1960
*Oct. 4
Nov. 21

JOHN GORDON CALDER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT;

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Perjury—Divorce action—Evidence of innocent bystander with no interest in outcome of trial—No evidence of intent to mislead, or knowledge of falsity of the evidence given—Criminal Code, 1953-54 (Can.), c. 51, s. 113(1).

The appellant was charged with perjury in that, as a witness in a divorce case in the outcome of which he had no interest, he had given evidence well knowing same to be false and with intent to mislead. The appellant asserted that his evidence, given more than a year after the events to which it related, was an honest statement of what he could remember. An appeal from his conviction by a judge sitting without a jury was dismissed by the Court of Appeal. The appellant then appealed to this Court.

Held: The appeal should be allowed, the conviction quashed and a judgment of acquittal entered.

Per Curiam: There was no evidence of any intent to mislead, or knowledge of the falsity of the evidence given. The evidence may have been in error, although that was doubtful, but error alone affords no basis for the inference of the intent and knowledge necessary to support a charge of perjury.

Per Locke, Cartwright, Abbott, Martland and Ritchie JJ.: It was incumbent upon the prosecution to prove beyond reasonable doubt (i) that the appellant's evidence, specified in the indictment, was false in fact, (ii) that the appellant when he gave it knew that it was false, and (iii) that he gave it with intent to mislead the Court. Although there was some evidence on which it was open to the tribunal of fact to find that the first of these matters was proved, there was no evidence on which it could find that either of the other matters was proved. In such circumstances, had the trial been before a jury it would have been the duty of the trial judge to direct them to find a verdict of not guilty and it was equally his duty to so direct himself.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the conviction of the appellant. Appeal allowed.

W. G. Morrow, Q.C., for the appellant.

W. Shortreed, Q.C., for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

The judgment of Kerwin C.J. and of Taschereau, Locke, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—John Gordon Calder appeals from the judgment of the Appellate Division of the Supreme Court of Alberta, which dismissed his appeal from his conviction on a charge of perjury after a trial before a judge sitting without a jury. The only reasons before us from the Appellate Division are those of the Chief Justice, who dissented and would have allowed the appeal.

The precise charge of perjury against the appellant was that, as a witness in a divorce case heard in September 1958, he had given evidence to the effect

> that shortly after the 1st day of July, A.D. 1957, Mr. Douglas Dunn and Mrs. Geraldine Holland and her two children moved to his trailer located about 30 feet west of his office facing south on 8th Street and Railway Avenue, Dawson Creek, British Columbia, and lived in the said trailer from three weeks to a month, well knowing same to be false and with intent to mislead.

In 1957 the appellant was living in Dawson Creek and carrying on a transport business. In his yard there was a trailer which he used for the accommodation of his drivers when they came in late at night and needed sleeping quarters. In June 1957 he permitted one Douglas Dunn, who also owned a small trucking business, to occupy this trailer. In the latter half of June 1957, Dunn was joined by a woman, whom he introduced as Mrs. Dunn. This woman was at that time married to William Holland. The two lived in this trailer for a period of about two weeks in the month of June 1957, and for part of this time there was another couple living there with them. At the end of June Mrs. Holland returned to Edmonton with Dunn to pick up her two children at the end of the school term. The two returned with the children to Dawson Creek early in the morning of July 2. Her story is that for the remainder of the first night she slept in the car with the two children and then immediately moved into a house with Dunn.

In the divorce action between Holland, as plaintiff, and his wife, as defendant, the appellant was subpoenaed as a witness. This is the evidence that he gave:

> Q. Was anybody else living in this trailer at the time you met Mrs. Dunn, as you were introduced to her?
>
> A. Mr. Dunn.

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Q. He was living there?

A. Yes.

Q. How long did Mr. Dunn and the woman you were introduced to as Mrs. Dunn live in this trailer?

A. I would say approximately three weeks to a month.

Q. Had Mr. Dunn slept in the trailer prior to the time that this lady appeared on the scene?

A. That is right, yes.

Q. And do you recall what period of time it would be that Mr. Dunn and this lady, who you now know to be Mrs. Holland, occupied the trailer?

A. Sometime shortly after the 1st of July. It was right within a week of that First of July.

Q. Were there any children?

A. Yes.

Q. The COURT: Do you mean that she started to occupy the trailer about the 1st of July or the latter part of June?

A. No, after the 1st of July, sometime right in there.

Q. The COURT: Sometime after the 1st of July, that was the first time she occupied it?

A. Yes.

Q. The COURT: Now you said something about the children, they were there too?

A. Yes.

Q. Mr. STANTON: How many children?

A. Two I believe sir.

Q. When did they appear on the scene?

A. Sometime just a few days after the 1st of July.

Mr. Miller cross-examines:

Q. Another thing now, Mr. Calder, I am suggesting to you that Mrs. Holland's children never stayed in that trailer, that when they came to Dawson Creek they immediately went to this house that we are speaking about that belonged to Henderson?

