

YIP SING AND OTHERS.....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1935

* Apr. 30.
* May 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
COLUMBIA

Criminal law—Assault—Conviction—Appeal—Motion before appellate court for leave to adduce new evidence—Dissenting opinion in the judgment dismissing motion—Conviction unanimously affirmed by appellate court—Whether appeal to Supreme Court of Canada—Section 1023 Cr. C.

The appellants were tried and convicted on a charge of assault occasioning actual bodily harm. On the hearing of their grounds of appeal before the Court of Appeal, the appellants moved also for leave to admit new evidence. This motion was dismissed by a majority of the Court of Appeal, two judges expressing dissenting opinions. Later on, the Court of Appeal rendered judgment affirming unanimously the conviction of the appellants; and such judgment contained also a paragraph mentioning the fact that dissenting opinions had been expressed by two members of the Court on the motion to adduce new evidence.

Held that the dissent in the Court of Appeal on the motion for leave to introduce new evidence is not a dissent of that Court against the affirmance of the appellants' conviction on a question of law within the meaning of section 1023 of the Criminal Code.

MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia, affirming the judgment of the trial judge, Lampman J., with a jury, by which the appellants had been convicted on the charge that they had unlawfully assaulted one Fong Chan Ten and thereby occasioned him actual bodily harm.

* PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J.
ad hoc.

1935
YIP SING
v.
THE KING.

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

J. Nicholson for the appellants.

Gordon McG. Sloan K.C. for the respondent.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal from a judgment of the Court of Appeal for British Columbia, dated the 8th day of January, A.D. 1935, affirming the conviction of the appellants by His Honour Judge Lampman in the County Court Judges' Criminal Court, in and for the county of Victoria, on the charge that they did, on the 3d day of March, 1934, unlawfully assault Fong Chan Ten and did thereby occasion him actual bodily harm.

The appellants were tried and the conviction was recorded on June 29, 1934. They each filed a notice of appeal to the Court of Appeal for British Columbia on several grounds.

On the hearing of the appeal the appellants moved the Court of Appeal for leave to admit the evidence of two witnesses, who were not called at the trial, and to set aside the conviction and order a new trial on the ground that even though the evidence adduced at the trial might have justified a finding of guilty, the evidence of these two new witnesses raised a doubt as to the appellants' guilt.

The motion to admit the new evidence was refused, on the 29th of October, 1934, by the Court of Appeal, McPhillips and M. A. MacDonald, JJ.A., dissenting. But the conviction was not affirmed until the 8th of January, 1935. The formal judgment of the court affirming the conviction, after properly reciting what had taken place, contains the following:—

And this Court having ordered, on the 29th October, 1934, that the motion to set aside the conviction and order a new trial on the ground of the discovery of the new evidence, be dismissed, * * * and this Court having directed that this appeal do stand for judgment and upon the same coming on this day for judgment the Court doth order and adjudge that the appeal be and the same is hereby dismissed and the conviction affirmed.

There was no dissenting judgment to the affirmance of the conviction, but the formal judgment contains this paragraph:—

The Honourable Mr. Justice McPhillips and the Honourable M. A. MacDonald dissented from the judgment of this Court on the motion to set aside the conviction and order a new trial on the ground of the discovery of the new evidence.

It is upon these dissenting judgments on the motion to admit new evidence that the appellants claim a right to appeal to this Court under section 1023 of the Criminal Code, which provides that any person convicted of any indictable offence, whose conviction has been affirmed by an appeal taken under section 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

We are all of opinion that the dissent in the Court of Appeal on the motion for leave to introduce new evidence is not a dissent against the affirmance of the appellants' conviction on a question of law within the meaning of section 1023.

This Court has therefore no jurisdiction to entertain the appeal. *Rex v. Boak* (1).

The motion to quash will therefore be granted.

Appeal quashed.

1935

YIP SING

v.

THE KING.

Lamont J.