1966

*May 27
Oct. 4

JOHN PERCY MacKROW .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Fraud—Real estate transaction—Lawyer for vendor acting also for purchaser—Existence of second mortgage not disclosed to purchaser—Whether case correctly put to jury—Criminal Code, 1953-54 (Can.), c. 51, s. 323(1).

The appellant, a lawyer, was convicted by a jury of having defrauded O by deceit, falsehood or other fraudulent means, contrary to s. 323(1) of the *Criminal Code*. The appellant, who was engaged on a monthly fee basis by the vendors, represented also the purchaser O in a transaction in respect of the sale of a motel. The evidence was that the appellant had failed to disclose to O the existence of an outstanding second mortgage on the property. The Crown contended that this failure constituted fraud within the meaning of s. 323(1) of the Code. The accused admitted that he knew of this second mortgage but that his failure to inform the purchaser was due to inadvertence on his part and without any intent to defraud. It was conceded that the accused did not personally profit from the alleged fraud. In his charge to the jury, the trial judge said that the evidence, if believed, was that a false statement had been made by the accused to the purchaser. An appeal to the Court of Appeal was dismissed. The accused was granted leave to appeal to this Court.

Held: The appeal should be allowed, the conviction quashed and the appellant acquitted.

*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Hall JJ.

The trial judge's charge amounted to misdirection. The Crown's case against the appellant was not that he had given false information but that he had fraudulently withheld material information from O, a situation essentially different in character from that put to the jury by the trial judge. It was not possible to say that no substantial wrong or miscarriage of justice had occurred by reason of this misdirection.

Droit criminel—Fraude—Opération immobilière—Avocat du vendeur agissant aussi pour l'acheteur—Existence d'une seconde hypothèque non dévoilée à l'acheteur—La cause a-t-elle été soumise correctement au jury—Code criminel, 1953-54 (Can.), c. 51, art. 323(1).

L'appelant, un avocat, a été trouvé coupable par un jury d'avoir frustré O par supercherie, mensonge ou autres moyens dolosifs, le tout contrairement à l'art. 323(1) du *Code criminel*. L'appelant, qui touchait des honoraires mensuels du vendeur, a représenté aussi l'acheteur O lors d'une opération immobilière concernant la vente d'un motel. La preuve était à l'effet que l'appelant n'avait pas dévoilé à O l'existence d'une seconde hypothèque en vigueur sur la propriété. La Couronne prétend que cette négligence constituait une fraude dans le sens de l'art. 323(1) du Code. L'appelant a admis qu'il était au courant de la seconde hypothèque mais que son défaut d'en informer l'acheteur était dû à une inadvertance de sa part et sans aucune intention de frustrer. Il est admis que l'appelant n'a retiré personnellement aucun profit de la fraude alléguée. Dans son adresse au jury, le juge au procès a dit que la preuve, si elle était crue, était à l'effet que l'accusé avait fait à l'acheteur une fausse déclaration. La Cour d'appel a rejeté l'appel. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu, la condamnation mise de côté et l'appelant acquitté.

Les instructions du juge au procès étaient erronées. L'accusation portée contre l'appelant n'était pas qu'il avait donné de faux renseignements mais qu'il avait frauduleusement caché à O des renseignements pertinents, une situation ayant un caractère essentiellement différent de celle qui avait été soumise au jury par le juge au procès. Il était impossible de dire qu'aucun tort important ou qu'aucune erreur judiciaire grave ne s'était produite en raison des instructions erronées.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique, confirmant un verdict de fraude. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a conviction for fraud. Appeal allowed.

