court.

Held: The appeal should be allowed and the verdicts of acquittal restored.

Per Cartwright C.J. and Martland and Ritchie JJ.: There was dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section. To determine whether an act, admittedly done, was done with a certain intention, it is necessary to inquire into the state of mind of the doer. Such an inquiry is as to a matter of fact. Unless the intention is expressed, it will be founded on an inference drawn from all the relevant circumstances. In drawing that inference, the Court is making a finding of fact. If the trial judge erred in finding that the onus, which was on the Crown to prove that the appellant did the acts complained of with the specified guilty intention, had not been satisfied, his error was one of fact. *Sunbeam Corporation of Canada Ltd. v. The Queen* [1969] S.C.R. 221, applied.

Per Judson and Spence JJ.: The Court of Appeal has rightly concluded that the inference that there was an intent to create a false or misleading appearance of active public trading in a security, was irresistible. However, following the judgment in *Sunbeam Corporation of Canada Ltd. v. The Queen, supra,* the trial judge's error was one of fact and the Crown had no right of appeal under s. 584 of the Code.

Droit criminel—Appel—Manipulations frauduleuses d'opérations boursières —Conclusion que l'intention criminelle n'avait pas été prouvée—Verdict

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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d'acquittement—Inférence quant à l'intention est une question de fait —Code criminel, 1953-54 (Can.), c. 51, art. 325(a), 584.

L'appelant, courtier depuis plusieurs années, a été déclaré non coupable sur un acte d'accusation contenant 29 chefs l'accusant d'avoir, avec l'intention de créer une apparence fausse ou trompeuse de négociation publique active d'une valeur mobilière, fait des opérations par l'entremise des facilités de la bourse canadienne sur cette valeur qui n'entraînèrent aucun changement dans la propriété bénéficiaire de cette valeur, contrairement à l'art. 325(*a*) du *Code criminel*. Le juge au procès a conclu que l'appelant avait fait les opérations en question intentionnellement mais statua que la Couronne n'avait pas prouvé hors d'un doute raisonnable que l'appelant avait eu l'intention de créer une apparence fausse et trompeuse de négociation publique active. La Cour d'appel a mis de côté les déclarations de non culpabilité, a jugé que les faits n'étaient pas contestés et que la seule inférence que l'on pouvait tirer des faits était que l'appelant avait eu l'intention de créer l'apparence fausse et trompeuse. Ceci, d'après la Cour d'appel, soulevait une question de droit donnant à la Couronne un droit d'appel en vertu de l'art. 584 du *Code criminel*. Le prévenu en appela à cette Cour.

Arrêt: L'appel doit être accueilli et les déclarations de culpabilité rétablies.

Le Juge en Chef Cartwright et les Juges Martland et Ritchie: La question vitale de fait à savoir si l'appelant a commis les actes que l'on a prouvé qu'il a commis avec l'intention coupable spécifiée à l'article, était contestée. Pour juger si un acte, reconnu comme ayant été commis, l'a été avec une certaine intention, il est nécessaire d'enquêter sur l'état d'esprit de celui qui l'a commis. Une telle enquête porte sur une question de fait. A moins que l'intention soit exprimée, elle sera basée sur une inférence tirée de toutes les circonstances pertinentes. En tirant cette inférence, la Cour en vient à une conclusion de fait. Si le juge au procès a fait erreur en jugeant qu'on n'avait pas rencontré le fardeau, qui était sur les épaules de la Couronne, de prouver que l'appelant a commis les actes dont on se plaint avec l'intention coupable spécifiée, son erreur en était une de fait. *Sunbeam Corporation of Canada Ltd. v. The Queen* [1969] R.C.S. 221.

Les Juges Judson et Spence: La Cour d'appel a jugé avec raison que l'inférence était irrésistible que l'appelant avait eu l'intention de créer une apparence fausse ou trompeuse de négociation publique active d'une valeur mobilière. Cependant, vu le jugement de *Sunbeam Corporation of Canada Ltd. v. The Queen, supra,* l'erreur du juge au procès était une erreur de fait et la Couronne n'avait pas droit d'appel en vertu de l'art. 584 du Code.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], faisant droit à l'appel de la Couronne à l'encontre d'un verdict d'acquittement. Appel accueilli.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal by the Crown against a verdict of acquittal. Appeal allowed.

