1965

*June 15
June 24

BRADFORD LEONARD SMITH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

On appeal from the Court of Appeal for Ontario

Criminal law—Notice of appeal to Court of Appeal expressing appellant's wish to be present and argue orally—Appellant not present and not represented—Jurisdiction of Court of Appeal to hear and dismiss appeal—Criminal Code, 1953-54 (Can.), c. 51, s. 549(1).

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

Following his conviction for the offence of having possession of instruments for house-breaking, the appellant gave notice of his intention to appeal on a printed form in which he expressly stated his wish to be present and to present oral argument. When the matter came before the Court of Appeal, the appellant was not present; he was still in custody; he was not represented by counsel and had not been notified of the date on which the appeal was to be heard. The Court of Appeal nevertheless dismissed his appeal from conviction and increased his sentence from two to five years. He was granted leave to appeal to this Court.

Held: The appeal should be allowed and the record should be referred back to the Court of Appeal for a hearing in accordance with the *Criminal Code*.

Under s. 594(1) of the Code, the appellant had a statutory right to be present and to submit his case by oral argument. When it appeared that he had expressed his desire to be present, that he was not present and that he had received no notice of the date of the hearing, the Court of Appeal had no right to enter upon the hearing and should have adjourned the case to enable the appellant to be present. To proceed in his absence was error in law.

Droit Criminel—Avis d'appel à la Cour d'Appel exprimant le désir de l'appelant d'être présent et de plaider oralement—L'appelant non présent et non représenté—Juridiction de la Cour d'Appel d'entendre et de rejeter l'appel—Code criminel, 1953-54 (Can.), c. 51, art. 549(1).

A la suite de sa condamnation pour l'offense d'avoir eu en sa possession des instruments d'effraction, l'appelant a donné avis de son intention d'appeler sur une formule imprimée dans laquelle il a expressément déclaré son désir d'être présent et de présenter une plaidoirie orale. Lorsque l'appel vint devant la Cour d'Appel, l'appelant n'était pas présent; il était encore sous garde; il n'était pas représenté par un avocat et n'avait pas été notifié de la date que l'appel devait être entendu. La Cour d'Appel a quand même rejeté son appel contre la condamnation et a augmenté sa sentence de deux à cinq ans. Il a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et le dossier renvoyé à la Cour d'Appel pour une audition conformément au *Code criminel*.

En vertu de l'art. 594(1) du Code, l'appelant avait un droit statutaire d'être présent et de soumettre son appel par un plaidoyer oral. Lorsqu'il apparut qu'il avait exprimé le désir d'être présent, qu'il n'était pas présent et qu'il n'avait pas reçu notification de la date de l'audition, la Cour d'Appel n'avait pas le droit d'entendre la cause et aurait dû ajourner l'appel pour permettre à l'appelant d'être présent. Ce fut une erreur de droit que de procéder en son absence.

APPEL d'un jugement de la Cour d'Appel de l'Ontario, confirmant la condamnation de l'appelant. Appel maintenu.

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APPEAL from a judgment from the Court of Appeal for Ontario, affirming the appellant's conviction. Appeal allowed.

B. Carter, for the appellant.

C. Powell, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal from a judgment of the Court of Appeal for Ontario is brought pursuant to leave granted by this court on April 27, 1965, on the following question of law:

Had the Court of Appeal jurisdiction to enter upon the hearing of the application to that Court when the appellant, who had given notice that he desired to be present at the hearing of his appeal, was in custody, was not represented by counsel, was not present at the hearing of the appeal and had not been notified of the time of the hearing of his appeal?

The appellant was convicted before His Honour Judge Moore at Toronto on April 16, 1964, of the offence of having possession of instruments for house-breaking, without lawful excuse, contrary to s. 295 of the *Criminal Code,* and was sentenced on the same day to two years imprisonment.

The appellant who was then in custody in the Toronto jail gave a notice dated May 7, 1964, on a printed form headed: "Form of Notice of Appeal or Application for leave to Appeal."

Following the heading giving the appellant's name and particulars of the conviction and sentence as contemplated by the printed form, the notice reads as follows:

I hereby give you notice that I desire to appeal (or apply for leave to appeal, as the case may be) to the Court of Appeal against *my conviction (or against my sentence)* on the grounds following:—
See Attached sheets.

I desire to present my case and argument "By Oral Argument"
(Fill in either "in writing" or "by oral argument," as the case may be)

If a new trial is directed I "Desire"
("desire" or "do not desire" as the case may be)

that such new trial be before a jury.

My address for service is 550 Gerrard Street East, Toronto, Ontario.
(Fill in carefully, as this is important)

Dated this 7th day of May, 1964.
Bradford L. Smith
(Signature of the appellant or of his solicitor or counsel)

The "Attached sheets" referred to in the notice set out eleven numbered grounds none of which involves a question of law alone.

