1932

*Apr. 26.
*Jun. 15.

HIS MAJESTY THE KING.....APPELLANT;

AND

RONALD C. C. STEWART.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Disqualification of a petit juror—Juror convicted of criminal offence—No objection taken at the trial—Insufficient ground of appeal—Applicability of s. 1011 Cr. C.—Leave to appeal to this court granted by a judge under s. 1025 Cr. C.—Jurisdiction of this court—Existence of conflict must also be found by the court at the hearing of the appeal—Sections 1025, 1011, 1011 Cr. C.—The Jury Act R.S.B.C., 1924, c. 123, ss. 6, 10, 15.

The conviction of the respondent was set aside by the appellate court on the ground that one of the jurors at the trial was disqualified to act as such for the reason that he had been convicted of an indictable offence within the meaning of section 6c of the *Jury Act* (R.S.B.C., 1924, c. 123).

Held that the fact of a defect of that kind in the constitution of the petit jury constituted no ground for an appeal to the appellate court in view of the provisions of section 1011 Cr. C., the more so as no objection to it had been taken at the trial.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

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Held, also, that the order of a judge of this court granting leave to appeal under the provisions of section 1025 Cr. C. is not conclusive as to the existence of conflict between the judgment to be appealed from and that of some "other court of appeal in a like case"; and, upon the hearing of the appeal, the Court must itself be independently satisfied that there is, in fact, such a conflict. Duff J. expressed no opinion.

Judgment of the Court of Appeal ([1932] 1 W.W.R. 912) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1) setting aside the conviction of the respondent.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

J. A. Ritchie K.C. for the appellant.

Michael Garber for the respondent.

The judgments of Anglin C.J.C. and Rinfret, Lamont and Smith JJ. were rendered by

ANGLIN C.J.C.—The Crown appeals by leave of Smith J. given under section 1025 of the Criminal Code. That section reads:

1025. Either the Attorney-General of the province or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction of an indictable offence, if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case, and if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow.

Although at first disposed to think that the order of Smith J. might be conclusive as to the existence of conflict between the judgment *a quo* and that of some "other court of appeal in a like cause," on consideration of the above quoted section of the Code, I find that there really are two conditions precedent to the right of appeal here, viz., (*a*) that there is, in fact, conflict between the judgment *a quo* and the judgment of a court of appeal in a like case, and, (*b*) that leave to appeal be granted by a judge of this court. The latter condition was, undoubtedly, complied with; but the Court must be independently satisfied of the existence of the former.

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The case cited by Smith J., (*Rex* v. *Boak* (1)), is probably distinguishable from that at bar, in so far as it relates to disqualification of a petit juror, inasmuch as in that case, as was pointed out in the judgment of this Court, the fact of such disqualification was known to the prisoner and his counsel during the trial. Indeed, it would seem from the judgment delivered that the juror's deafness had been canvassed before the trial judge; yet no objection on that ground was taken to the trial proceeding. But there does seem to be a clear conflict between the decision *a quo* and the decision of the Court of King's Bench for Quebec in *Rex* v. *Battista* (2). Other cases could, no doubt, be found in which there were decisions along similar lines to that given in *Rex* v. *Battista* (2). For instance, see *Brisebois* v. *Reginam* (3); whereas *Rex* v. *McCrae* (4) may be cited in support of the view taken by the Court of Appeal of British Columbia, although, in that case, differing from the *Boak* case (1), the presence of a disqualified juror had been complained of before verdict was rendered. See too *R.* v. *Feore* (5).

In the result, it would seem that the conflict between the decisions in the *Battista* case (2) and in that at bar justified the granting of leave to appeal, and that, consequently, there is jurisdiction here to entertain this appeal.

The present appeal is from an order of the Court of Appeal for British Columbia setting aside the conviction of the respondent Stewart on the ground that one of the jurors at the trial was disqualified by reason of clause (*c*) of section 6 of *The Jury Act* (R.S.B.C., c. 123), which provides that,

> 6. Every person coming within any of the classes following shall be absolutely disqualified for service as a juror, that is to say:—
>
> (*c*) Persons convicted of indictable offences, unless they have obtained a free pardon.

It is common ground that the case falls within this clause. The only question would seem to be whether or not the fact of a defect of this kind in the constitution of the petit jury, afforded ground for an appeal to the Court of Appeal in view of the provisions of section 1011 Cr. C., no objection to it having been taken at the trial.

(1) [1925] Can. S.C.R. 525.
(2) (1912) 21 C.C.C. 1.
(3) (1888) 15 Can. S.C.R. 421.
(4) (1906) Q.R. 16 K.B. 193.
(5) (1877) 3 Q.L.R. 219.

