HENRY WATTS AND WILLIAM GAUNT ..... } APPELLANTS; 1953

*Mar. 9, 10
*Apr. 15

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Drift logs in rivers—Whether mens rea ingredient of offence under s. 394 (b) of the Criminal Code—Alleged custom or practice of paying salvage.

The appellants, acquitted by the trial judge, were convicted by a majority in the Court of Appeal under s. 394(*b*) of the *Criminal Code* for having refused to deliver up to the owners certain saw-logs which had been found adrift in a river in British Columbia.

Held: The appeal should be allowed and the trial judgment restored.

Per: Taschereau, Rand and Fauteux JJ.—There was an implied understanding between the appellants and the owners of the logs salvaged whereby the former were entitled to assume that they would be paid for services upon delivery of the logs and, under such circumstances, the appellants were not within s. 394(*b*) of the *Code*.

Per: Kellock J.—Considering s. 394(*b*) with s. 990(2) of the *Code*, the appellants had lawfully taken possession of the logs on the implied basis that the owners in accordance with past practice were willing to remunerate them. Therefore no offence was disclosed.

Per: Estey and Cartwright JJ.—*Mens rea* is an essential ingredient of the offence created by s. 394(*b*) of the *Code* and, in view of the practice between the owners of these logs and the appellants, its existence was not established.

*PRESENT: Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

1953

WATTS AND GAUNT v. THE QUEEN

Locke J. agreed with Robertson J.A. that there was at the time an outstanding offer by the owners of these logs to pay the beachcombers for the salvaged logs, that the appellants were doing what they thought they had a right to do and that therefore there was no *mens rea*.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing, Robertson J.A. dissenting, the appeal of the Crown and convicting the appellants under s. 394(*b*) of the *Criminal Code*.

G. McDonald for the appellants.

S. J. Remnant Q.C. for the respondent.

A. A. Moffat Q.C. for the A.G. of Canada.

TASCHEREAU, J.—In view of the practice that was followed for many years, I believe that the appellants thought that they were entitled with the tacit consent of the owners, to keep possession of the logs they had found afloat or resting on the shore. They were, I think, left under the honest impression, as a result of previous happenings, that they were entitled to receive forty per cent of the market value of the logs they had recovered, or sell them after ten days, remitting sixty per cent to the owners. I can find no elements of criminality attached to the act done by the appellants.

I would allow the appeal, and quash the conviction.

RAND, J.:—There is no doubt that the accused acted on the fact or the reasonable belief in the fact that they had permission from the owners to salvage logs on the understanding that they would be entitled to compensation to the extent of 40 per cent of the value which could be deducted from the sale price realized by them or paid by the owner on delivery up of the logs. On that state of facts that no offence has been committed under sec. 394(*b*) of the *Code* seems to me to be scarcely arguable. The word "fraudulently" carries through the entire section; and, regardless of that, on the language of (*b*) to import an offence from such objective acts divested of intent would be a new departure in the interpretation of criminal legislation.

I would, therefore, allow the appeal and restore the judgment of acquittal.

(1) 104 Can. C.C. 207.

KELLOCK, J.:—The appellants were convicted under the provisions of section 394(*b*) of the *Criminal Code* for, on August 20, 1951, having in their possession certain saw-logs which had been found adrift in a river in Canada and unlawfully did refuse to deliver up the said sawlogs to the proper owner thereof or to the person authorized by such owner to receive the same. The appellants had for some years followed the practice of picking up sawlogs found adrift at the mouth of the Fraser River and the adjacent waters or on the shores. Thereafter they informed the British Columbia Forest Service, asking that department to scale the logs so taken. In due course, this was done by an officer of the department, which then sent a copy of the scale to the appellants and, in the case of logs bearing a visible mark, a copy was also sent to the respective owners. It was the practice for the appellants to wait à period of ten days thereafter and at the end of that time to dispose of the logs, remitting sixty per cent to the owners and retaining forty per cent for their own services.

According to the evidence, the purchasers of such logs from the appellants would be furnished by the department or obtain from the department the original scale showing the names of the owners of marked logs. The evidence also shows, and counsel for the respondent argued the case on the basis that, as found by the trial court, the owners of the particular logs here in question had followed this practice with the appellants for some four or five years. The majority in the court below (1) were, however, of opinion that in such circumstances, the appellants, having in the present instance refused to give up the particular logs to the owners on demand, there was no defence to the charge. Section 394(*b*) reads as follows:

> 394—Everyone is guilty of an indictable offence and liable to three years' imprisonment who
>
> (*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner or authorized by such owner to receive the same, any such timber . . .

