

1961

ABRAHAM BELZBERG APPELLANT;

*Oct. 24, 25
Dec. 15

AND

HER MAJESTY THE QUEEN RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
APPELLATE DIVISION

Criminal law—Bribery—Bribes offered to Chief Building Inspector of city—Whether proof that he was a municipal official—Whether bribery related to official act—Criminal Code, 1953-54 (Can.), c. 51, s. 104—City Act, R.S.C. 1955, c. 42, s. 2(q).

The accused was charged under s. 104 of the *Criminal Code* with offering bribes to W, the Chief Building Inspector for the City of Calgary, in consideration for that official to fail to perform certain official acts. The trial judge held that the bribes had been offered, but dismissed the charges on the ground that there was no evidence that W had been appointed as an official in accordance with s. 104 of the Code. The Court of Appeal set aside the acquittal and found the accused guilty, as charged.

Held: The appeal should be dismissed.

The finding of fact by the trial judge that the bribes had been offered having been unanimously affirmed by the Court of Appeal and being entirely consistent with the probabilities of the case, could not be disturbed.

The uncontradicted evidence of W that he was both the Chief Building Inspector and a municipal official, coupled with the description of his official activities contained in his own evidence and in that of the appellant, and which were appropriate to those of a person holding office within the dictionary sense of that term and under *The City Act*, R.S.C. 1955, c. 42, constituted *prima facie* evidence that he was a person who held office under the City of Calgary and was a municipal official within the meaning of s. 104 of the Code. It has been held on more than one occasion that evidence of a person acting in an official capacity raises a rebuttal presumption of his due appointment to that office. In this case there was not only evidence of W having performed the duties, but there was also direct evidence from W himself that he held the appointment and it was plain that the appellant recognized that he represented the city in an official capacity. There was evidence that the alleged bribes related to an official act.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division¹, reversing a judgment of Cairns J. and finding the accused guilty of having offered bribes. Appeal dismissed.

Joseph Sedgwick, Q.C., and Robert H. Barron, Q.C., for the appellant.

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

¹ (1961), 35 W.W.R. 402, 35 C.R. 297, 130 C.C.C. 371.

H. J. Wilson, Q.C., and *R. P. Adolphe*, for the respondent.

1961

BELZBERG

v.

THE QUEEN

The judgment of the Court was delivered by

ITCHIE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta¹ allowing the appeal of the Crown from the judgment of Cairns J. whereby the present appellant had been acquitted of the following two charges:

1. That he, at Calgary, in the Judicial District of Calgary, on the 9th day of November, A.D. 1959, did offer to Lawrence Walker, Chief Building Inspector for the City of Calgary, a Municipal Official, the sum of \$500 as consideration for the said official to fail to perform an official act, contrary to Section 104 of the Criminal Code.
2. That he, at Calgary, in the Judicial District of Calgary, on the 22nd day of August, A.D. 1960, did offer to Lawrence Walker, Chief Building Inspector for the City of Calgary, a Municipal Official, the sum of \$300 as consideration for the said official to fail to perform an official act, contrary to Section 104 of the Criminal Code.

Mr. Walker, who testified that during the years 1959-60 he held the position of Chief Building Inspector of the City of Calgary and was a municipal official, recounted two separate occasions upon which the appellant offered him money. The first incident took place on November 9, 1959, after Walker, in his capacity as Chief Building Inspector, had condemned a building owned by the appellant and one J. Singer; Walker states that at this time the appellant said to him:

Allow this building to remain in occupancy for another year, and forget about the condemning order, and if you will so do I will give you \$500.

and that he then took some money out of his pocket and put it on the table between them. The second incident which took place on August 22, 1960, concerned an order issued by one of the building inspectors in Walker's department, notifying a "builder-owner" by the name of Korytko that a building on his property was being over-developed in contravention of a city by-law; in this regard Walker's best recollection of the relevant portion of his conversation with the appellant is that "he asked me if I would overlook this over-development, and if I would overlook it he would give me \$300."

¹ (1961), 35 W.W.R. 402, 35 C.R. 297, 130 C.C.C. 371.

1961
 BELZBERG
 v.
 THE QUEEN
 Ritchie J.

The appellant denied having made these offers, but the learned trial judge, having heard all of the evidence, expressed himself as follows:

I have no doubt whatsoever on the facts of this case that the defendant offered the bribes alleged in the charges. It has been proved to me to a moral certainty and beyond reasonable doubt. There is no question about that at all. On that I accept the evidence of Mr. Walker, and I don't think I need to go any further; it follows that if I accept his evidence I do not accept other evidence.

It is contended on behalf of the appellant that because the learned trial judge acquitted him on the ground that there was no evidence that Mr. Walker had been appointed as an official in accordance with s. 104 of the *Criminal Code*, it must, therefore, follow that the above-quoted finding was *obiter* and should be disregarded as having been intended to be "a mere gratuitous rebuke to the appellant". This finding is also attacked on the ground that no reasons are given for it and one of the grounds stated in the notice of appeal to this Court is that the Appellate Division erred in law in not holding that the trial judge had misdirected himself in determining the credibility of witnesses without considering whether or not the evidence of the witnesses whom he believed was in accordance with the probabilities of the case.