A. No sir.

Q. I want you to consider, Mr. Calder, I am suggesting to you that the children never stayed in that trailer.

A. Well, it is, they were there, that is all I know.

Q. I know they were in Dawson Creek.

A. They were there in that trailer. I have mentioned that twice or three times now sir.

Q. All right now, Mr. Calder, I am suggesting to you that Mr. and Mrs. Hine stayed in that trailer at the time that Mrs. Holland or/and Mr. Dunn were there?

A. I don't know anything about that.

The COURT: Were you ever in the trailer when Mrs. Holland and Mr. Dunn were in there?

A. No, not that I recall sir.

The COURT: When did you see Mrs. Holland in there with Mr. Dunn?

A. Every day, right there 30 feet from my office, I couldn't help but see.

The COURT: She was inside?

A. Yes, she was outside and inside and in and out all the time.

The COURT: And the children too?

A. Yes.

At the trial of the appellant on the charge of perjury, Mrs. Holland, who by that time had become Mrs. Dunn, denied that she had ever occupied the trailer at any time in the month of July 1957 with Dunn and the children. The appellant gave evidence in his own defence and stated that Dunn and the woman had stayed in the trailer in June for some time and that the next time he saw them was July 2. On the following day they moved into the trailer again and he saw them in and around the trailer for a few days, after which they moved into a house. He asserted that his evidence, given at the trial, was an honest statement of what he could remember and that he thought that the couple had stayed in the trailer for a few days with the children. He admitted that he had never walked around and looked in the trailer to see who was in it. His observations were made from his office which was about 30 feet away. His understanding from Dunn was that they would be there for a few days. He explained that his evidence of the occupation of the trailer for a period of three weeks to a month, given at the trial, related to the month of June. He also said that he had seen Mrs. Holland's children around the trailer after Dunn had spoken to him about arrangements for the use of the trailer.

The unquestionable facts are that Mrs. Holland was living in the trailer with Dunn in the second half of June 1957, with Dunn and the children in a small house nearby from some time early in July until the end of September 1957 and that the children did not arrive in Dawson Creek until July 2.

The appellant gave his evidence at the divorce trial on September 16, 1958, more than a year after the events to which he testified. He became involved, as an innocent bystander, in events which were of no particular significance to him at the time. He had no interest in the outcome of the divorce trial and he was in court under subpoena. On this record, there is, to me, a preponderance of evidence, coming

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from other witnesses as well as the appellant, that this couple, along with the children, were in occupation of the trailer for some period early in July 1957. This, however, is no ground for reversal in this Court. But I agree with the learned Chief Justice that this appellant should not have been convicted of perjury on the ground that there was no evidence of any intent to mislead, or knowledge of the falsity of the evidence given. The evidence may have been in error, although I doubt that, but error alone, and that is the most that can be found against the appellant, affords no basis for the inference of the intent and knowledge necessary to support this charge.

I would quash the conviction and direct that a judgment of acquittal be entered.

The judgment of Locke, Cartwright, Abbott, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Judson and have little to add.

While the learned Chief Justice of Alberta dissented from the judgment of the majority of the Appellate Division on two questions of law I find it necessary to consider only the first of these which is expressed in the formal order in the following words:

> There was no evidence on which it could properly be found that the accused intended to swear as to the facts as was charged.

The test to be applied in determining whether or not there was *any* evidence, as distinguished from *sufficient* evidence, to support a conviction is to be found in the unanimous judgment of this Court delivered by Duff C.J.C. in *The King v. Décary*[1]. The question to be answered is whether "there was no evidence in support of the accusation before the jury in the sense that it was within the power of the trial judge, and therefore, of course, his duty, to direct a verdict of not guilty to be entered"; it has long been settled that the question so stated is one of law in the strict sense, while the question on which the Court of Appeal is empowered to pass by s. 592(1)(*a*)(i) of the *Criminal Code* —whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence—is a mixed question of fact and law.

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

This Court has jurisdiction to review a decision of the Court of Appeal on the first but not on the second of these questions. The two questions have however a common feature; to answer either the Court must, speaking generally, review the whole of the evidence.

In the case at bar it was incumbent upon the prosecution to prove beyond a reasonable doubt three matters, (i) that the evidence, specified in the indictment, given by the appellant on September 16, 1958, before Greschuk J. was false in fact, (ii) that the appellant when he gave it knew that it was false, and (iii) that he gave it with intent to mislead the Court. It may well be that if there were evidence to support findings that the appellant had given evidence false in fact knowing it to be false the tribunal of fact, in the absence of other evidence as to his intention, could properly draw the inference that in so doing he intended to mislead the Court.

After reading all the evidence with care it appears to me that there was some evidence on which it was open to the tribunal of fact to find that the first of the matters mentioned above was proved but, in my opinion, there was no evidence on which it could find that either the second or third of such matters was proved. In such circumstances, had the trial been before a jury it would have been the duty of the learned trial judge to direct them to find a verdict of not guilty and it was equally his duty to so direct himself.

I would allow the appeal, quash the conviction and direct a judgment of acquittal to be entered.

Appeal allowed, conviction quashed and judgment of acquittal directed to be entered.

Solicitors for the appellant: Morrow, Reynolds & Stevenson, Edmonton.

Solicitor for the respondent: The Attorney General for Alberta.