No one appearing for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

1966

MACKROW v. THE QUEEN

The judgment of the Court was delivered by

HALL J.:—The appellant was tried jointly with one Arthur Bennett by a judge and jury in the month of January 1963 at Vancouver in the Province of British Columbia upon three counts as follows:

1. That at the City of Vancouver, in the County and Province aforesaid, between the 1st day of January, A.D. 1959, and the 30th day of March, A.D. 1959, they, the said ARTHUR BENNETT and JOHN MacKROW, together with HYCREST HOLDINGS LIMITED and HYCREST MOTELS LIMITED by deceit, falsehood, or other fraudulent means, did defraud SAM~~UEL~~ NORWOLL of property, money or valuable security, contrary to the form of the statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.
2. That at the City of Vancouver, in the County and Province aforesaid and at the City of New Westminster, in the Province aforesaid, between the first day of May, A.D. 1959, and the 30th day of June, A.D. 1959, they, the said ARTHUR BENNETT and JOHN MacKROW, together with HYCREST INVESTMENTS LIMITED, IDEAL MOTELS LIMITED and HYCREST MOTELS LIMITED by deceit, falsehood or other fraudulent means, did defraud JAMES JACK ORAN of property, money or valuable security, contrary to the form of the statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.
3. That at the City of Vancouver, in the County and Province aforesaid, between the 1st day of May, A.D. 1959, and the 30th day of June, A.D. 1959, he the said JOHN MacKROW, being a trustee of money for the use and benefit of JAMES JACK ORAN did convert, with intent to defraud and in violation of his trust, the said money or a part of it to a use that was not authorized by the trust, contrary to the form of statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.

"Amended
15.1.63
A.B.C."

The jury acquitted MacKrow on Count 1, but convicted him on Counts 2 and 3. Bennett was convicted on Counts 1 and 2. MacKrow was sentenced by Mr. Justice Ruttan, the trial judge, to serve a term of five years in the penitentiary on each of Counts 2 and 3, the sentences to be served concurrently. He appealed to the Court of Appeal for

British Columbia which, on October 17, 1963, dismissed the appeal as to Count 2 but quashed the conviction on Count 3. Accordingly, Count 2 in respect of MacKrow only is the one issue now before the Court. The Court of Appeal did not disturb the five years' sentence when it dismissed the appeal in respect of Count 2. MacKrow was a prisoner in the penitentiary until paroled on July 8, 1965. Shortly after his release from the penitentiary, MacKrow applied to this Court for an order extending the time within which to make application for leave to appeal and for an order granting leave to appeal from the judgment of the Court of Appeal pronounced on the 17th day of October, 1963. This application was dealt with on December 8, 1965, when the following order was made:

THIS COURT DID ORDER AND ADJUDGE that the time for applying for leave to appeal to this Court be and the same was extended to the 8th day of December, 1965.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that leave to appeal from the Judgment of the Court of Appeal for the Province of British Columbia pronounced on the 17th day of October, 1963 be and the same was granted on the following questions of law, namely:

"(1) Did the Court of Appeal err in holding that there was evidence upon which the jury could reasonably convict the appellant on Count No. 2 of the indictment.

(2) Did the Court of Appeal for British Columbia err in holding that any defence which was available to the accused was properly and adequately put by the learned trial judge in view of the appellant's contention that:

(*a*) The learned trial judge instructed the jury that there was evidence on the part of the witness Oran that a false statement was made to him at the time specified in the said Count No. 2 whereas there was no such evidence;

(*b*) The learned trial judge instructed the jury that it was not challenged that the appellant had given false information to Oran whereas it was a part of the appellant's defence that he had not done so;

(*c*) The learned trial judge instructed the jury that the appellant's sole defence was that he had been negligent whereas it was part of his defence that he had given no false information."

The substantive question argued on the hearing of the appeal was whether the learned trial judge had erred in his direction to the jury in respect of the law and evidence relating to Count 2. MacKrow was not present on the hearing of the appeal nor was he represented by counsel. However, he did file a factum and a memorandum in reply to the respondent's factum pursuant to leave granted by the Chief Justice of this Court. Mr. Burke-Robertson, Q.C.,

1966

MACKROW v. THE QUEEN

Hall J.

appeared for the Crown and developed the evidence and points in issue with scrupulous fairness to the Crown and to the appellant.