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[1] [1968] 2 O.R. 470, [1968] 4 C.C.C. 201.

George D. Finlayson, Q.C., and *Burton Tait*, for the appellant.

C. M. Powell, for the respondent.

The judgment of Cartwright C.J. and of Martland and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to s. 597(2)(*a*) of the *Criminal Code*, from a judgment of the Court of Appeal[1] pronounced on April 8, 1968, setting aside verdicts of acquittal entered on February 9, 1966, by His Honour Judge Waisberg on twenty-nine counts in an indictment and ordering verdicts of guilty on each of the twenty-nine counts to be entered.

The respondent was tried before His Honour Judge Waisberg in the County Court Judges Criminal Court for the County of York. The trial occupied seven days. The indictment contained thirty-one counts. Except for differences in dates and in the number of shares all the counts were in the same words. Count 1 read as follows:

> 1. REGINALD STUART LAMPARD stands charged that he, on the 7th day of January, in the year 1963, at the Municipality of Metropolitan Toronto, in the County of York, with intent to create a false or misleading appearance of active public trading in the securities of Dominion Leaseholds Limited, effected a transaction through the facilities of the Canadian Stock Exchange in the securities of Dominion Leaseholds Limited, to wit, 14,000 shares that involved no change in the beneficial ownership of the said securities, contrary to The Criminal Code.

The offence charged is that defined in s. 325(*a*) of the Code which reads:

> 325. Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,
>
> (*a*) effects a transaction in the security that involves no change in the beneficial ownership thereof,
>
> * * *
>
> is guilty of an indictable offence and is liable to imprisonment for five years.

The Crown offered no evidence on count 27 and consented to the dismissal of count 3. The charges contained in these two counts were accordingly dismissed. His Honour found the appellant not guilty on the remaining twenty-nine counts.

[1] [1968] 2 O.R. 470, [1968] 4 C.C.C. 201.

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The learned trial Judge found as a fact that the appellant intended to effect each of the twenty-nine transactions in the shares of Dominion Leaseholds Limited through the facilities of the Canadian Stock Exchange and intended that there be no change in beneficial ownership in the shares involved in the transactions. He acquitted the appellant because he was not satisfied beyond a reasonable doubt that the appellant intended to create a false and misleading appearance of active public trading in the shares.

There is no dispute as to the carrying out of the transactions. The appellant who had been in the brokerage business for many years was at the material times president of Lampard and Company Limited, a broker-dealer. The appellant had employed another person to run a publicity campaign in connection with the shares of Dominion Leaseholds Limited.

The trading by the appellant which resulted in the wash sales occurred on six different days in the months of January and February 1963, namely January 7th, January 22nd, January 23rd, January 24th, February 11th and February 18th.

On January 7th (counts 1, 2 and 4), the appellant placed orders to buy 41,000 shares at 50¢, 1,000 shares at 49½¢ and 3,000 shares at 51¢. On the same day he placed an order to sell 46,000 shares at 50¢. These orders resulted in three wash trades totalling 32,000 shares. On that day the total trading in the shares of Dominion Leaseholds on the Canadian Stock Exchange was 152,000 shares.

On January 22nd, 1963 (counts 5 to 15) the appellant placed seven orders to buy a total of 38,000 shares at 48½¢ through six different brokers. On the same day he placed four orders to sell a total of 35,000 shares at 48½¢. These orders resulted in eleven wash trades of 34,500 shares. The total volume of shares of Dominion Leaseholds traded on the Canadian Stock Exchange on that day was 38,500.

On January 23rd (counts 16 to 26) the appellant placed nine orders to buy a total of 173,500 shares through three different brokers at prices ranging from 50¢ to 65¢. He also placed two orders to sell a total of 147,500 shares at prices ranging from 50¢ to 56¢. These orders resulted in eleven

wash trades of 143,000 shares. The total volume of trading in the shares of Dominion Leaseholds on the Canadian Stock Exchange on that day was 199,000 shares.

