HER MAJESTY THE QUEEN .....APPELLANT;

AND

JOSEPH MACHACEK .....RESPONDENT.

1960
*Dec. 2

1961
Jan. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Taxation—Income tax—False statements in returns—Limitation of actions—Criminal Code, 1953-54 (Can.), c. 51, s. 693—Income Tax Act, R.S.C. 1952, c. 148, s. 132(1)(a), 136(4)—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

Statutes—Whether repeal by implication of special enactment by later general enactment.

The respondent was charged under the *Income Tax Act* with having made false statements in his income tax returns for each of the years 1953 to 1956 inclusive. With the exception of the charge relating to the

*PRESENT: Locke, Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1942] S.C.R. 80 at 83, 2 D.L.R. 401.

1961

THE QUEEN
v.
MACHACEK

year 1953, the charges were laid after the six-month period provided in s. 693(2) of the *Criminal Code* for summary conviction matters, but within the five-year time limit provided in s. 136(4) of the *Income Tax Act*. The charge with respect to 1953 was laid more than six months after the subject-matter arose, but within one year from the day certified by the Minister as the day on which evidence, sufficient, in his opinion, to justify a prosecution for the offence, came to his knowledge.

The respondent was convicted on all four charges, which convictions were affirmed on appeal to the district Court. The Appellate Division of the Supreme Court, by a majority, allowed the respondent's appeal from this decision on the grounds that, contrary to the provisions of s. 693(2) of the Code, the proceedings had been instituted more than six months after the time when the subject-matter of the proceedings arose. Leave was granted to the Crown to appeal to this Court.

Held: The appeal should be allowed and the convictions restored.

Section 136(4) of the *Income Tax Act* was properly applicable to the present proceedings. These were "proceedings" within the definition contained in s. 692(1)(*d*) of the *Criminal Code*. By virtue of s. 693(1), Part XXIV of the Code was applicable to them "except where otherwise provided by law". The words of this subsection meant not only that the application of the whole of Part XXIV may be excluded where it is otherwise provided by law, but also that, although Part XXIV may be generally applicable, any portion of it may be excluded from operation if otherwise provided by law. Subsection (2) of s. 693 is a part of Part XXIV and its application in these proceedings was excluded because s. 136(4) of the *Income Tax Act* otherwise provided with respect to the time for the taking of proceedings. *Jorgenson v. North Vancouver Magistrate et al.* 28 W.W.R. 265, referred to.

The contention of the respondent that s. 136(4) of the Act was repealed by implication by s. 693(2) of the Code (which took effect at a later date) was rejected.

The assessments of tax made by the Minister on the basis of the returns filed by the respondent had no bearing in relation to the charges laid and did not preclude the magistrate from trying them.

The two periods of time mentioned in s. 136(4) of the Act are alternative and the charges were properly laid within the five-year time limit provided in the subsection.

The final contention that this Court was without jurisdiction to hear the appeal because the *Supreme Court Act* gives no right of appeal to the Attorney General of Canada from a judgment of a provincial court of appeal quashing a conviction for a non-indictable offence was also rejected.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Feir C.J.D.C. Appeal allowed.

S. Samuels, for the appellant.

K. E. Eaton and *P. Haljan,* for the respondent.

The judgment of the Court was delivered by

[1] (1960), 32 W.W.R. 73, 14 D.T.C. 1166.

1961

THE QUEEN v. MACHACEK

Martland J.

MARTLAND J.:—The respondent was charged on April 20, 1959, under the *Income Tax Act,* with having made false statements in his income tax returns for each of the years 1953 to 1956 inclusive. With the exception of the charge relating to the year 1953, the charges were laid more than six months, but less than five years, from the time when the subject-matter arose. The charge with respect to the year 1953 was laid more than six months after the subject-matter arose, but within one year from the day certified by the Minister of National Revenue as the day on which evidence, sufficient, in his opinion, to justify a prosecution for the offence, came to his knowledge.

The respondent was convicted on all four charges, which convictions were affirmed, on appeal, by the Chief Judge of the District of Southern Alberta. The Appellate Division of the Supreme Court of Alberta, by a majority of two to one, allowed the respondent's appeal[1] from this decision on the grounds that, contrary to the provisions of s. 693(2) of the *Criminal Code,* the proceedings had been instituted more than six months after the time when the subject-matter of the proceedings arose. There were four other grounds of appeal raised before the Appellate Division, but the ground on which the majority decision was rested was the only one which was regarded as meriting consideration. Leave was granted to the appellant to appeal to this Court.