While the Crown was within its rights in including Counts 1 and 2 in the one indictment, the fact that the two counts were proceeded with in the one indictment did make for a very long and complicated trial (over three weeks) in which it was difficult to keep separate the evidence relating to Count 1 from that relating to Counts 2 and 3, particularly as the wheelings and dealings of Bennett and the corporate manipulations and financial difficulties of his companies, Hycrest Holdings Limited and Hycrest Motels Limited, named in Count 1, were involved in both Counts 1 and 2 and the same corporate manipulations and difficulties of these companies and of a third company, Ideal Motels Limited, named in Count 2, were also involved in respect of Count 2 as well as those of a fourth company, Pacific American Motels Limited, not named in the count. The offence charged in Count 2 was alleged to have taken place, according to the evidence, on or about the 15th day of May, 1959. The evidence shows that the appellant was arrested on the charge on January 5, 1962, and that in the interval civil litigation over the transactions in question had taken place resulting in James Jack Oran, the man named in Counts 2 and 3 recovering judgment against Bennett and MacKrow in an amount of approximately $5,000 and costs. I mention this because in the address of Mr. Mussallem, who was counsel for MacKrow at the trial, he made reference to this lapse of time. He was interrupted by Ruttan J. and directed to go no further with that submission as follows:

> THE COURT: But you are criticizing the Crown for not bringing the case earlier which, I think, is in fact criticism, and I ask you not to go ahead with it.

Considered alone, perhaps nothing substantial turns on this point although it is related to the question as to whether any defence which was available to the appellant was properly and adequately put to the jury by the learned trial judge. The fact that criminal proceedings were not instituted for some 32 months after the alleged offence is said to have been committed and then only after civil proceedings had been taken and a judgment for some $5,000 obtained which was unsatisfied when the charge was

laid, was in my view, a proper matter for comment when the issue was, as in this case, one relating to whether or not a person has been defrauded by deceit, falsehood or other fraudulent means. Criminal proceedings brought long after the event complained of and following civil proceedings that result in an unsatisfied judgment without any explanation for the delay may well be looked upon with some suspicion by a jury where the issue is financial loss arising out of a commercial transaction.

The basic facts upon which Counts 2 and 3 are based are that on or about the 15th day of May, 1959, the person named in Counts 2 and 3, the said James Jack Oran, had answered an advertisement in a Saskatchewan paper relating to a motel which was for sale at White Rock, British Columbia. He called at the Hycrest office in Vancouver on May 12, 1959, and saw a Mrs. Young and Bennett. Following a discussion with these parties, he decided to purchase the property. He signed a document (Exhibit 48) which is headed "Offer for Purchase, Acceptance and Interim Receipt", the vendor being Pacific American Motels Limited. The purchase price was stated to be $47,500 payable $18,000 cash and an Agreement for Sale for the balance, $29,500 payable over 15 years with interest at 6 per cent. He made a deposit of $1,000. He was told at this time that there was a mortgage in favour of Associated Investors Limited against the property for $12,000 payable at $225 per month. The offer was submitted to Pacific American Motels Limited. Two days later he was communicated with, and following a discussion, agreed to increasing the interest rate to 7 per cent. He was then brought to MacKrow's office which was in the office of Hycrest Investments Limited, a motel on Denman Street in Vancouver. MacKrow, who had been called to the Bar May 1, 1954, was engaged principally in doing work for Bennett and his companies on a $1,200 a month fee basis. This was the first time Oran had met MacKrow. In so far as going to MacKrow, Oran testified:

A. I did say to Mrs. Young if I decide to buy this property I will have to get a lawyer to draw up the transactions.

Q. Yes.

A. And she says, "Well, we have a lawyer working with us, Mr. MacKrow, and that would be the most convenient, to have him do the work." And I said, "Well, he works for your company. Probably I should still get a lawyer, some other lawyer." And she was

1966

MACKROW v. THE QUEEN

Hall J.

very emphatic, she said that it will cost more to get some other lawyer, it will take more time, and besides MacKrow, he does this work every day, it will be quicker, and the effect of what she said was that it would be quicker and cheaper and it would be the best to have MacKrow do the work. As a result of her suggestion I did engage MacKrow.