On January 24th (count 28), the appellant placed one order to buy 20,000 shares at 52¢. On the same day he placed one order to sell 20,000 shares resulting in one wash trade of 20,000 shares. The total volume of shares traded on the Canadian Stock Exchange on that day was 25,000 shares.

On February 11th (counts 29 and 30) the appellant placed two orders to buy a total of 70,000 shares at 62¢. On the same day he placed two orders to sell a total of 90,000 shares at 62¢. These orders resulted in wash trades of 69,500 shares. The total volume of shares of Dominion Leaseholds traded on that day was 72,000 shares.

On February 18th (count 31) the appellant placed two orders to buy a total of 50,000 shares at 74¢. On the same day he placed two orders to sell a total of 50,000 shares at 74¢. These orders resulted in one wash trade of 25,000 shares. The total volume of shares of Dominion Leaseholds traded on that day was 60,150 shares.

On the buy side of the impeached transactions, the appellant employed seven different brokers and the orders were placed in the name of Lampard and Company as buyer. On the sell side most of the orders were placed through one broker, J. T. Frame and Company, but neither the appellant's name nor the name of his company appeared on such sell orders placed with that firm. Some of the sell orders with respect to transactions referred to in counts 20 to 26 inclusive and counts 29 to 31 were placed by the appellant with J. T. Leslie and Company showing Lampard and Company as seller. All the sales referred to above were carried out at the direction of the appellant.

On this evidence the learned trial Judge, having concluded that the appellant effected the transactions without change in beneficial ownership and that he did so intentionally, that is to say that it was not due to accident, mistake or inadvertence that there was no change in beneficial ownership, addressed himself to the remaining question as to whether the appellant did so with intent to create a false or misleading appearance of active public trading.

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The final conclusion at which the learned trial Judge arrived is expressed in his reasons in the following two sentences:

> I fail to see that the Crown has proven beyond a reasonable doubt that the accused intended to create a false appearance.
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> * * *
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> So that I find that I am not satisfied beyond a reasonable doubt that the accused intended to create a false or misleading appearance of active public trading and I cannot register a conviction. I have some doubt and the accused is entitled to the benefit of the doubt and I dismiss the charges.

The reasons for judgment of the Court of Appeal were delivered by McLennan J.A. After setting out the details of the transactions he said in part:

> . . . To take for example the simple case proved with respect to count 28 where the respondent (i.e., the appellant in this Court) placed one order to buy 20,000 shares and one to sell 20,000 shares resulting in one wash trade of 20,000 shares. The total volume of shares traded on the Exchange on that day was 25,000 shares and the only real public trading that day was 5,000 shares.
>
> It is, I think, irrefutable that a false and misleading impression of active public trading was created with respect to that count and so with all the other counts. The ticker tape records of the transactions impeached with respect to the total volume each day carried to a greater or lesser degree, depending upon the relationship between the wash trades and the total volume of shares traded, a false and misleading appearance of active public trading in the shares.
>
> The respondent did not give evidence himself nor did he call any witnesses on his own behalf. He had been in the brokerage business for many years and must be taken in the absence of evidence from which some other reasonable explanation may be inferred, not only to have foreseen that each wash trade would create a false appearance of active public trading, but to have intended that result. In *Regina v. Jay* (1965) 2 O.R. 471 referred to by the learned trial judge there was evidence in the record that the accused had an intent other than the intent described in section 325. No such evidence of another intent is in the record in this case or can be inferred.
>
> The record also discloses other matters relevant to the issue of intent. All the transactions set out in the 29 counts related to the shares of one company. They were carried out in substantially the same manner and on the sell side the name of the real seller was concealed altogether in most of the transactions and in part with respect to the others. In these circumstances when considering any intent with respect to any one count, it is proper to consider the conduct of the respondent with respect to the others in order to determine whether there was an intent to create a false and misleading appearance of public activity in the shares. *Regina v Stephens,* 16 Cox. 387, C.C.R. referred to in Phipson on Evidence, 10th ed. p. 464, and such other authorities as *Makin v. Attorney General of New South Wales* (1894) A.C. 57; *Harris v. Director of Public Prosecution* (1952) A.C. 694; *Regina v. Doughty* (1921) 50 O.L.R. 360; *Regina v. Mortimer* (1936) 25 Cr. App. R. 150.