In my view the excerpt above-quoted from the decision of the learned trial judge constitutes a clear finding of fact for which it was unnecessary to give any other reason than his acceptance of the evidence of Walker. (See *Lemay v. The King*¹). As this finding has been unanimously affirmed by the Court of Appeal and as it is, in my view, entirely consistent with the probabilities of the case, I do not think it can be disturbed.

In acquitting the appellant, the learned trial judge said:

However, I feel the Crown has failed to prove that in the acts which Mr. Walker did, he was acting as an official in accordance with the terms of Section 104. An official is one, as Mr. McGillivray points out, who is appointed either by by-law or resolution of a city. There is no evidence before me that Mr. Walker has been so appointed, and unless he does these acts as a person holding office under a municipal government, and the office is proven in the manner in which he is appointed, I think the charge must fail.

In setting aside the acquittals which were based on this finding, Macdonald J.A., speaking on behalf of the Appellate Division, held it to be "abundantly proved that Walker was Chief Building Inspector of the City of Calgary" and that

¹[1952] 1 S.C.R. 232 at 238, 14 C.R. 89, 102 C.C.C. 1.

as such he "held an office under a municipal government, namely, the City of Calgary". It followed from these conclusions that the Appellate Division found him to be "a municipal official" within the meaning of s. 104 of the *Criminal Code*, the relevant portions of which read as follows:

1961
 BELZBERG
 v.
 THE QUEEN
 Ritchie J.

104. (1) Every one who

- (a) gives, offers or agrees to give or offer to a municipal official, or
- (b) being a municipal official, demands, accepts or offers or agrees to accept from any person, a loan, reward, advantage or benefit of any kind as consideration for the official

* * *

- (f) to perform or fail to perform an official act, is guilty of an indictable offence and is liable to imprisonment for two years.

* * *

104. (3) In this section "municipal official" means a member of a municipal council or a person who holds an office under a municipal government.

In conformity with the finding of the learned trial judge, it was urged on behalf of the appellant that there was no evidence that Walker was "a municipal official" within the meaning of this section or that either of the alleged offers of money related to "an official act". In support of this contention, it was said that the only evidence quoted by the Appellate Division as a basis for its finding that Walker was a municipal official was his affirmative answer to the question: "Mr. Walker, during the year 1959 and during the year 1960 and up to the present moment, were you a municipal official?" and that the finding cannot stand because this was an improper and leading question, the answer to which involved the very question of law which the trial court had to decide. I do not agree that this question and answer formed the basis for the finding of the Appellate Division, but in any event it is significant to note that no evidence was called to contradict this answer and that the first question and answer on Walker's cross-examination by appellant's counsel were:

Q. Mr. Walker, you have been the Chief Building Inspector for a matter of some four years?

A. That is correct.

This latter statement which is uncontradicted, when taken together with the extensive evidence illustrative of the manner in which Walker carried out his duties in the inspection of buildings, appears to me to fully justify the finding of the

1961
 BELZBERG
 v.
 THE QUEEN
 Ritchie J.

Court of Appeal that it is "abundantly proved that Walker was the Chief Building Inspector of the City of Calgary". That this evidence is of itself sufficient to support such a finding is shown by reference to *R. v. Gordon*¹, *Berryman v. Wise*² and other cases cited in Roscoe's *Criminal Evidence*, 16th ed., p. 11.

Certainly Walker's own evidence that he had been Chief Building Inspector for some four years disposes of the argument advanced on behalf of the appellant to the effect that the fact of Walker having signed certain letters as "Building Inspector" *simpliciter* raised some doubts as to whether he held the office of Chief Building Inspector.

It is, however, stated in the appellant's factum and was strenuously argued on this appeal that the real issue in the present case

... is not whether Walker was the Chief Building Inspector, but rather whether the Chief Building Inspector is a "municipal official" within the strict narrow meaning of that term as defined in sec. 104(3).

This resolves itself into the question of whether the Chief Building Inspector of the City of Calgary has been shown to be "a person who holds office under a municipal government" and this in turn depends in great degree on the meaning to be given to the word "office" as used in s. 104(3). Section 99(d) of the *Criminal Code* provides that in Part III of the Code the word "office" includes:

- (i) an office or appointment under the government;
- (ii) a civil or military commission; and
- (iii) a position or employment in a public department.

I am satisfied, however, that this section does not apply to an "office" under a municipal government, and that Macdonald J.A. was entirely justified in referring to the definitions of "office" contained in the *New Century* and *Shorter Oxford English Dictionaries*. The evidence in the present case is that the duties of the Chief Building Inspector included the inspection of buildings for the purpose of enforcing the by-laws of the city, and that as Chief Building Inspector Walker had authority to supersede decisions made by building inspectors in the Building Inspection Division. A position which involved such authority, responsibility and

¹ (1789), 1 Leach 515, 168 E.R. 359.