The ground on which the appeal was allowed raises the issue as to whether the time within which the proceedings had to be commenced was governed by subs. (4) of s. 136 of the *Income Tax Act,* R.S.C. 1952, c. 148, or by subs. (2) of s. 693 of the *Criminal Code.* The relevant subsection of the *Income Tax Act* and s. 693 of the *Criminal Code* provide as follows:

136. (4) An information or complaint under the provisions of the *Criminal Code* relating to summary convictions, in respect of an offence under this Act, may be laid or made on or before a day 5 years from the time when the matter of the information or complaint arose or within one year from the day on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, came to his knowledge, and the Minister's certificate as to the day on which such evidence came to his knowledge is conclusive evidence thereof.

693. (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.

[1] (1960), 32 W.W.R. 73, 14 D.T.C. 1166.

1961

THE QUEEN
v.
MACHACEK

Martland J.

(2) No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

"Proceedings", for the purpose of Part XXIV of the *Criminal Code*, are defined in s. 692(1)(*d*) as follows:

(*d*) "proceedings" means

(i) proceedings in respect of offences that are declared by an Act of the Parliament of Canada or an enactment made thereunder to be punishable on summary conviction, and

(ii) proceedings where a justice is authorized by an Act of the Parliament of Canada or an enactment made thereunder to make an order;

The provision of the earlier *Criminal Code*, which preceded s. 693, was s. 1142, which read as follows:

1142. In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, the complaint shall be made, or the information laid, within six months from the time when the matter of the complaint or information arose, except in the Northwest Territories and the Yukon Territory, in all which Territories the time within which such complaint may be made or such information laid shall be twelve months from the time when the matter of the complaint or information arose.

The *Income Tax Act*, as part of the Revised Statutes of Canada of 1952, was proclaimed in force on September 15, 1953. The present *Criminal Code* received royal assent on June 26, 1954, and took effect on April 1, 1955. The contention of the respondent, which succeeded before the Appellate Division, was that subs. (4) of s. 136 of the *Income Tax Act* was repealed by implication by subs. (2) of s. 693 of the *Criminal Code*. The issue was defined and resolved in the majority decision of the Appellate Division as follows:

In relation to the points in issue in the present case, it does seem to me that there are two reasonable constructions to be placed upon sec. 693(2) of the *Code*, the first being that its meaning is governed by the expression appearing in sec. 693(1) "Except where otherwise provided by law", and the second, that the limitation period of six months is of general application and would apply to sec. 132(1)(*a*) of the *Income Tax Act*, notwithstanding the provisions of sec. 136(4) of the latter Act.

Though I lean to the first construction as being the more reasonable, nevertheless I cannot say that the second construction is not reasonably possible. In other words, I have a reasonable doubt of the meaning of sec. 693, which the application of the canons of interpretation has failed to solve. I am in doubt whether the words of sec. 693(2) can have their proper operation without altering the effect of the limitation clause of the *Income Tax Act*.

Such being the case, it seems to me that considering that the statute is a penal one, I should give the benefit of the doubt to the accused and adopt the construction which is the more lenient one. When the liberty of the subject is involved, it seems to me that the legislation pertaining thereto should be so clear as to leave no room for reasonable doubt.

The issue had been decided adversely to the respondent in the Courts below on the ground that the application of s. 136(4) of the *Income Tax Act* was preserved by virtue of subs. (1) of s. 693 of the *Criminal Code*. Johnson J.A., who delivered the dissenting judgment in the Appellate Division, rested his decision on the proposition that the two subsections could stand independently of each other and that s. 136(4) of the *Income Tax Act* had not been repealed by implication. He referred to the proposition stated by A. L. Smith J. in *Kutner v. Phillips*[1]:

> Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, *"Leges posteriores contrarias abrogant"* (2 Inst. 685) applies.
>
> Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together: *Thorpe v. Adams* (1871) L.R. 6 C.P. 125, 40 L.J.M.C. 52.

The conclusion of Johnson J.A., respecting this issue, was as follows:

> Prosecutions for income tax offences, particularly of the kind we are considering, present particular problems. Because of the large number of returns which must be made before a certain date and because violations can only be detected after investigations which involve an examination of the suspect's books and records and other records (in the present case the records of banks and the wheat board provided some of the evidence) it becomes clear that a longer than ordinary limitation period must be required for such cases. To apply the limitation of the *Code* subsection to such cases would mean that few, if any, prosecutions could be laid under the summary trial provisions of the *Code*, and an accused could only be prosecuted, except in very few instances, by indictment with its heavier and mandatory penalties.
>
> These are matters which we are entitled to consider in deciding whether or not sec. 136(4) has been impliedly repealed.