There is nothing before us to shew that both counsel for the prisoner and the prisoner himself, were ignorant of this disqualification in question during the trial (*Rex* v. *Boak* (1)); but that this was the case may be assumed since the Crown does not rely on this objection to the appeal, counsel representing the Crown conceding indeed, as he did at bar, that both the prisoner and his counsel at the trial were unaware of the fact of this disqualification.

I see no reason why the provisions of section 1011 of the Criminal Code should not apply to this case. That section reads as follows:

1011. No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the striking of special juries shall be ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

There can be no doubt that this section is intended to apply to the case of a petit juror since it deals with a " ground for impeaching any verdict " and " error upon any appeal to be brought upon a judgment rendered in any criminal case." The effect of s. 1011 is, after verdict, to preclude an appeal on the ground, *inter alia,* of disqualification of a petit juror, no complaint thereof having been made at the trial. That section, in our opinion, is applicable and was conclusive against the right of appeal to the Court of Appeal in the case at bar.

Moreover, section 1010 Cr. C. provides that,

1010. Judgment, after verdict upon an indictment for any offence against this Act, shall not be stayed or reversed,

(*d*) because any person has served upon the jury who was not returned as a juror by the sheriff or other officer.

If the fact, that a person who sat to try a case had no right to be in the jury box because not returned as a juror, cannot be taken advantage of, after verdict, as a ground of appeal, *a fortiori,* we think that a disqualification of a person on the list who serves as a petit juror, taken for the first time only after verdict, must likewise be insufficient to warrant an appeal. We entirely agree with the decision in *Rex* v. *Battista* (2).

The case of *Bureau* v. *Regem* (the latest authority to which we are referred) (3) is entirely distinguishable from

(1) [1925] Can. S.C.R. 525. (2) [1912] 21 C.C.C. 1.
(3) (1931) Q.R. 51 K.B. 207.

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that at bar on two grounds, viz., (*a*) that case had to do with a grand jury and not a petit jury, and (*b*) the appellant there would appear to have made every effort possible during the trial to have effect given to his objection.

Apart altogether from any ground of appeal based on s. 1010 (*d*), as above stated, s. 1011 of the Criminal Code is conclusive against the appeal to the Court of Appeal in this case. The appeal to this Court will, accordingly, be allowed and the judgment of the trial court restored.

DUFF J.—This appeal involves the construction and application of section 1011 of the Criminal Code, which reads as follows:

> No omission to observe the directions contained in any Act as respects the disqualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

The relevant B.C. enactments (R.S.B.C., 1924, c. 123, secs. 10, 15 and 6) are, in substance, these:

Section 10 of the Act directs the selector to select, from the last revised voters' list for the county, the requisite number of persons resident in the county, to serve as grand and petit jurors for the next succeeding year.

Section 15 directs the selectors to meet and hold meetings annually commencing on the first Monday in July for the purpose of selecting a preliminary list of persons *liable* to serve as jurors.

Section 6 enumerates certain classes of persons, who, although their names appear on the last revised list of voters, are disqualified from service as a juror, *inter alia*, (*c*)

> * * * persons convicted of indictable offences, unless they have obtained a free pardon * * *.

One of the jurymen who tried the respondent was afterwards discovered to be a person who had been convicted of an indictable offence, within the meaning of section 6. On this ground, that is to say, on the ground that this juryman was disqualified to act as such, the Court of Appeal for British Columbia quashed the conviction.

The question before us is whether or not this decision can be sustained, in view of the terms of section 1011, above quoted. In my opinion the gist of the complaint upon

which the respondent's objection is founded is of such a character as to bring the objection within the language of section 1011. The complaint is founded on the failure of the selectors to observe the directions of the *Jury Act*, who are authorized and required to select, for the jury lists, persons liable to be called upon to serve as jurors. The Act plainly excludes from the classes of persons which it was competent to the selectors to select, persons who have been guilty of an indictable offence, and who have not received free pardon therefor. It is to this default that must be ascribed the fact that the disqualified juryman was called to serve and did serve as one of the jury on the trial of the accused. No wrong against the respondent is alleged in respect of the trial, except the fact that the juryman, being disqualified for the reasons mentioned, was present on the jury. I should have thought, especially having regard to the observations of Channel, J. in *Montreal Street Ry. Co.* v. *Normandin* (1), delivering the judgment of the Judicial Committee of the Privy Council, that in the absence of some such provision as section 1011, the presence of this disqualified juryman would have been sufficient ground for quashing the conviction. But in my opinion, that particular illegality is one of the class contemplated by that section, and, therefore, the objection is not open to the respondent.

Appeal allowed.

Solicitor for the appellant: *A. C. Bass.*
Solicitor for the respondent: *Gordon M. Grant.*