It might well be said that this section contemplates that the owner or his agent who demands possession of the timber has not, qua the person to whom the demand is addressed, disentitled himself to possession. However that

(1) 104 Can. C.C. 207.

1953

WATTS AND GAUNT v. THE QUEEN

Kellock J.

may be, the section is to be considered, as counsel for the respondent concedes, with section 990(2), which reads:

> Possession by the accused . . . of any such timber . . . shall, in all cases, throw upon him the burden of proving that such timber . . . came lawfully into his possession . . .

In view of this provision, no offence was disclosed in the circumstances conceded to exist in the case at bar where the appellants, acting in accord with the practice as between them and the owners of the logs here in question, had taken possession of the logs with the consent of the owners on the implied basis that if they did so, the owners were willing to remunerate them for so doing.

In these circumstances, I think there was no ground upon which the acquittal could have been properly set aside. I would allow the appeal and set aside the order below.

ESTEY, J.:—The appellants were charged that on the 20th day of August, 1951, they refused to deliver up to the owners, the Vanwest Logging Co. Ltd., saw-logs in their possession and thereby committed an offence contrary to s. 394(*b*) of the *Criminal Code*. They were acquitted in the County Court Judge's Criminal Court, but in the Court of Appeal (1) the majority of the learned judges directed a conviction.

The appellants were engaged in the business, recognized in British Columbia, of collecting logs that have become separated, as those here in question, from their booms and are afloat or resting on the shore.

A few days prior to August 20, 1951, the appellants, in the course of their business, collected a number of logs, including those here in question bearing the mark 1-Q-1, the property of the Vanwest Logging Co. Ltd. The appellants notified the Forestry Service, whose employees then scaled the logs and under date of September 4 the Forestry Service notified the appellants of its charge therefor in the sum of $117.45 and added:

> Upon receipt of your CERTIFIED CHEQUE for $177.45 or cash, the original Scale and Royalty Account will be released to you which will enable you to dispose of these logs.

This amount of $117.45 was paid by the appellants.

(1) 104 Can. C.C. 207.

Either on the same date (September 4) or prior thereto the Forestry Service notified the Vanwest Logging Co. Ltd. of the existence of these logs in the possession of the appellants and, as a consequence, on September 4 the latter wrote the appellants as follows:

> We have received a letter from the Forest Service that the following logs were scaled at the Ft. Nanaimo Street, South Vancouver for your account:
>
> 2 pcs. No. 2 Fir 859 Feet Mark 1Q1
> 9 pcs. No. 3 Fir 3,213 Feet Mark 1Q1
>
> Kindly forward proceeds, from these logs after making deductions for salvage, etc.

The appellants, upon receipt of this letter, deducted the salvage and forwarded the proceeds as requested, thereby becoming owners of the logs.

The Vanwest Logging Co. Ltd. had their logs insured with the B. L. Johnson, Walton Company Limited, insurance brokers, who employed a group of men to collect the logs, afloat or on the shore, of their insured. When one of their employees, Carson, on August 20, found the logs here in question in the possession of the appellants the latter refused to deliver them to Carson, as agent for the owners, unless the salvage was settled for, which Carson was not prepared to do. He reported to his employer, the B. L. Johnson, Walton Company Limited, and the latter obtained a letter from the Vanwest Logging Co. Ltd. reading as follows:

> The undersigned, being the registered owner under the Forest Act of Timber Mark 1-Q-1 do hereby authorize you or your agent nominated in writing, to demand and secure possession on my/our behalf of any logs bearing the above mark or marks found in possession of any unauthorized person or persons whatsoever.
>
> And for so doing, this shall be your sufficient warrant and authority.
>
> Dated at Vancouver, B.C., this 20th day of August, 1951.

The phrase "any unauthorized person or persons whatsoever" in this letter is not explained. It may be that it would include those who were in the business and in the habit of dealing with the Vanwest Logging Co. Ltd., which would include the appellants. This much is significant, that the record does not suggest that Carson or another officer or agent of the B. L. Johnson, Walton Company Limited, in any conversation with any officer or agent of the Vanwest Logging Co. Ltd., mentioned when obtaining

1953

WATTS AND GAUNT v. THE QUEEN

Estey J.

the letter that the logs were in the possession of the appellants. However, the B. L. Johnson, Walton Company Limited gave this letter to Carson who, with another letter from the B. L. Johnson, Walton Company Limited to himself authorizing him, on its behalf, to demand the logs from any unauthorized person, again interviewed the appellants and demanded the logs. The appellants took the same position to the effect that when the salvage was paid they would surrender the logs and Carson took the position that they were not entitled to salvage. As a consequence of this refusal criminal proceedings were taken against the appellants. The learned trial judge found as follows:

> I do not think there is any criminal intent on the part of these men whatever. They were carrying on the practice—there is always the Court of Appeal—that is why I say the custom between Vanwest and these men existed for four or five years. Every exhibit there is against you.
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> Here the practice has gone on 29 years, according to your own witness; then all at once, they take criminal proceedings. It sounds very much like private prosecution. I am not going to say any more about it.