² (1791), 4 T.R. 366, 100 E.R. 1067.

public trust can, in my view, properly be described as an “office” within the meaning of s. 104(3) of the *Criminal Code*.

1961
 BELZBERG
 v.
 THE QUEEN
 Ritchie J.

The City Act, R.S.A. 1955, c. 42, which appellant’s counsel describes as “the Charter of the City of Calgary” is advanced as containing a number of sections which are of considerable help in determining whether or not a “Chief Building Inspector” is an “official” of the City of Calgary. Section 2(q) of that Act reads as follows:

“official” includes a city commissioner, city manager, city clerk, city treasurer, assessor, city solicitor, auditor, comptroller, city engineer and any other official appointed by the council to any office pursuant to the provisions of Part III, Division B; (The italics are mine.)

It is provided in Part III, Division B (s. 55(1)) that “such other officials as are deemed necessary for carrying into effect of the provisions of the” *City Act* are to be appointed by resolution of the City Council and s. 81(1) requires that before entering upon the duties of his office such an official shall make and subscribe the official oath, solemn affirmation or declaration prescribed by the *Oaths of Office Act*. Although *The City Act* does not expressly mention the office of Chief Building Inspector, the provisions of ss. 385 to 389 deal with “Control of Buildings” and s. 388(e) provides that the

. . . Council may pass by-laws

* * *

(e) appointing street and building inspectors and defining their duties.

As the evidence makes it clear that there was a *Chief Building Inspector* and as there was no evidence that he was not properly appointed, it is to be assumed that the City Council of the City of Calgary deemed it necessary to appoint and did appoint such an official for carrying into effect the provisions of *The City Act*.

The substance of the appellant’s argument in this regard is that there was no evidence that Walker had been appointed by resolution or by-law of the City Council. In my view, Walker’s uncontradicted evidence that he was both the Chief Building Inspector and a “municipal official”, coupled with the description of his official activities contained in his own evidence and in that of the appellant, constitutes *prima facie* evidence that he was a person who held office under the City of Calgary and was a “municipal

1961
 BELZBERG
 v.
 THE QUEEN
 Ritchie J.

official" within the meaning of s. 104(3). It has been held on more than one occasion that evidence of a person acting in an official capacity raises a rebuttable presumption of his due appointment to that office. (See Halsbury's Laws of England, 3rd ed., vol. 15, p. 347, para. 628; Phipson on Evidence, 9th ed., p. 120; *R. v. Smith*¹; *R. v. Goodman*²; *R. v. Roberts*³ and *Doe v. Brawn*⁴). In this case there is not only evidence of Walker having personally inspected buildings in the City of Calgary and of his having been the superior officer in control of other building inspectors, but there is also direct evidence from the official himself that he held the appointment, and it is plain that the appellant recognized that he represented the City of Calgary in an "official capacity". In the course of his direct examination, the appellant, referring to Walker's having condemned another building, said that he did whatever Walker asked him to do, and he was then asked:

Q. Why did you do what he asked you?

A. Why? I couldn't help it.

Q. Not because he is a nice fellow?

A. No.

Q. Just because you couldn't help it?

A. I couldn't help it, it is the City, you couldn't knock the City.

As to the contention that there was no evidence that either of the alleged bribes related to an official act, it seems to me to be sufficient to say that Walker's evidence, as to his refusal of the money offered in November 1959, is that he told the appellant,

... that in my office as Building Inspector I had, it was my duty to do what I believed was the proper thing to do in relation to the building by-law regarding buildings.

and that when the appellant asked him in August 1960 to overlook the "over-development" by the builder-owner Korytko he was, in effect, asking him to countermand an order made by a building inspector who was under his authority which order was enforceable by the laying of a charge under By-law 4682 of the City of Calgary. In my opinion, if he had complied with either of these requests, Walker would have failed to perform an official act.

¹ (1930), 54 C.C.C. 359, 25 A.L.R. 100.

² (1951), 99 C.C.C. 366.

³ (1877), 14 Cox C.C. 101.

⁴ (1821), 5 B. & Ald. 243, 106 E.R. 1181.

The last error alleged in the decision of the Appellate Division was that the findings by that Court that Walker was "a municipal official" and that the bribes related to "an official act" were findings of fact which that Court had no jurisdiction to make on an appeal by the Crown. There was no conflict of evidence as to the fact that Walker was the Chief Building Inspector and the alleged findings of fact, in my opinion, constitute a decision of the Appellate Division that under the true construction of the language used in s. 104(3) of the *Criminal Code* the holder of such a position is a "municipal official" and the acts performed in his capacity as such are "official acts" within the meaning of those phrases as used in that section. This was a decision which the Appellate Division had jurisdiction to make in this case.

1961
 BELZBERG
 v.
 THE QUEEN
 Ritchie J.

I would dismiss this appeal.

Appeal dismissed.

*Solicitors for the appellant: Fenerty, Fenerty, McGil-
 livray, Robertson, Prowse, Brennan & Fraser, Calgary.*

Solicitor for the respondent: Edward P. Adolphe, Calgary.
