THOMAS R. PEARSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1959

*Feb. 17
Feb. 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Theft—Admissibility of statement of accused—Whether dissent on question of law—Criminal Code, 1953-54 (Can.), c. 51, s. 597(1)(a).

The appellant was convicted on a charge of theft and appealed on the ground that a statement made by him had been wrongfully admitted at trial. The majority in the Court of Appeal affirmed the conviction

[1] (1875), L.R. 6 P.C. 398, 44 L.J.P.C. 79, 33 L.T. 1.

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on the ground that the conviction did not depend upon the admissibility of the statement, and that, in any event, there had been no injustice done. The dissenting judge considered that the statement had been improperly admitted and was highly prejudicial to the appellant.

Held: The conviction must be affirmed.

This Court was without jurisdiction as there was no dissent on any ground of law. The judgment of the majority resulted from an examination of the evidence, while the dissenting judgment was as to the sufficiency of the evidence for a conviction, which is a question of fact.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the conviction of the appellant by McLaurin C.J. Appeal dismissed.

A. M. Harradence, for the appellant.

H. J. Wilson, Q.C., and *J. W. Anderson,* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—The appellant was convicted by the Chief Justice of the Trial Division of the Province of Alberta sitting without a jury on a charge that whilst an employee of Alberta Pacific Grain Co. (1943) Ltd. he did fraudulently and without colour of right convert to his own use certain goods:—grain of a total quantity of approximately 11,300 bushels of a total value of about $8,863, the property of the said company, and did thereby commit a theft contrary to the *Criminal Code* of Canada. An appeal from that conviction was dismissed by the Appellate Division with Mr. Justice Hugh John Macdonald dissenting. The respondent alleges that there is no dissent on a question of law within s. 597 (1)(*a*) of the *Criminal Code* and therefore no appeal to this Court. This argument is entitled to prevail.

The reasons for judgment of the majority of the Appellate Division are very short and read as follows:

The majority of the Court think that the conviction for theft does not depend upon the admissibility of the statement of the accused that was admitted in evidence by the learned Trial Judge.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Martland JJ.

It is our opinion that quite apart from this statement there is ample evidence in the sales of grain by him to prove the offence of theft as charged, and that no injustice has been done to the accused in the verdict of guilty. Therefore, without arriving at any decision on the question of admissibility of the statement, we dismiss the appeal, and affirm the conviction. The time in custody pending the appeal will be allowed to count on the term of imprisonment.

The important parts of the dissenting judgment are as follows:

Amongst the grounds raised on appeal is a submission that the learned Chief Justice improperly admitted a statement of the accused. That statement was admitted in the trial as Exhibit 2, and is unequivocably a confession of guilt.

On the voir dire, an attempt was made by counsel for the defence to show by cross-examination that the statement was not voluntary.

Counsel for the appellant contends that the learned Chief Justice admitted the statement before counsel was given an opportunity of advising the Court if the defence would call evidence. On the voir dire on the question of admissibility two witnesses were called by the Crown, namely, Albert William Meston and Timothy James Corkery. Meston was examined and cross-examined, followed by Corkery's examination and cross-examination. At the conclusion of the cross-examination of Corkery, according to the record, there were remarks by Mr. Thurgood for the Crown and the learned Chief Justice as follows:

> "Mr. THURGOOD: That is all I have in connection with this matter, my Lord. My learned friend has the right to call witnesses.
>
> THE COURT: That is all, Mr. Corkery. You might—we have been conducting a trial within a trial, Mr. Corkery, you might just withdraw and we will have you back later. Oh, I think I will let it in. Recall Mr. Meston."

Counsel stated on the hearing of the appeal that it was his intention to call such evidence on the voir dire, but owing to the ruling made by the learned Chief Justice he was denied such opportunity. The defence must be given every opportunity to show that any statement of an accused, proposed to be tendered in evidence, was not voluntary. I have reached the conclusion that in the case at bar the defence was not given such opportunity.

It seems to me that the confession of the accused was improperly admitted at trial. That confession was of a very damaging character and was highly prejudicial to the accused. Its admission could very well have changed the strategy of the defence in the trial.

I do not think that the remaining evidence conclusively establishes the guilt of the accused. I would accordingly quash the conviction and direct a new trial.

It is apparent that the majority of the Appellate Division in the first part of their reasons in using the word "admissibility" were referring to the question whether the statement of the accused was properly admitted and

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that in the second paragraph they decided that if the statement were improperly admitted then, within the meaning of s. 592 (1)(*b*) of the Code, there was no substantial wrong or miscarriage of justice. There is no doubt as to the rule referred to by counsel for the appellant that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if a charge to a jury had been correct or if no evidence had been improperly admitted: *Schmidt v. The King*[1]. On this branch of the case the judgment of the majority resulted from an examination of the evidence while the dissenting judgment was as to the sufficiency of the evidence for a conviction which is a question of fact. There was no dissent on any ground of law dealt with by the dissenting judge and upon which there was a disagreement in the Appellate Division and therefore this Court is without jurisdiction: *The King v. Décary*[2]; *Rozon v. The King*[3].

The appeal should be dismissed but the time spent in custody allowed to count on the term of imprisonment.

Appeal dismissed.

Solicitors for the appellant: Harradence, Kerr, Arnell & Duncan, Calgary.

Solicitors for the respondent: H. J. Wilson, Edmonton, and J. W. Anderson, Melfort.