

1950  
\*May 30  
June 1

M. MARCOTTE ..... APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,  
PROVINCE OF QUEBEC

*Criminal law—Appeal—Special leave—Jurisdiction—Whether statute giving new right of appeal is retrospective—New trial—Starting point of proceedings—Same indictment—11-12 Geo. VI, c. 39, s. 42, enacting s. 1025 (1) Criminal Code.*

*Held:* The amendment to section 1025 (1) of the *Criminal Code*, by which any person whose conviction on an indictable offence has been affirmed by a Court of Appeal may, on any question of law, with special leave granted by a judge, appeal to this Court, creates a new right of appeal "which cannot be construed retrospectively so as to cover cases that arose prior to the new legislation. (*Boyer v. The King*, [1949] S.C.R. 89.)

PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Cartwright JJ.

*Held:* Even though a new trial ordered by the Court of Appeal was heard subsequent to the coming into force of the new legislation, appellant cannot avail himself of the amendment as the new trial is not the starting point of the proceedings—it is merely the reconsideration of the case under the same indictment.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing appellant's appeal from his conviction on a murder charge.

*Valmore Bienvenue, K.C.* for the appellant.

*H. M. Loranger, K.C.* for the respondent.

The judgment of the Court was delivered by:

TASCHEREAU, J.: In September, 1947, the appellant was originally charged with the murder of Marcel Boileau, and was found guilty in October of the same year. In September, 1948, the Court of King's Bench of the Province of Quebec (Appeal Division) ordered a new trial which was held in November, 1948, and a second verdict of murder was rendered by the jury. The Court of King's Bench (Appeal Division) (2) *unanimously* confirmed this finding in September, 1949.

Special leave to appeal to this Court was granted on the 21st day of October, 1949.

The respondent now raises the question of jurisdiction of this Court and submits that the appellant, having been charged in September, 1947, is still subject to the law, as it existed at that time, and that he may not therefore, even with the permission of one judge, appeal to this Court on a question of law, as he would have the undisputable right, if the proceedings had originated on or after the 1st of November, 1948, date on which the new amendment came into force.

There can be no doubt that special leave to appeal granted by a judge of this Court under the new amendment, on a question of law, does not confer jurisdiction on this Court, if otherwise this jurisdiction does not exist. Special leave to appeal is a condition precedent to the right to appeal, but the latter is subordinate to the power

(1) Q.R. [1949] K.B. 664.

(2) Q.R. [1949] K.B. 664.

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of this Court to hear such an appeal. Moreover, I may add that when the application for special leave was heard, the question of jurisdiction of the Court was not raised.

Before the 1st of November, 1948, an accused person, convicted of a crime, and whose conviction had been *unanimously* affirmed by a Court of Appeal, could appeal to this Court by special leave, under section 1025 of the Criminal Code, only when the judgment of the Court of Appeal came in conflict with the judgment of any other Court of Appeal in a like case. However, since the 1st of November, 1948, the law has been amended, and now any person convicted of an indictable offence, whose conviction has been affirmed by a Court of Appeal, may on any question of law, with special leave granted by one judge, appeal to this Court. The jurisdiction of the Court has thus been considerably extended.

When the appellant made his application for special leave, he did not attempt to show that the judgment of the Court of Appeal conflicted with the judgment of another Court of Appeal in a like case, but merely raised questions of law which he argued, were sufficient under the new amendment to allow his appeal to be heard by the full Court.

It is now said on behalf of the respondent that section 1025 of the Criminal Code as amended, applies only to proceedings that originated after the 1st of November, 1948, and that in view of the *unanimous* judgment of the Court of Appeal, it was imperative upon the appellant in order to obtain special leave, to show the existence of a conflict.

With this proposition, I entirely agree, as I do not think that the new amendment which creates a new right of appeal, can be construed retrospectively, so as to cover cases that arose prior to the legislation. It is true that the new trial was heard in November, 1948, at a date subsequent to the coming into force of the new legislation, but this new trial ordered by the Court of Appeal under the provisions of section 1014 of the Criminal Code, is not the starting point of the proceedings. It is merely the reconsideration of a case previously heard in October, 1947, which in the opinion of the Court of Appeal had

been illegally tried. The indictment is the same, and the new trial is therefore the continuation of proceedings started prior to the new amendment.

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In the case of *Boyer v. The King* (1), the unanimous judgment of the Court of Appeal was given on the 30th of November, 1948, one month after the coming into force of the amendment. On behalf of the appellant it was argued that the judgment of the Court of Appeal, being posterior to the new legislation, he could take advantage of the amendment and obtain leave to appeal on a question of law. The Chief Justice (1), after consultation with all the members of this Court, held that the amendment created a new right of appeal, and had no retroactive effect. It therefore did not apply to pending cases, which, in the view of the Chief Justice, continued to be governed by the former ss. 1 of s. 1025 Cr. C.

I fail to see how the present case can be distinguished from the *Boyer* case, and I would therefore quash the appeal for want of jurisdiction.

*Appeal quashed.*

Solicitor for the appellant: *Valmore Bienvenue.*

Solicitor for the respondent: *H. M. Loranger.*

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(1) [1949] S.C.R. 89.