1962

*Dec. 10
Dec. 17

FONG SING .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Acquittal—Court of Appeal ordering extension of time for applying for stated case—Stated case remitted for hearing and disposal on its merits—Supreme Court without jurisdiction to grant leave to appeal.

The applicant was acquitted on two charges of evading payment of income tax on the sole ground that the proceedings against him, having been instituted more than six months after the time when the subject-matter of the proceedings arose, were barred by the provisions of s. 693 (2) of the *Criminal Code*, despite the provisions of s. 80(4) of the *Income War Tax Act*, R.S.C. 1927, c. 97, as amended by 11-12 Geo. VI, c. 53, s. 13. The Crown's application for a stated case was made six days after the acquittal was granted instead of within four days as required by Rule 13 of the *Crown Office Rules (Criminal)*. When the stated case came on for hearing before Lord J., an application was made on behalf of the Crown to extend the time for applying for the said stated case, which application was refused and the appeal by way of stated case dismissed on the ground that the case was not stated within the time prescribed. Upon appeal to the Court of Appeal the matter was referred back to the Supreme Court for reconsideration.

The application that the time for applying for the stated case be extended was subsequently dismissed by Wilson J. The Court of Appeal allowed an appeal from the latter decision and ordered that the time for applying for the stated case be extended and that the stated case be remitted to the Supreme Court for hearing and disposal. From this judgment the applicant applied for leave to appeal to this Court.

Held: The application should be dismissed.

The power conferred on this Court by s. 41 of the *Supreme Court Act* to grant leave to appeal from judgments relating to offences other than indictable offences is limited to cases in which the judgment sought to be appealed is that of a court acquitting or convicting an accused or setting aside or affirming a conviction or acquittal. The judgment of the Court of Appeal in the present case did none of these things. For the time being the acquittal of the applicant remained standing; the effect of the judgment of the Court of Appeal was not to set it aside but to require a judge of the Supreme Court of British Columbia to hear and dispose of the stated case on its merits and therefore to decide whether the acquittal should be set aside or affirmed. *Paul v. The Queen*, [1960] S.C.R. 452, followed.

APPLICATION for leave to appeal from a judgment of the Court of Appeal for British Columbia. Application dismissed.

W. J. Wallace, for the applicant.

D. Walker, for the respondent.

*PRESENT: Cartwright, Martland and Ritchie JJ.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an application for leave to appeal to this Court from a judgment of the Court of Appeal for British Columbia pronounced on May 1, 1962, and entered on October 3, 1962.

On August 11, 1960, the applicant was acquitted by a deputy police magistrate in and for the City of Vancouver on two charges of evading payment of income tax. The sole ground of acquittal was that the proceedings against the applicant, having been instituted more than six months after the time when the subject-matter of the proceedings arose, were barred by the provisions of s. 693(2) of the *Criminal Code,* despite the provisions of s. 80(4) of the *Income War Tax Act,* R.S.C. 1927, c. 97 as amended by 11-12 George VI, c. 53, s. 13, which provided:

> (4) An information or complaint under Part XV of the *Criminal Code* in respect of an offence under this section or section forty-six A may be laid or made within five years from the time when the matter of the information or complaint arose or within one year from the day on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, came to his knowledge, and the Minister's certificate as to the day on which such evidence came to his knowledge is conclusive evidence thereof.

On August 17, 1960, an application was made on behalf of the Attorney General for Canada to the learned deputy magistrate to state a case pursuant to s. 734 of the *Criminal Code.*

At that date the procedure to be followed was governed by the *Crown Office Rules (Criminal)* of the Province of British Columbia, Rule 13 of which read:

> 13. Every application by a party aggrieved to a Justice to state a case shall be made within four days after the order, determination, or other proceeding has been made or rendered, or within such further time as may be allowed by the Court or a Judge.

On September 9, 1960, a case was stated by the learned deputy police magistrate and notice dated September 16, 1960, that a case had been stated and was to be heard in the Supreme Court of British Columbia on November 1, 1960, was served on the applicant.

On November 1, 1960, the hearing of the stated case was adjourned by the presiding judge in chambers pending the

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result of the appeal to the Supreme Court of Canada, taken from the judgment of the Appellate Division of the Supreme Court of Alberta in *The Queen v. Machacek*[1].