The learned trial judge's report made under s. 1020(2) of the *Criminal Code* reads in part:

> In this particular case I not only believe the evidence of all the Crown witnesses but also the very candid evidence of the accused Gaunt who gave evidence on behalf of himself and his partner Watts.
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> I found the accused not guilty, my reasons being:—
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> (*a*) There was nothing fraudulent in their action.
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> (*b*) The accused came lawfully in possession of the logs in question.
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> (*c*) A custom had been established between the actual owners of the logs and the accused as to the payment of salvage, both before and after the enacting of Sec. 394B of the Canadian Criminal Code. An arrangement had been made between the owners and/or their agent or agents as to the payment of the salvage.
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> (*d*) I doubted the delegation of the authority from one agent to pass along the authority to another agent.
>
> (*e*) I doubted whether the logs were picked up in a river, as set out in the indictment.

The Court of Appeal accepted the finding of the learned trial judge, but the learned Chief Justice, with whom Mr. Justice Smith and Mr. Justice Bird agreed, was of the opinion that "fraud is not an element required to be proved in a prosecution under '(*b*)' of Sec. 394" and apparently treated the word "fraud" as equivalent to *mens rea*. Mr. Justice Robertson and Mr. Justice O'Halloran were of the opinion that *mens rea* is an essential ingredient of the offence defined in s. 394(*b*).

Section 394 reads:

394. Drift Timber.—Every one is guilty of an indictable offence and liable to three years' imprisonment who,

(*a*) without the consent of the owner thereof, (i) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log, shingle bolt or other description of lumber, boom chains, chains, lines or shackles, which is found adrift in, or cast ashore, or lying upon or imbedded in the bed, bottom, or on the bank or beach of any river, stream, or lake, in Canada, or in the harbours or any of the coast waters, including the whole of Queen Charlotte Sound, the whole of the Strait of Georgia or the Canadian waters of the Strait of Juan de Fuca, of British Columbia, or (ii) wholly or partially defaces or adds or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles, or makes or causes or procures to be made, any false or counterfeit mark on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles; or

(*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles.

It is a general rule that *mens rea* is an essential ingredient of criminal offences. Its meaning varies in relation to different offences, but it is generally described by Cave J. as "some blameworthy condition of the mind," *Chisholm v. Doulton* (1), or by Chief Justice Robertson as "at least an intention to do a wrong or to break the law," *Rex v. Stewart* (2), Tremeear, 5th Ed., p. 18; Russell on Crime, 10th Ed. p. 25.

While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention. Parliament created or defined the indictable offences under s. 394(*a*) and (*b*) in one sentence. Although it is not necessary to decide the point, the grammatical construction of the sentence, as well as the history of the section, suggests that Parliament intended the section should be construed in a manner that the word "fraudulently" is an essential ingredient of each of the offences therein defined.

(1) (1889) 22 Q.B.D. 736. (2) [1940] O.R. 178 at 181.

1953

WATTS AND GAUNT v. THE QUEEN

Estey J.

Even if it be assumed that the word "fraudulently" is not included under the offence defined in s. 394(*b*), it does not follow that *mens rea* is not an essential ingredient thereof.

In *Bank of New South Wales v. Piper* (1), in the first part of the section an offence was created of which "with a view to defraud" was an essential ingredient, while in the latter part the offence created did not include these words and their Lordships of the Privy Council found no "ground for construing the section as if the words 'with a view to defraud' had been inserted" in the latter part. Their Lordships went on to point out the distinction between a specific intent and *mens rea* as essential ingredients of an offence. In the Piper case a fraudulent intent was required in the first part, yet while that was not required in the second part it did not follow that *mens rea* was not an essential ingredient. Even if, therefore, the word "fraudulently" should not be construed to apply to all the offences under s. 394, as above suggested, it does not follow that *mens rea* would not be an essential ingredient of the offence under s. 394(*b*). At p. 389 their Lordships stated:

> It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory there must be *mens rea* on the part of the accused, and that he may avoid conviction by shewing that such *mens* did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations.
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> In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. . . . The circumstances of the present case are far from indicating that there was no *mens rea* on the part of the respondent . . . Then he knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as *mens rea*.