Considering the transactions proved in the 29 counts, their proximity in time, the manner in which they were executed, including the subterfuge with respect to most of the sales, the employment of Roberts to run a publicity campaign with respect to the shares of Dominion Leaseholds, I can come to only one conclusion—and in my opinion it is an irresistible one—that the respondent was engaged in a scheme or plan to create a false and misleading appearance of active public trading in the shares of Dominion Leaseholds.

Counsel for the respondent submitted that the finding of reasonable doubt of the learned trial judge was a finding of fact from which the Crown has no right of appeal by virtue of the provisions of section 584 of the Criminal Code. As already stated the facts are not in dispute and in such circumstances where there is only one reasonable inference to be drawn from the facts, if that inference is not drawn a question of law is raised. *Edwards (Inspector of Income Tax) v. Bearstow* (1956) A.C. 14; *Bracegirdle v. Oxley* (1947) 1 All E.R. 126 discussed and approved by this Court in *Regina v. Sunbeam Corporation of Canada Limited* (1967) 1 O.R. 661. Here the facts are not in dispute and as I have said the only inference that can be drawn from the facts in the record is that the respondent intended to create a false and misleading appearance of active public trading which raises a question of law and the Crown has a right of appeal.

For the reasons given, I would allow the appeal, set aside the verdicts of acquittal and direct the entry of verdicts of guilty on each of the 29 counts.

The judgment of the Court of Appeal in *Regina v. Sunbeam Corporation of Canada Ltd.* referred to and relied upon by McLennan J.A. was reversed by this Court[2] in a judgment delivered on November 1, 1968. I venture to think that if the Court of Appeal had had the advantage of reading the reasons of the majority of the Court in that case delivered by my brother Ritchie they would have come to a different conclusion.

The basis of the decision of the Court of Appeal is found in the sentence already quoted above:

> . . . . Here the facts are not in dispute and as I have said the only inference that can be drawn from the facts in the record is that the respondent intended to create a false and misleading appearance of active public trading which raises a question of law and the Crown has a right of appeal.

With the greatest respect I am unable to agree that a question of law was raised. It is not correct to say that the facts are not in dispute. There is dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section.

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[2] [1969] S.C.R. 221, (1969), 1 D.L.R. (3d) 161.

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To determine whether an act, admittedly done, was done with a certain intention it is necessary to inquire into the state of mind of the doer. That such an inquiry is as to a matter of fact has often been held.

In *Clayton v. Ramsden*[3], Lord Wright said:

> States of mind are capable of proof like other matters of fact.

In *Edgington v. Fitzmaurice*[4], Bowen L.J. said:

> But the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

Nothing that was said in regard to Bowen L.J.'s celebrated dictum either in *R. v. Dent*[5] or in *Cox and Paton v. The Queen*[6] throws any doubt on the pronouncement that the state of a man's mind is a fact.

Unless the doer of the act has expressed his intention, the finding as to what that intention was will necessarily be founded on an inference drawn from all the relevant circumstances proved in evidence. It has often been pointed out that where a trial judge makes findings of primary facts and draws an inference therefrom an appellate tribunal is in as good a position as was the trial judge to decide what inference should be drawn, but in drawing the inference the Court is making a finding of fact. In the case of an appeal at large the Court of Appeal has, of course, power to substitute its view, as to what inference should be drawn, for that of the trial judge, but where, as in the case at bar, the jurisdiction of the Court of Appeal is limited to questions of law in the strict sense it has no such power.