The matter came before the Court of Appeal on June 23, 1964. The appellant was not present; he was still in custody; he was not represented by counsel and he had been given no notice of the date on which the appeal was to be heard. That this is so was stated before us by counsel for the appellant and by counsel for the Attorney General.

At the conclusion of the hearing the Court of Appeal delivered oral reasons in which no reference is made to the absence of the accused. The formal judgment of the Court reads as follows:

This is to certify that the application for leave to appeal and the appeal in writing of the above named Bradford Leonard Smith against his conviction and sentence, having come on to be heard before this Court this day in the presence of Counsel for the Crown, and upon having read the Notice of Application for leave to appeal and Judge's Report, and upon hearing what was alleged by Counsel for the Crown, aforesaid,

This Court did order that the said appeal against conviction should be and the same was thereby dismissed as frivolous.

And this Court did further order that the application for leave to appeal against sentence should be and the same was thereby granted, and that the sentence of two (2) years be set aside and a sentence of five (5) years in penitentiary substituted therefor.

Rule 16 of the Criminal Appeal Rules in force in Ontario at the time the matter was dealt with by the Court of Appeal, read as follows:

16. If it is not the intention of the appellant to present his case before the Court orally he shall be at liberty to make his argument in writing, in which case notice of his intention shall be embodied in the notice of appeal or notice of application for leave to appeal, and a copy of the written argument shall be left with the Registrar when the appeal is set down or within seven days thereafter.

The appellant's notice quoted above made it clear that he intended to present his case before the Court orally and not to make his argument in writing.

Rule 17 of the same rules read as follows:

17. When the appeal or application for leave to appeal is ready for hearing the Registrar shall give notice to the appellant and to the Attorney General of the date that has been fixed for the hearing of the application and shall place the case upon the list for hearing upon that date.

The Registrar did not give to the appellant the notice required by this rule.

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Cartwright J.

Section 594 of the *Criminal Code* reads as follows:

> 594 (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.
>
> (2) An appellant who is in custody and who is represented by counsel is not entitled to be present
>
> (*a*) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,
>
> (*b*) on an application for leave to appeal, or
>
> (*c*) on any proceedings that are preliminary or incidental to an appeal,
>
> unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.
>
> (3) A convicted person who is an appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case or argument so presented.
>
> (4) The power of a court of appeal to impose sentence may be exercised notwithstanding that the appellant is not present.

In the circumstances of this case we are concerned only with subs. (1). Subsection (2) has no application because the accused was not represented by counsel.

Under this section the appellant had a statutory right to be present and to submit his case to the Court by oral argument. When it appeared (i) that he had expressed his desire to be present (ii) that he was not present and (iii) that he had received no notice of the date of the hearing, I think it clear that the Court had no right to enter upon the hearing and should have adjourned the case to enable the appellant to be present. To proceed in his absence was, in my opinion, error in law.

A similar situation arose in England in the case of *The King v. Dunleavey*[1].

Section 11(1) of the *Criminal Appeal Act*, (1907),7 Edward VII, c.23, read as follows:

> An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of Court provide that he shall have the right to be present, or where the Court gives him leave to be present.

The appeal involved questions of fact. The prisoner was unable to be present owing to illness but had stated he desired to be present. The report at pages 200 and 201 reads as follows:

[1] (1909), 1 K.B. 200, 1 Cr. App. R. 212.

F. T. Bingham, for the prisoner. Sect. 11, sub-s. 1, of the Criminal Appeal Act, 1907(1) appears to place a difficulty in the way of the appeal being heard in the absence of the prisoner who desires to be present, unless the Court think that the discretion of the prisoner as to whether he should be present passes to counsel. The presence of the prisoner would not aid the conduct of the appeal. The question is whether counsel can, on behalf of the prisoner, waive the right to be present.

The judgment of the Court (Lord Alverstone C.J. and Phillimore and Walton JJ.) was delivered by

Lord Alverstone, C.J.—The case must stand over. Sect. 11, sub-s. 1, of the Criminal Appeal Act is imperative; the prisoner has a right to be present unless the ground of appeal is on law alone, and in the present case the appeal involves questions of fact.

I agree with this decision and the case for the present appellant is even stronger as he was without counsel.

Under s. 600(1) of the *Criminal Code* this Court may on this appeal make any order that the Court of Appeal might have made. I have already expressed the view that the order it should have made was that the case should stand over to permit the appellant to be present.

I would allow the appeal, set aside the judgment of the Court of Appeal of June 23, 1964, and direct that the record be returned to that Court to set a date for the hearing and to hear and determine the application of the appellant in accordance with the provisions of the *Criminal Code*.

Appeal allowed.

Solicitor for the appellant: R. J. Carter, Toronto.

Solicitor for the respondent: C. Powell, Toronto.