Parliament, in s. 394(*b*), defined an indictable offence in the same sentence with one in which fraud must be found as an essential ingredient and provides the same maximum

(1) [1897] A.C. 383.

penalty of three years for each offence. That is understandable if *mens rea* is an essential ingredient under s. 394(*b*), but, if one who is acting with an honest and reasonable belief that what he is doing is right and involves no breach of the law is guilty of the offence and liable to the same punishment, it involves a consequence that, apart from express language, ought not to be attributed to Parliament. As stated by Sir Richard Couch, "absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." Piper case, *supra,* at p. 389.

Moreover, in the main, statutory offences that have been construed not to include *mens rea* as an essential ingredient have been enacted to promote public safety, health or morality. Section 394 is placed in the *Criminal Code* under the general heading "Offences Resembling Theft" and, therefore, directed to wrong doing in respect of property.

Section 990(2) places the onus upon one charged with any one of the offences under s. 394 to prove that the saw-logs "came lawfully into his possession." It would, therefore, seem that Parliament intended that if one had saw-logs lawfully in his possession he could retain them if he had a right thereto in the nature of a lien for services performed which the business or practice here gave to the appellants.

The evidence here does not justify the conclusion that the business or practice followed by the appellants existed as far back as 1892. It does, however, establish that it has existed over a sufficiently long period to justify the conclusion that these provisions were never directed against one who engages in the business of gathering saw-logs with the intent and purpose of returning them to the owner upon payment of salvage, or of purchasing them from the owner upon a basis recognized by both owners and others in the business, and all with the assistance and co-operation of a department of government.

With great respect to the opinion of the learned judges who entertain a contrary view, it would appear that *mens*

1953

WATTS AND GAUNT v. THE QUEEN

Estey J.

rea is an essential ingredient of the offence under s. 394(*b*) and the evidence here did not establish that the appellants possessed that essential ingredient.

The appeal should be allowed.

LOCKE, J.:—The relevant facts in this matter are stated in the dissenting judgment of Robertson J.A. (1) and it is unnecessary to repeat them.

Whether or not Dickenson knew at the time he wrote to the appellants on September 4, 1951, that the logs referred to in the scale and royalty account No. 92492 were those of which Carson had demanded possession on August 20, that letter and the subsequent transaction between Gaunt and his partner and the Vanwest Logging Company Limited, whereby the former paid to the latter sixty per cent of the value of the logs, support the view that there was at the time in question an outstanding offer by the owners of these logs to pay to beachcombers either forty per cent of the market value of logs of that company which had gone adrift and been recovered qua salvage, or to sell them such logs for sixty per cent of their market value.

I respectfully agree with the reasons and with the conclusion of Mr. Justice Robertson and would allow this appeal.

CARTWRIGHT, J.:—For the reasons given by my brother Estey I agree with his conclusion that *mens rea* is an essential ingredient of the offence defined in clause (*b*) of section 394 of the *Criminal Code*. The findings of fact made by the learned trial judge, as set out in his oral reasons delivered at the conclusion of the trial and in his report made pursuant to section 1020(2) of the *Code*, appear to me to indicate not merely that *mens rea* on the part of the appellant was not established but that it was expressly negatived.

I would allow the appeal and restore the judgment of the learned trial judge.

(1) 104 Can. C.C. 207.

FAUTEUX, J.:—I agree that this appeal should be allowed. In enacting sections 394 and 990 of the *Criminal Code*, Parliament intended to provide a protection of the right of ownership of things therein mentioned and assure its adequate exercise by punishing such encroachments of the same as are described in the sections. These provisions necessarily assume the existence of a right of ownership and are therefore operative in the measure in which such a right or its exercise is not otherwise affected or conditioned either by laws of a competent legislature or by the very person vested with it. It cannot be presumed, for instance, that Parliament intended, by enacting ss. (*b*) of s. 394—i.e. by making the refusal to deliver to the owner a crime—, to defeat a contract authorized in civil matters under the terms of which a right to retain the logs until payment for services rendered would be given by the party owning these logs to the party gathering them.

In the present case, no one suggested that the appellants have, in relation to the logs in question, committed the offence described in paragraph (*a*) of s. 394. As to the charge actually laid against them under paragraph (*b*) of s. 394, the trial Judge found—and this finding is supported by the evidence—in an existing custom, an implied understanding between the appellants and the owners entitling the former, at the time when the logs would have to be delivered, either to be paid by the latter for their services or to purchase the logs they collected upon a basis recognized by both. The circumstances of this case do not bring the appellants within the scope of the sub-section on which they were charged.

Appeal allowed.

Solicitor for the appellants: *G. McDonald.*

Solicitor for the respondent: *S. J. Remnant.*

Solicitor for A.G. of Canada: *A. A. Moffat.*