By judgment of this Court pronounced on January 24, 1961, the appeal in *Machacek's* case was allowed. This judgment is reported in [1961] S.C.R. 163.

The stated case came on for hearing before Lord J. on February 21, 1961, at which time an application was made on behalf of the Attorney General, pursuant to Rule 13, *supra,* to extend the time for applying for the said stated case, which application was refused and the appeal by way of stated case dismissed on the ground that the case was not stated within the time prescribed.

By notice, dated March 1, 1961, an appeal was entered in the Court of Appeal for British Columbia from the judgment of Lord J. and by judgment of the Court of Appeal[2] pronounced on June 12, 1961, the appeal was allowed and it was ordered that the stated case be remitted back to the Supreme Court to consider whether the time for applying for the stated case should be extended and if so to hear the said stated case.

The application that the time for applying for the stated case be extended to August 17, 1960, came on for hearing before Wilson J. on September 13, 1961, and that learned judge dismissed the application, giving the following oral reasons:

> If it (the hearing of the stated case herein) had gone on then (the 1st day of November, 1960) he would have been not guilty. If the matter had come on before me, I would not have granted an adjournment, not in a criminal case. I am going to refuse the application.

The formal order of Wilson J. reads as follows:

> UPON THE APPLICATION of the appellant by the Attorney General of Canada, in the presence of J. S. Maguire, Esq., Q.C. of counsel for the appellant, and W. J. Wallace, Esq. of counsel for the respondent; AND UPON HEARING counsel aforesaid;
>
> IT IS ORDERED that the application be and the same is hereby dismissed.

It is clear that Wilson J. dealt with the question whether the extension of time should be granted and having decided that it should not he did not deal with the stated case on its merits.

[1] (1960) 32 W.W.R. 73, 33 C.R. 283, 127 C.C.C. 418; reversed, [1961] S.C.R. 163, 34 C.R. 299, 129 C.C.C. 1.

[2] (1961), 35 W.W.R. 525, 35 C.R. 406, 131 C.C.C. 72.

Notice of motion for leave to appeal to the Court of Appeal from the judgment of Wilson J. was filed and served on September 27, 1961. On May 1, 1962, the Court of Appeal granted leave to appeal, allowed the appeal and ordered:

> That the time for applying for the Stated Case herein be and the same is hereby extended to and including the 17th day of August, A.D. 1960; and that the Stated Case be remitted to the Supreme Court of British Columbia for hearing of the Stated Case herein, and disposal of it according to law.

It is from this judgment of the Court of Appeal that the applicant now asks leave to appeal on a number of grounds including the following:

> The Court of Appeal in hearing the appeal brought by the present plaintiff (respondent) from the decision of the Honourable Mr. Justice Wilson exceeded its jurisdiction under Section 743(1) in that the question whether the learned Judge properly exercised his discretion in refusing to extend the time for stating a case is not a question of law alone.

No reference to the question of its jurisdiction is made in the reasons for judgment given orally by the Court of Appeal.

The application to this Court is met *in limine* by the objection that we are without jurisdiction. To this it is answered that jurisdiction is conferred by s. 41 of the *Supreme Court Act*.

The reasons of the majority of this Court in *Paul v. The Queen*[1] appear to me to hold that on the true construction of s. 41 the power thereby conferred on this Court to grant leave to appeal from judgments relating to offences other than indictable offences is limited to cases in which the judgment sought to be appealed is that of a court acquitting or convicting an accused or setting aside or affirming a conviction or acquittal. The judgment of the Court of Appeal of May 1, 1962, does none of these things. For the time being the acquittal of the applicant stands; the effect of the judgment of the Court of Appeal is not to set it aside but to require a judge of the Supreme Court of British Columbia to hear and dispose of the stated case on its merits and thereby to decide whether the acquittal shall be

[1] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.

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set aside or affirmed. In these circumstances it is my opinion that we are bound by the judgment in *Paul v. The Queen*, *supra*, to hold that we are without jurisdiction to grant the leave sought by the applicant.

For these reasons I would dismiss this application.

Application dismissed.

Solicitors for the applicant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the respondent: Clark, Wilson, White, Clark & Maguire, Vancouver.