When the onus of establishing a certain fact lies upon a party it may be a question of law whether there is any evidence (as distinguished from sufficient evidence) to prove that fact. In the case at bar the onus was, of course, upon the Crown to prove that the appellant did the acts complained of with the guilty intention specified in the section. If the learned trial Judge erred in finding that that onus had not been satisfied, his error was one of fact,

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[3] [1943] A.C. 320 at 331, [1943] 1 All E.R. 16.

[4] (1884), 29 Ch. D. 459 at 483.

[5] [1955] 2 Q.B. 590 at 595, [1955] 2 All E.R. 806.

[6] [1963] S.C.R. 500 at 519, 40 C.R. 52, [1963] 2 C.C.C. 148.

certainly not one of law in the strict sense. The applicable principles are clearly set out in the reasons of my brother Ritchie giving the judgment of the majority of this Court in the *Sunbeam* case, *supra,* and it is not necessary to repeat them.

In a criminal case (except in the rare cases in which a statutory provision places an onus upon the accused) it can sometimes be said as a matter of law that there is no evidence on which the Court can convict but never that there is no evidence on which it can acquit; there is always the rebuttable presumption of innocence.

Nothing would be gained by my expressing an opinion as to what inference as to the intention of the appellant the learned trial Judge should have drawn from the primary facts which he found to have been proved. The Court of Appeal has said in the passage quoted above that "there is only one reasonable inference", that the conclusion that the guilty intention existed in the mind of the appellant is "an irresistible one", that it is "the only inference that can be drawn from the facts in the record". If I shared fully the view so expressed by the Court of Appeal, I would none the less be satisfied that the error (if such it were) made by the learned trial Judge in failing to draw the suggested inference was an error of fact.

In my opinion the Court of Appeal has fallen into the error of saying that the question of what inference should be drawn from certain undisputed facts is a question of law. Whether or not it is so must depend on the nature of the question as to which the inference is to be drawn. Here, as I have endeavoured to show above, the inference is as to the intention with which the appellant effected the transactions, that is as to the state of the appellant's mind, which is a question of fact.

Before parting with the matter I should point out that the Crown's appeal from the acquittal was based on and limited to a single ground stated in the notice of appeal as follows:

> The learned Trial Judge, having found that the accused had effected the transactions alleged in the indictment, erred in law in holding that there was any evidence from which it could be inferred that the accused had any intent other than the intent alleged in the indictment.

This wording seems to me to suggest a misapprehension as to one of the cardinal principles of the criminal law.

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In order for the appellant to be convicted it was essential for the Crown to prove beyond a reasonable doubt that the accused did the acts complained of with the specified guilty intent. That is an onus which never shifts. It was not incumbent upon the appellant to show that he did the acts with some intent other than that charged in the indictment.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the verdicts of acquittal entered by the learned trial Judge.

The judgment of Judson and Spence JJ. was delivered by

JUDSON J.:—The facts relating to the trading activities of R. S. Lampard, the appellant here, are fully set out in the reasons delivered in the Court of Appeal[7] and the reasons of the Chief Justice in this Court. Under s. 584(1)(*a*) of the *Criminal Code,* the Attorney General's appeal is confined to "any ground of appeal that involves a question of law alone". The appellant here submits that if there was error in the judgment at trial, which he does not admit, it is error in fact.

The basis of the judgment of the learned trial judge, who was sitting without a jury, was that the trading activities of the appellant did not indicate to him beyond a reasonable doubt that they were carried out "with intent to create a false or misleading appearance of active public trading in a security". On the other hand, a unanimous Court of Appeal thought that the inference that there was such intent was irresistible.

I agree with this conclusion of the Court of Appeal but we are still left with the question whether the error was one of fact or law. I am compelled by the majority judgment of this Court delivered in *Sunbeam Corporation of Canada Ltd. v. The Queen*[8] to hold that the error—and I am sure that it was error—was one of fact. The appeal therefore succeeds.

Appeal allowed and verdicts of acquittal restored.

Solicitors for the Appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: C. M. Powell, Toronto.

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[7] [1968] 2 O.R. 470, [1968] 4 C.C.C. 201.

[8] [1969] S.C.R. 221, (1969), 1 D.L.R. (3d) 161.