Then, in connection with the actual Agreement for Sale which was prepared by MacKrow, Oran said that some two days later he got a call to come to MacKrow's office. This is when the Agreement for Sale (Exhibit 51) was prepared and signed. Respecting the agreement, Mr. Oran testified:

MR. COLTHURST:

Q. Who produced the agreement for sale, Mr. Oran?
A. MacKrow did.

Q. And what, if any, discussion took place about the document?
A. Well, I read over the first page terms.

Q. Yes?
A. And we agreed verbally with the terms, the full amount $47,500.00, the down payment $18,000.00, of which I had already paid $1,000.00.

Q. Yes?
A. And the monthly payments $263.51.

Q. Yes?
A. And there was a 15-year basis we agreed verbally.

Q. Let me see that. Do you recall any further discussion in connection with that agreement for sale?
A. Yes, I particularly noticed the Associated Investors mortgage.

Q. And that is the mortgage that is referred to on the first page of that document, is it?
A. That is right.

Q. Where it says subject to a mortgage in favour of Associated Investors Limited, registered in the Land Registry office under No. 238252C, which the vendors herein covenant to pay according to the terms thereof?
A. Yes.

Q. And save harmless the purchasers therefrom provided that should the vendors default in the payment of any monies due under the said mortgage the purchaser may make payment of such monies to the said mortgagee and the vendors shall allow the purchaser full credit hereunder to the amount of such payment.
A. That is what I am referring to, yes.

Q. And was there any discussion in that connection?
A. Well, we discussed the amount of the mortgage and the standing and he said that is the mortgage that was on the listing. It is approximately $12,000.00.

Q. And when you say "he", who was "he"?
A. MacKrow.

Q. Yes. He said that is it. I am sorry, you have already told us what he said. Yes, and what else?
A. That is the mortgage in good standing, it is being paid off at $225.00 a month.

Q. Yes.

A. I think there was another ten years to go. So I did say, "Well, couldn't I pay that directly to Associated Investors?" Well, he said it really didn't matter. The effect of what he said was that it didn't matter, the difference between $12,000.00 and the agreement for sale was $29,500.00, and this particular mortgage is only $12,000.00 so even if the vendor did default in the payments that I still had there was still $17,000.00 left. So it really didn't matter, he said.

Q. And did you look at any other portion of that agreement for sale?

A. Well, I went over all of it and they said, I probably didn't read all of the second page. MacKrow said, "Well, that is the usual form," and he emphasized paid in 15 years, I will get a clear title, and that is all I asked to have the agreement for sale be what it is.

Q. And as far as looking now at the second page of that agreement you say that you, as I recall the effect of what you said, was you probably didn't read it all. Did you read any of it or notice any of it?

A. Well, I probably didn't read it all, but I noticed there were, this blank space.

Q. Yes?

A. And I think we discussed that. MacKrow mentioned that if there were any changes or alterations it would be here. But this is the usual blank space, the usual form that is used and I felt that that was good enough.

Q. And you are referring to what blank space? Just hold it up and show?

A. This one here.

Q. That is the blank space where again?

A. Right here.

Q. Where there is certain typewritten words, is that right?

A. Yes.

Q. The typewritten words being what?

A. No exceptions.

After signing the agreement, Oran made out two cheques totalling $17,060.18 payable to MacKrow. Oran then left and did not see or speak to MacKrow again until some months later. Meanwhile, MacKrow proceeded to have the agreement registered and in due course, on June 2, 1959, wrote Oran at White Rock, British Columbia, as follows:

Dear Sir: Re sale to you of Ideal Motel, White Rock.

The registration of the above-mentioned sale has now been completed and I enclose herewith your copy of the agreement for sale, which was registered in the New Westminster Land Registry Office under No. 261951C. Also is enclosed a copy of the statement of adjustments for your records.

1966

MACKROW v. THE QUEEN

Hall J.

He enclosed a statement of adjustments as follows:

Purchaser's Statement of Adjustments adjusted as of May 16, 1959.
Re: Purchase of Ideal Motel, White Rock, B.C.