My opinion is that s. 136(4) of the *Income Tax Act* is properly applicable to the present proceedings. These were "proceedings" within the definition contained in s. 692(1)(*d*) of the *Criminal Code*. By virtue of s. 693(1), Part XXIV of

[1] [1891] 2 Q.B. 267 at 271, 60 L.J.Q.B. 505.

1961

THE QUEEN v. MACHACEK

Martland J.

the *Criminal Code* was applicable to them "except where otherwise provided by law". I have considered carefully the view expressed by Coady J.A. in *Jorgenson v. North Vancouver Magistrate et al.*[1], as to the effect of this subsection, but I construe those words as meaning not only that the application of the whole of Part XXIV may be excluded where it is otherwise provided by law, but also that, although Part XXIV may be generally applicable, any portion of it may be excluded from operation if otherwise provided by law. Subsection (2) of s. 693 is a part of Part XXIV and, in my view, its application in these proceedings was excluded because s. 136(4) of the *Income Tax Act* otherwise provided when it stated:

> An information or complaint under the provisions of the *Criminal Code* relating to summary convictions, in respect of an offence under this Act, may be laid or made on or before a day 5 years from the time when the matter of the information or complaint arose . . .

In addition, I also agree with the conclusions reached by Johnson J.A., for the reasons which he states, that this is not a case in which it can be said that there has been any repeal of s. 136(4) by implication.

The respondent raised other grounds to support the quashing of the convictions, which had previously been submitted to the Appellate Division, and also one additional ground relating to the jurisdiction of this Court.

It was contended that in summary conviction proceedings for income tax offences an assessment made under the *Income Tax Act* is binding on the court of criminal jurisdiction which deals with the matter. In the present case no re-assessment had been made of the income tax payable by the respondent for the years in question and it was, therefore, urged that the magistrate who tried the charges was bound by the assessments which had been made. There does not appear to be any substance in this contention. The charges were laid, under s. 132(1)(*a*) of the *Income Tax Act*, for unlawfully making false statements in the returns filed by the respondent. It seems to me that the assessments of tax made by the Minister on the basis of those returns had no bearing whatever in relation to these charges and certainly did not preclude the magistrate from trying them.

[1] (1959), 28 W.W.R. 265 at 267, 30 C.R. 333.

It was also argued that, in so far as the charges relating to the years 1954 to 1956 inclusive were concerned, they were barred even under the provisions of s. 136(4) of the *Income Tax Act*. This argument rested on the proposition that the charges in question had not been brought within one year from the date when the Minister had sufficient evidence to justify a prosecution. No certificate as to the Minister's knowledge had been filed in respect of these three charges.

As I read s. 136(4), the charges could be laid within five years from the time when the matter of the information or complaint arose, irrespective of the day on which, in the Minister's opinion, there was sufficient evidence to justify a prosecution. It seems to me that the two periods of time mentioned in s. 136(4) are alternative and these charges were properly laid within the five-year time limit provided in the subsection.

As to the next point raised in argument, the material to which we were referred by counsel for the respondent does not justify the contention that the respondent had been deprived of a fair trial.

Finally it was contended that this Court was without jurisdiction to hear the appeal because the *Supreme Court Act*, R.S.C. 1952, c. 259, as amended, gives no right of appeal to the Attorney General of Canada from a judgment of a provincial court of appeal quashing a conviction for a non-indictable offence.

It is clear that under s. 41 of the *Supreme Court Act* leave may be given for an appeal from a final or other judgment of the highest court of final resort of a province upon a question of law in relation to an offence other than an indictable offence. Leave was given in this case on a motion made on behalf of Her Majesty the Queen, who had been described as the respondent in the notice of appeal filed by the present respondent, when he appealed to the Appellate Division of the Supreme Court of Alberta. In my opinion, leave could properly be given to the appellant named in the present appeal to appeal, on the questions of law stated, from the judgment which had been rendered by the Appellate Division. The case of *Dennis v. The Queen*[1], which was referred to in argument by the respondent, does not assist

[1] [1958] S.C.R. 473, 28 C.R. 173

1961

THE QUEEN v. MACHACEK

Martland J.

his contention. That case was concerned with the matter of the proper person to be served with a notice of appeal on an appeal under the provisions of Part XXIV of the *Criminal Code*. It was held that, on an appeal under that Part by the accused, the notice of appeal must be served upon the informant. I do not see how the decision has any application to the present issue.

For the foregoing reasons, in my opinion the appeal should be allowed and the convictions restored.

Appeal allowed and convictions restored.

Solicitor for the appellant: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitor for the respondent: Paul Haljan, Edmonton.