To: Purchase Price	$ 47,500.00	
By: Agreement for Sale		$ 29,500.00
By: Deposit		1,000.00
To: Insurance at $404.00 for 3 yrs. unexpired portion 2 yrs.	268.40	
By: Taxes—Vendor's share 4½ mos. @ $677.71		254.11
By: Vendor's share sewer tax—$62.00 4½ mos.		23.31
By: Plexolite Sign	5.20	
To: Registration of Agree. for Sale	24.00	
To: Legal fees	40.00	
By: Balance due from you		17,060.18
	$ 47,837.60	$ 47,837.60

As stated previously, Oran was advised of the mortgage in favour of Associated Investors Limited before he saw MacKrow. The charge against MacKrow was that in addition to the Associated Investors' mortgage there was also registered against the title to the property which Oran was buying a second mortgage given by Ideal Motels Limited to Issie Feldstein dated September 19, 1958, for the sum of $12,000 payable on or before March 25, 1959. Oran was not advised of the existence of this mortgage when he signed the offer to purchase (Exhibit 48) and did not learn of it until, in the month of September 1959, he had a call from Feldstein advising him of the mortgage and demanding payment and threatening foreclosure as the mortgage was then overdue. He immediately got in touch with MacKrow who he says assured him the matter would be taken care of. MacKrow communicated with Bennett who, after some delay and because neither he nor Hycrest Motels Limited were able to pay off the Feldstein mortgage, arranged along with solicitors for Oran to have Credit Foncier Franco-Canadien take title and pay off the two mortgages. This left Oran to settle with Credit Foncier but the transaction resulted in an actual loss of $2,507.80 to Oran. The motel cost him that much more than he had agreed to pay for it in the first place. This loss was part of the unsatisfied judgment previously mentioned which he subsequently recovered against MacKrow and Bennett.

The Crown alleged that MacKrow had knowledge of the existence of the Feldstein mortgage on May 15, 1959, both from the fact that he had prepared the mortgage in the first place in September 1958 and from the fact that he participated in a meeting on April 8, 1959, at which a document (Exhibit 35) was prepared by him and which dealt specifically with the Feldstein mortgage. Exhibit 35 reads as follows:

Vancouver, B.C.
April 8, 1959.

Hycrest Motels Ltd.,
1120 Denman St.,
Vancouver, B.C.
Dear Sirs:

Re: Transfer to us of El Rancho
Columbia, Fairlane, Triway
Motels.

This is to confirm our agreement with you made this date with reference to the above transfer of motel properties, as follows:—

1. We are to have full possession and title to the above motels, together with all shares in companies owning any of the said properties.

2. All adjustments between us with reference to the said transfers are to be taken as settled by the transfer to us of all shares in the company known as Ideal Motels Ltd., and by the transfer to us of the property known as Buena Vista Motel, White Rock, B.C. You agree to discharge at your expense "by April 26, 1959" the mortgage now on the Ideal Motel property in the approximate amount of $13,800.00 held by one Issie Feldstein.

3. A full mutual release is to be executed by both you and us.

Yours very truly,
Pacific American Motel Corp. Ltd.
Per: "E. W. Ormheim"
Per: "J. W. Ambler"
"EWO"
"JPM"

The Crown says that MacKrow's failure to bring to Oran's attention the fact of the existence on May 15, 1959, of the Feldstein mortgage was fraud within the meaning of s. 323(1) of the *Criminal Code*. There is no evidence that MacKrow said in so many words that the property was subject only to the Associated Investors' mortgage or that there was only one mortgage. Rather he inserted a clause in the Agreement for Sale (Exhibit 51) to safeguard Oran in respect of the Associated Investors' mortgage only of which Oran had knowledge. The Crown's position is that MacKrow's silence and failure to make known the existence

1966

MACKROW v. THE QUEEN

Hall J.

of the Feldstein mortgage to Oran at that time was fraud on his part. MacKrow, while admitting that he knew of the Feldstein mortgage in September 1958 and that it was still unpaid as of April 8, 1959, said that his failure to inform Oran of it was due to inadvertence on his part, and while admitting negligence as a solicitor in failing to have a search made of the title which would have shown the mortgage still on the title, he insisted that it had been done innocently and in a hurry and without any intent to defraud. The issue, therefore, which the jury had to decide was whether the Crown had made out its case of fraud against MacKrow beyond a reasonable doubt.

The burden of proof was on the Crown to establish the fraud. It relied strongly on Exhibit 35 quoted above, but it must be noted that this exhibit specifically contained the statement that the Feldstein mortgage was to be discharged by April 26, 1959. There was no direct evidence that the appellant knew that this had not been done when he dealt with Oran on May 15. The jury was asked to conclude that because this mortgage was registered against the property to MacKrow's knowledge in April that it was necessarily fraud on his part when he failed to communicate that fact to Oran on May 15 even though the document (Exhibit 35) relied on so strongly by the Crown itself provided for the mortgage being off the title by April 26. Much stress was placed by the Crown on a document (Exhibit 56) dated May 22, 1959, signed by one Ellen M. Rodgers, MacKrow's secretary, which accompanied the Agreement for Sale when it was tendered for registration in the Land Registry Office on May 27, 1959. This document in which Rodgers said she was the authorized agent of Oran stated that the Agreement for Sale was being registered subject to both mortgages and listed the registered numbers of the two mortgages. According to this witness, these numbers may have been typed in after the document was prepared between May 22 and May 27, 1959. Obviously by May 27, 1959, some one in MacKrow's office was or became aware that the Feldstein mortgage was still on the title because its registered number was inserted at or prior to the time the Agreement for Sale was being tendered for registration. MacKrow denied having prepared the document and there was no evidence of the source from which the witness Rodgers got the number of the Feldstein mortgage if, in

fact, she was the one who actually typed in the number. She did not identify MacKrow as the source from which she got the number.

This summarizes the evidence relied on by the Crown to bridge the gap between the time the Feldstein mortgage should have been discharged according to Exhibit 35 and May 15 and upon which the Crown argued that the jury must infer that MacKrow knew the mortgage had not been discharged as of May 15 and that he fraudulently withheld that fact from Oran in order to get the $17,000 cash for his principal client Bennett. It was conceded that MacKrow did not personally profit from the alleged fraud.

This was the case which MacKrow had to answer. The defences open to him on the evidence included (1) the contention that he had made no false or any statement to Oran respecting the Feldstein mortgage and (2) that his failure to tell Oran of the Feldstein mortgage was due to inadvertence and was not deliberate or intended to mislead or defraud Oran. Ruttan J. put the case to the jury as follows:

> Now on the other hand in the second count, in the Oran count, there is, I suggest to you, no evidence of a promise to do something in the future. *The evidence, if you accept it, on the part of Oran is that a false statement was made to him at that time. In fact, I do not think it is challenged that he was given false information. The defence is that it was by negligence, by inadvertence, but I do not think it is disputed that he was given false information, the false statement being once again, that there was only one encumbrance on the property when, in fact, there was a second encumbrance,* once again a mortgage in the name of Issie Feldstein which was never revealed to Oran until Feldstein himself called him up some months later to warn him that he was going to foreclose.

(The italics are my own.)

In my view this was misdirection. The case against the appellant was not that he had *given* false information but that he had fraudulently *withheld* material information from Oran in order to obtain the money which Oran paid to him on May 15, a situation essentially different in character from that put to the jury in the quotation set out above. See *Regina v. Charters*[1].

I am unable to say that no substantial wrong or miscarriage of justice has occurred by reason of this misdirection. It follows that the conviction against the appellant on Count 2 cannot stand.

[1] (1957), 119 C.C.C. 223.

1966

MACKROW v. THE QUEEN

Hall J.

There remains the question as to whether a new trial should be ordered. Crown counsel did not ask for a new trial in the event that the conviction was set aside. The conviction will, accordingly, be quashed and MacKrow acquitted on Count 2. His previous acquittals on Counts 1 and 3 completely dispose of the charges against him.

Appeal allowed, conviction quashed and appellant acquitted.

Solicitors for the respondent: Boyd, King & Toy, Vancouver.